

(APPELLATE DIVISION)

In the matter between:

WILMOT QUARRIES Appellant

AND

HAZELD NORMAN WESTCOTT Respondent

Coram: CORBETT, KOTZÉ et CILLIÉ, JJ.A.

Heard: 18 May 1984

Delivered: 29 May 1984

J U D G M E N T

CILLIÉ, J.A. :

The appellant is a firm carrying
on business on the farm The Ghio, Bathurst. It was
the defendant in the Court a quo and will be called

the defendant in this judgment.

The respondent who is a farmer on the farm Glen Erin, Bathurst, was the plaintiff in the Court a quo; in this judgment he will be referred to as the plaintiff. This Court has been informed that the plaintiff

"has suffered substantial financial losses consequent upon the sustained droughts. He cannot meet the costs of counsel to argue his opposition to the appeal."

In the result no argument on his behalf was advanced in this Court.

The appeal is directed against a judgment given in the Eastern Cape Division of the Supreme Court ordering the defendant to pay to the

plaintiff / 3

plaintiff the amount of R9 000 as damages suffered by the plaintiff when a heavy motor truck belonging to the defendant collided with a herd of cattle belonging to the plaintiff. The truck was loaded with crushed stone to its full capacity of 14 ton and was driven by the defendant's servant, one Mtshizana, in the course of his employment. The herd of cattle consisted of 51 Friesland and Guernsey cows; six cows were killed in the collision and four were so seriously injured that they had to be destroyed. It was agreed before the trial started that the plaintiff's loss amounted to R9 000.

The collision occurred at about 16h 30 on the afternoon of 17 July, 1980 on a public

road between Port Elizabeth and Alexandria. The road traverses Glen Erin, had a gravel surface and was in a good condition. The cattle were being driven from one part of the farm to another where the homestead is situated. Mtshizana used the road to take a full load of crushed stone from the defendant's quarry on The Ghio to Alexandria. He travelled in the same direction as that in which the herd was being driven. He knew the road very well; the collision occurred during his fourth trip over the road on that day. He also knew the truck very well and had been its only driver for a number of years.

The collision occurred "near the bottom of a long and substantial decline." In his

report on the inspection in loco on the first day of the trial, the Judge a quo described the terrain as follows:

"As one travels along this road one comes to a decline and the road takes a curving course. The first curve is to the right and it is at this point that the Court was informed that the driver of the vehicle would say that he applied his brakes and found that they were not working. Thereafter the road curves to the left, then to the right, then to the left and then again to the right and finally to the left in two left hand curves, one of which is almost a blind curve and this final curve leads down to a dip. (The trial Court found that the brake failure occurred at the penultimate curve.) The road then rises from that dip curving slightly to the right. The distance from the initial curve to the point where the alleged collision occurred is approxiamtely 900 metres. The width of the road is roughly six paces and the verges are narrow and unstable.

At the point where the alleged collision occurred on the left hand side of the last curve before reaching the dip, there is a substantial embankment about 20 ft in height. Throughout the course of the road which I have described the (right?) verge drops away some 20 ft gradually diminishing from the last curve to the dip ... The road runs in a fairly steep gradient to the dip where the alleged point of impact occurred. The road surface is firm, though dusty, and appears to be reasonably smooth and with no noticeable corrugations."

According to the judgment there are straight stretches of a hundred to a hundred and fifty yards between some of the curves.

The plaintiff pleaded that Mtshizana caused the collision because he was negligent in his manner of driving in that he drove the truck at a speed excessive in the circumstances, that he failed to

exercise proper care and skill in the control of the truck, that he failed to keep a proper lookout and have due regard to the presence of the cattle on the road, and that he failed to take any or adequate steps to avoid colliding with the cattle when by the exercise of reasonable care he could or should have done so.

With regard to the braking of the truck it was pleaded that Mtshizana was negligent in failing to apply the brakes of the truck timeously or at all, in driving the truck when he knew or ought to have known that the truck's braking system was defective, and in allowing the truck to run downhill while not in gear.

In the alternative the plaintiff pleaded that the collision was due solely to the

negligence of the defendant or his employees because they had failed to maintain the truck in a sound mechanical condition and particularly to ensure that the truck's braking system was functioning properly, because they had allowed Mtshizana to drive the truck or had not prevented him from doing so when they knew or ought to have known that the truck's braking system was not functioning properly, or because they had not warned him of the condition of the braking system. Finally and as a further alternative the plaintiff pleaded that the collision was due to the simultaneous negligence of Mtshizana, the defendant and his employees in the various respects set out before.

The defendant admitted that the

collision / 9

collision did take place but denied that it was caused by his negligence or that of any of his employees. He pleaded that the sole cause of the collision was the negligence of the plaintiff's employees who had driven the herd in a negligent and dangerous manner along the road. Alternatively he pleaded:

"The said collision was inevitable and unforeseen in that, without fault on the part of the Defendant or any of its employees, the braking mechanism of the Defendant's aforesaid vehicle suddenly and unexpectedly failed to function."

It will be convenient to mention at this stage that the trial Judge came to the conclusion that the defendant had failed to prove negligence on the part of the plaintiff or his employees. In this Court the finding was challenged by counsel for the defendant. However, because of the view I take of Mtshizana's negligence it is unnecessary to

deal now or later with this aspect of the case.

The crucial finding by the trial Judge was that the brakes of the truck had failed shortly before the collision occurred. The truck and its braking system were described as follows:

"It is a very large vehicle with a front axle with single wheels and double rear axles, each with four wheels. The transmission is to the eight rear wheels. It was common cause that the braking system is air operated. This operates on all ten wheels. In addition the vehicle has an emergency springbrake operating on the four wheels of the forward rear axle. This emergency brake comes into operation automatically if the main system fails to operate. It can also be brought into operation manually."

After the collision the four wheels on the middle axle were found to be locked. According

to a witness these wheels could only be released if the pins, which formed part of the springbrake mechanism, were removed from the wheels. Other evidence also indicated that the air brakes had failed and that the springbrake was put into operation. That the brakes had failed was common cause. The trial Judge said:

"On the evidence before me, I am able to say why the brakes failed - by a loss of pressure due to the disengagement of the connecting pipe from the junction union. I am unable to say why the connecting pipe disengaged."

When the brakes of the truck failed and the springbrake did not stop the vehicle, there was a sudden emergency as pleaded by the defendant. However, the mere proof of such a sudden emergency does

not necessarily justify the inference that the defendant and his driver must be absolved from all responsibility and blame for the collision which resulted.

Further inquiry is necessary. It must be investigated, firstly, whether or not the failure of the brakes was in any way related to negligence on the part of the defendant or his employees; secondly, whether Mtshizana was in proper control of the truck before the failure and did not cause the emergency; and, thirdly, whether he took all reasonable steps after the failure to avoid the collision.

In connection with possible negligence of the defendant and his employees in relation to the failure of the brakes the trial Judge found as follows:

"On the evidence before me I am unable to say on a balance of probabilities that the failure of the brakes was due to inadequate maintenance on the part of the defendant, or that by the exercise of reasonable care, the defendant could, or should, have become aware of any defect in the connection.

The plaintiff has failed to discharge the onus of proving that the accident was due to the alternative grounds of negligence pleaded by him."

On a consideration of the evidence I have come to the conclusion that the trial Judge's finding is correct. I wish to add that there is no reason to doubt Mtshizana's evidence that he, with the aid of another employee, conducted tests of the truck's brakes every day before the truck was taken on the road and that he did so on the day in question.

The trial Judge came to the conclusion that the collision was due to the negligence of Mtshizana in failing to keep the vehicle under proper control. With this finding I cannot agree. The learned Judge gave the following detailed description of how Mtshizana drove the truck down the decline.

"Mtshizana had travelled that road many times. Familiarity bred contempt. On this day he was in a hurry, according to the evidence. He travelled down the road expecting to run down and through the dip as he normally did. He came upon the cattle unexpectedly and was unable to control the vehicle and collided with them. He admitted that an experienced driver - and he felt he was that - when coming to a steep hill, would change into a gear which would hold the vehicle to a speed which would require the driver to apply the brakes only lightly and from time to time. This in this instance he clearly

did not do. He drove into the decline in third gear at a speed of almost 50 kilometres per hour. He did not change down to an appropriate gear before embarking on the decline. He took a considerable risk in driving in this way. Possibly he had been fortunate, in the past, in not meeting cattle or any other obstruction on the road, as he did on this occasion. When he did meet this obstruction, travelling as he was, he was unable to cope with it adequately. He had travelled that road many times. He was raised in the area. The road traversed the plaintiff's farm. Mtshizana had seen cattle there before. He should have anticipated that he might meet cattle on the road. Such a thing is not unusual in a farming area. Because he failed to travel down that road in an appropriate gear and in a manner which would have enabled him to control the vehicle, he was unable to pull up when he saw the cattle. He failed to keep his vehicle under adequate control."

In commenting on these findings I

have not lost sight of the fact that the trial Judge,

after seeing and hearing Mtshizana in Court, found him

to be "an unsatisfactory witness" who was "vague and evasive" and created an "unfavourable impression."

However, according to the record Mtshizana does not appear to have been dishonest. He is a simple and uneducated man who experienced some difficulty in understanding the questions put to him. He did not always realize what the essence or the main object of a question was. Photographs of parts of the road down to the dip were produced in Court but it was not always certain that Mtshizana knew of which part of the road a particular photograph was taken. When he was asked questions about his driving round the bends on the

decline it is by no means clear that he knew to which bend he was being referred and he was undoubtedly confused. I should mention that it appears as if the standard of interpretation was not very high. Under such circumstances a good witness may well appear unreliable or vague or unsatisfactory.

A great deal of time was spent in trying to establish where, on the decline, the brakes had failed and the learned Judge came to the conclusion that it was not possible, on Mtshizana's evidence, to find the exact point. It was eventually concluded that the brakes failed, not at the beginning of the decline as indicated by Mtshizana to Wilmot, the plaintiff, but at the second last bend before the collision. In this regard the trial Judge said:

"It was coming upon the cattle, as he came round the penultimate bend, that caused him to apply his brakes fiercely. If the failure of the main braking system then occurred the emergency brake would have come on immediately, causing the vehicle to skid, as in fact it apparently did."

The evidence is to the effect that the cattle could only have been seen from the final bend. There is no evidence that the brakes were ever applied "fiercely" or that that would or could have caused the failure. The importance of this aspect is not where the brakes failed but that they did fail.

In my view there was no good reason for rejecting the evidence of Mtshizana that, on the afternoon of the collision and before the brakes failed, he drove the truck to and down the decline in the same

way as he had always driven it before, and that that was the manner in which an experienced driver would have driven the truck. His evidence that he was driving in the appropriate gear and at a safe speed should have been accepted. His statement that he did not feel the springbrake coming into operation is certainly not due to untruthfulness; it indicates the opposite and explains why he tried to apply that brake manually. To say that because of his manner of driving he failed to cope with the situation adequately when he saw the cattle in the road and could not pull up in time to avoid a collision, is to ignore the most important factor of the incident, namely that the brakes had failed to function.

The final question is whether

Mtshizana could, after the sudden emergency had occurred, have avoided the collision with the herd of cows by the exercise of reasonable skill and care.

His unchallenged evidence is that the cattle were spread across the road, that the truck's brakes had failed and that if he could have steered the truck off the road, he would have been killed. The last aspect is supported by the findings concerning the terrain. Furthermore, the truck was virtually out of control after the brakes had failed. The trial Court should have come to the conclusion that he could not have avoided the collision by the exercise of reasonable skill and care.

After taking all the evidence in the case into consideration I have come to the conclusion that the plaintiff did not discharge the onus of proving, on a balance of probabilities, the negligence he had averred against the defendant's employee, Mtshizana. (See Arthur v. Bezuidenhout and Mieny, 1962 (2) S.A. 566 (A) at p. 574 B-C.) The trial Judge should, in my view, also have come to this conclusion on the evidence before the Court.

The appeal must therefore succeed and for the order of the trial Court there must be substituted an order for the dismissal of the plaintiff's action with costs, such costs to include the qualifying expenses of expert witnesses. This Court was

asked to include in the substituted order a special order in regard to the costs of a particular pre-trial inspection and of certain photographs produced at the trial. This is, however, a matter for the taxing master who will, no doubt, allow such costs if they appear to him to have been necessary or proper. (See Rule 70.3 Uniform Rules of Court.)

1. The appeal is allowed with costs.
2. For the order of the trial Court the

following is substituted:

The plaintiff's claim is dismissed with costs, such costs to include the qualifying expenses, if any, of the expert witnesses, Messrs. Dovey and Sansom.

P.M. CILLIÉ, J.A.

CORBETT, J.A.)
KOTZÉ, J.A.) concur