

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 1712/2009

In the case between:

FLO-JAN VULSTASIE CC

Plaintiff

and

GAOREKWE GEORGE BOOYSEN
SERAME JOSJOA KGOMO

1st Defendant

2nd Defendant

JUDGMENT:

LEKALE, AJ

HEARD ON:

18 & 19 JANUARY 2011

DELIVERED ON:

27 January 2011

INTRODUCTION:

[1] This is judgment on merits in a claim and counterclaim for damages arising from a motor vehicle collision which occurred on the 7th September 2007 at the intersection of Charles Street and Harvey Road in Bloemfontein.

[2] At the commencement of the proceedings on the 18th January 2011 the parties agreed to separate the enquiry into quantum

from an enquiry into liability and, effectively, limited the trial to an enquiry into who of the two drivers was negligent as to the cause of the collision.

- [3] The trial endured for two days, viz the 18th and 19th January 2011 in the understanding that the enquiry into quantum shall take place at a later stage, if necessary, depending mainly on the outcome of the present enquiry.

BACKGROUND:

- [4] On the fateful day the plaintiff's vehicle, an IVECO midibus (the Iveco), was travelling from the north to the south along the right lane of Harvey Road. Harvey Road is a single carriageway with three lanes running in the same direction from the north to the south where it meets Charles Street.

- [5] The 1st defendant's motor vehicle, a 16-seater minibus (minibus) on the other hand, was travelling along the left lane of Charles Street with the 2nd defendant on the wheel at the relevant time. Charles Street is a dual road with two lanes running from the west to the east and two other lanes going in

opposite direction.

[6] At the intersection of the said roads and on the right-hand side of the Iveco and the left-hand side of the minibus, there is a concrete palisade which creates a blind spot for motorists travelling along those roads with the result that motorists cannot see each other's vehicles unless and until they have entered the intersection.

[7] To the far right of a motorist travelling to the east along Charles Street (a driver in the position of the second defendant) is a building housing the Free State Department of Health, known as Bophelo House. It is located at the western right corner of the intersection for the driver of the minibus and at the southern right corner of the intersection for the motor vehicle in the position of the Iveco.

[8] After the collision the minibus was, according to the police collision sketch plan (exhibit "A"), found with its nose into the wall fencing off Bophelo House along Harvey Road. The Iveco, on the other hand, was found at the entrance of

Bophelo House further south along the right hand side of Harvey Road.

[9] The plaintiff, eventually, issued summons against the two defendants alleging that the 2nd defendant was, *inter alia*, solely negligent as to the cause of the collision. The 1st defendant, on his part, countered and contended that the negligence of the driver of the Iveco was the sole cause of the collision, among others.

[10] Both parties, further, contended, in the alternative, that the negligence of the driver of each other's vehicle also contributed to the cause of the collision and accordingly claimed apportionment against each other.

[11] At the outset of the trial the parties agreed to an inspection of the scene of the collision *ante omnia*. The parties, further, announced that they had agreed to admit each other's *locus standi*.

[12] During the inspection *in loco* the parties observed and agreed,

inter alia, that:

- 12.1 the point of impact as depicted by the police on exhibit “A” is located around the mainhole inside the intersection and at the left hand side of the minibus and the right hand side of the Iveco;
- 12.2 the minibus came to a complete stop some 32 paces from the point of impact after the collision;
- 12.3 the Iveco come to a complete stop some 82 to 85 paces from the point of impact after the collision;
- 12.4 the robot post at the eastern right corner of the intersection, as seen from the perspective of the minibus, is some 22 paces from the point of impact.

[13] The plaintiff party, furthermore, consented to the admission and use of the photographs taken by and for the defendants shortly after the collision as exhibit “B”.

[14] The defendants inserted, with the plaintiff’s consent and for the sake of convenience and ease of reference, points “X” and “Y” on exhibit “A” as depicting the two vehicles which, according to them, yielded right of way to motorists in the

position of the minibus by stopping and waiting along the middle and left lanes of Harvey Road when the robot changed to green in favour of the minibus and red against them.

ISSUES IN DISPUTE:

[15] The parties are effectively at variance on the following questions of fact:

15.1 who of the two drivers had the right of way at the critical moment; and

15.2 who of the two motorists had the opportunity to avoid the collision.

PLAINTIFF'S VERSION:

[16] Three (3) witnesses testified to, *inter alia*, the following effect:

16.2 Jan Adriaan Breytenbach:

He was very familiar with the relevant intersection as he had been using the same route on a daily basis for 4 (four) or 5 (five) years as at the time of the collision. He was aware of the blind spot and used to approach the intersection with caution. On the day in question he was complacent and was not as careful as he used to be

when he approached and entered the intersection because he knew, from previous experience, that at that time of the day and on such a day the intersection was usually not busy. The robot was red for him when he approached the intersection with the Iveco. He, thus, reduced speed accordingly but when he was about the distance of three motor cars from the intersection, the robot turned green. He shifted to the second gear and increased speed in order to go through the intersection. He did not see the minibus coming and only heard a loud bang, whereafter, he lost consciousness. He would have avoided the collision if he was not driving fast. It is clear from the damage to the Iveco and the minibus, as depicted on photographs "B1" and "B2" in exhibit "B", that the Iveco caught the minibus at a right angle in an L-shape position. He was never involved in a collision before and now, with the benefit of hindsight, realises that he should have approached the intersection with care and caution as usual. It is possible that the robot was red for him when he entered the intersection but that his memory was failing him due to the concussion

which he suffered in the collision.

16.2 Adele Reyneke:

Breytenbach, the driver of the Iveco, is her father. On the day in question she, her 3 (three) year old daughter and her mother were following the Iveco with her mother driving. Her attention was mostly on her daughter who was enjoying ice-cream. She occasionally raised her eyes when the car slowed down along Harvey Road and noticed that the robot was red. When the car picked up speed she looked up at the robot again and saw that the robot had turned green. She, however, did not see how her father was driving. It is possible that her father ignored the red robot at the critical moment. The minibus struck the Iveco at the right front corner and it was not a middle front impact. After the collision, the minibus hit the post of the robot at the eastern right corner of the intersection, which caused it to turn back towards Bophelo House. It is possible that there were two vehicles at the intersection along the left and middle lanes of Harvey Road at the relevant time.

16.3 **Michael Thandikhaya Kondile:**

He was seated next to the driver as a passenger in the Iveco. The driver always drives slowly and stops at robots when he has to stop. On the day in question, he neither saw nor felt the Iveco slow down as it approached the intersection. It is, therefore, not correct for Breytenbach to say that he slowed down. The robot was green for the Iveco when it entered the intersection. He did not notice if there were any cars at the robot along Harvey Road. He only heard a loud bang and Breytenbach fell onto him. He took over the steering wheel after the collision and veered the Iveco to the right side of the road until it came to a complete stop.

DEFENDANTS' VERSION:

[17] **Joseph Serame Matshidiso Kgomo.**

He was the driver of the minibus and he was familiar with the relevant intersection as he used the relevant route on a daily basis in his occupation as a taxi driver. He always slows down when he approaches the intersection because of the blind spot to the left of the road. He was travelling at about 10

– 15 km/hr when he approached the robot, which was red for him. When he was about 20m from the intersection the robot turned green for him and he continued at the same speed when he entered the intersection. At about the stop line he noticed two cars at the intersection along the left and middle lanes of Harvey Road waiting for him to pass. There was no car along the right lane of Harvey Road when he looked to the left. He could see about 20 to 25m into Harvey Road. He could not avoid the collision and the only conclusion he came to was that the Iveco was driving at a high speed. The minibus did not hit the robot post after the collision.

APPLICABLE LAW:

[18] The parties are, effectively, in agreement on the law applicable herein insofar as they limited the dispute to factual issues.

[19] As a point of departure it is necessary to remind myself, lest I forget, that in law, a motorist is required to take reasonable precautions against harm being caused to another if the likelihood of such harm would have been foreseen by the

reasonable prudent driver.

(See **MANDERSON v CENTURY INSURANCE CO LTD** 1951 (1) SA 533 (A) at 544A).

[20] The question for the determination of liability in this matter is whether the *diligens paterfamilias*, in the position of either or both of the two drivers, would have regarded the possibility of a car emerging from that part of the intersection closest to him and in respect of which his vision was restricted as sufficiently real and immediate to require him to take preventive precautions. (Compare **AA MUTUAL INSURANCE v MANJANI** 1982 (1) SA 790 (A) at 796F).

[21] In the event of such a possibility having been sufficiently real for the reasonable man in the position of either or both of the two drivers, then there was a duty on either or both of the two drivers to take reasonable steps to guard against or avoid colliding with such a vehicle.

[22] Failure on the part of a motorist, whose conduct is in question, to take such necessary and reasonable precautions to prevent

the harm from eventuating results in such a driver being saddled with liability *vis-à-vis* the victim. (See **KRUGER v COETZEE** 1966 (2) SA 428 (A) at 430 E – F).

- [23] In the case of factual disputes that call for resolution by the courts, the technique generally employed requires a court to make findings on the credibility of various factual witnesses, their reliability and the probabilities in order to come to a conclusion on disputed facts. (See **STELLENBOSCH FARMERS' WINERY GROUP LTD AND ANOTHER v MARTELL & CIE SA & OTHERS** 2003 (1) SA 11 (SCA)).

FINDINGS:

- [24] When all is said and done the parties are, effectively, *ad idem* on the following:

24.1 that the Iveco hit the minibus at a right angle position in a situation reflecting an L-shape;

24.2 that both drivers were very familiar with the intersection and knew that they had to approach the same with caution;

24.3 that Breytenbach made a number of material

concessions during cross-examination;

24.4 that Breytenbach and his daughter, Reyneke, conceded that it is possible that he disregarded a red robot at the critical moment;

24.5 that Breytenbach could have avoided the collision by driving slowly and cautiously.

[25] Kgomo, testifying for the defendants, was firm in his evidence and maintained that the robot was green for him and that he could not avoid the collision. As correctly submitted by Mr Louw for the defendants, no suggestion was put to Kgomo about how he or a reasonable man in his position could have avoided the collision.

[26] On who of the two drivers had the right of way at the critical moment, the concessions made by Breytenbach and his daughter are relevant and need not be repeated. Kondile's evidence on the issue was of little, if any, assistance to the plaintiff. He did not make a good impression as a witness as the only thing he seems to have noticed and to be certain about is that the robot was green for the Iveco. He

contradicted Breytenbach on how the latter drove when he approached the robot. He is oblivious to the general traffic conditions prevailing at the time. He is simply not reliable. Kgomo, as I have already noted, stood his ground on the issue. The damage to the two vehicles as well as their positions after the collision suggest that the Iveco was driving fast. The foregoing, further, points to the possibility that the Iveco was racing after the robot in an attempt to beat it before it turned red.

- [27] Reyneke's evidence with regard to the robot post seems to contradict an established fact insofar as photo "B8" in exhibit "B" reflects no damage to the robot post. One would have expected the said post to have sustained some damage regard being had to the fact that, after it was allegedly struck by the minibus, the minibus turned back and went further to the opposite side where it went over the pavement and struck and damaged the wall around Bophelo House. Her evidence, further, contradicts the photographs with regard to the picture painted by the damage caused to both vehicles.

[28] The evidence is also clear with regard to who of the motorists had the opportunity to avoid the collision. It suffices, in my view, to point out that a motorist's negligence in the case of a blind spot relates to what steps such a driver took when he approached or went through such a spot. The foregoing, in my humble view, prevails because, once a motorist has entered such a spot, it is a point of no return for him as he, almost invariably, would find it difficult, if not impossible, to avoid a collision if a vehicle emerges from that spot. (Compare **ROAD ACCIDENT FUND v GROBLER** 2007 (6) SA 230 (SCA) on sudden emergency.)

[29] Although I am not persuaded by Kgomo's evidence to the effect that he looked some 20 to 25m into Harvey Road before he proceeded further into the intersection, I am satisfied that he had no reasonable opportunity to avoid the collision. In this regard, it should be noted that the stop lines on both roads are more or less in line with the corner of the concrete palisade which creates the blind spot. For Kgomo to be able to look 20 to 25m into Harvey Road he actually had to go over the stop line. It is probable from the point of impact that the

minibus was struck shortly after it had gone over the stop line. The undisputed evidence to the effect that there were two vehicles waiting at the intersection, along Harvey Road, when the minibus went over the stop line suggests that a reasonable man, in the position of Kgomo, would have been fortified in his view that it was safe to enter the intersection when Kgomo entered the same.

[30] In the premises I am satisfied, on the balance of probabilities, that:

30.1 the minibus had the right of way at the critical moment;

30.2 the driver of the Iveco had the opportunity to avoid the collision but failed to do so;

30.3 the driver of the minibus had no such opportunity and, as such, no degree of negligence may, in law and equity, be apportioned to the second defendant.

ORDER:

[31] For the foregoing reasons the plaintiff is vicariously liable for the cause of the collision.

[32] The plaintiff's claim is, thus, dismissed with costs.

L. J. LEKALE, AJ

On behalf of plaintiff: Adv. M van Antwerpen
Instructed by
Horn & Van Rensburg Attorneys
BLOEMFONTEIN

On behalf of defendants: Adv. M. Louw
Instructed by:
Hill McHardy & Herbst
BLOEMFONTEIN

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