



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

CASE NO: 18284/2004

20 November 2009

In the matter between:

MOLEFE CAIPHUS SHONGOANE

Plaintiff

And

S. SEGABETLA

First Defendant

M. M. SEGABETLA

Second Defendant

JUDGMENT

LEDWABA, J

- [1] On 3rd August 2001 the plaintiff was a passenger in a E20 minibus taxi motor vehicle with registration number MJV656GP (the vehicle), driven by the second defendant who was acting within the course and scope of his duties

with the first defendant. The said vehicle collided with a cow on the road between Lephalale and Shongoane.

- [2] The Road Accident Fund, since the plaintiff was a passenger, paid him a limited amount of R 25 000. The plaintiff is now claiming for the difference of his damages allegedly caused by the second defendant's negligently driving, under common law, from the defendants jointly and severally.
- [3] As the parties agreed I ordered in terms of Rule 33(4) of the rules of this court that the merits and quantum be separated. The trial proceeded on merits and the issue of quantum be stayed.
- [4] The plaintiff testified and closed his case after calling one witness. The second defendant also testified and thereafter closed his case. The first and second defendants in the plea admitted that when the accident occurred the second defendant was acting within the course and scope of his employment with the first defendant. The first defendant did not testify nor call any witnesses.
- [5] The plaintiff and his witness, Shadrack Mofokeng (Mr. Mofokeng), testified that on the day of the accident they were seated on the front seat. The plaintiff was sitting next to the door and Mr Mofokeng in the middle between the plaintiff and the second defendant. They said that when the taxi left Lephalale the second defendant did not stop at a certain stop

sign and when they reached a certain side road junction the second defendant turned to the right when it was safe to do so and nearly caused an accident.

- [6] As they were driving on a straight tarred road with two lanes accommodating vehicles driving to opposite direction, they passed a herd of cattle on their left hand side. The weather was clear and it was dusky. There are photos in bundle 'A' showing the scene of the accident and the game fence on each side of the road.
- [7] The plaintiff and Mr. Mofokeng further said after passing the herd of cattle, some about six meters from the herd, a cow from the left ran to the centre of tarred road in front of the vehicle driven by the second defendant. As the cow was crossing from the left to the right the second defendant swerved to the right and collided with the cow in the middle of the tarred road.
- [8] The plaintiff and Mr. Mofokeng further said that the second defendant was driving at a high speed; Mr. Mofokeng estimated the speed to be about 130 kilometres per hour. The plaintiff testified that to draw the second defendant's attention to the presence of the cow he said 'hi man a cow'. Mr. Mofokeng gave a long explanation that when he saw the cow running to the road he told the second defendant that there was a cow on the road, he should reduce his speed, and he should swerve to the left, the direction where the cow came from. However, the second defendant did not respond

nor comply accordingly. Both denied that prior to the collision there was an oncoming vehicle from the opposite direction that passed them.

- [9] The defendant denied that when he left Lephalale he drove negligently. He stated that when the accident happened it was dark, the lights of the vehicle were on and the vehicle was in a good condition with its speedometer functioning properly. Prior to the accident he was driving at a speed of 80-100 kilometres per hour.
- [10] He also said he used to travel on the said road regularly and did not expect cattle to roam on the road. In describing how the accident happened he said after an oncoming vehicle passed his vehicle, he suddenly saw a cow that he collided with. He tried to apply his brakes but could not avoid the collision.
- [11] He denied that prior to the collision the plaintiff and Mr. Mofokeng warned him about the cow that was crossing the road. He further said he did not see a herd of cattle prior to the accident.
- [12] The main issue to be decided is whether the second defendant was negligent as alleged by the plaintiff. In the plea, the defendant denied that he was negligent and in the alternative, that his negligence, if any, caused and/or contributed to the collision.

[13] In paragraph 6 of the plaintiff's particulars of claim the plaintiff made the following allegation:

"6. The sole cause of the collision was the negligent of the Second Defendant, who was negligent in one or more or all of the following respects:

6.1 He failed to keep a proper lookout;

6.2 He failed to apply brakes timeously or at all;

6.3 He failed to keep the motor vehicle under proper control or lost control thereof;

6.4 He drove the motor vehicle without due regard to the interest of the public more in particular those of the Plaintiff.

6.5 He drove at an excessive speed under the prevailing circumstances;

6.6 He failed to avoid the accident and thereby causing the vehicle to collide with a cow, when by exercise of reasonable and due care, he could and should have avoided the accident."

[14] The plaintiff's counsel argued that the second defendant was negligent; the second defendant's legal representative submitted that the second defendant could not have foreseen that a cow would cross the road more especially because it was dark and the second defendant was blinded by the lights of the oncoming vehicle when it passed his vehicle.

[15] In my view, the plaintiff was an honest reliable and credible witness. Even though Mr. Mofokeng's evidence on certain aspects cannot be relied upon, and when he said before the collision he explained to the second defendant about the

speed, the presence of the cow and what action was he to take to avoid the accident. I, with respect, find that to be impractical having regard to the speed that he alleged the second defendant was driving and the distance that he measured when he saw the cow on the road for the first time.

[16] When I carefully analyse the defence raised by the second defendant it is a defence of sudden emergency. There should be sufficient evidence that the second defendant faced an unexpected crisis, i.e., he had no timeous warning and a reasonable opportunity to decide on an appropriate action to take.

[17] The second defendant denied that they first passed a herd of cattle before the accident occurred. However, during cross examination he was referred to exhibit 'B' on page 16. He confirmed that he signed the document after reading it and was satisfied that the contents were correct. I need to state that the said statement cannot be regarded as an affidavit because there is nothing to show that he signed before a commissioner of oath. Paragraph 1 and 2 thereof reads as follows:

"Op Vrydag 2001-08-03 om ongeveer 19:00 ek was   bestuurder van Nissan E20 met reg nr MJV 656GP. Ek het gery op die makke Ellisras teer terwyl. Ek besig om te ry   1 km vanaf Koedoe winkel het klomp beeste van links na regs gehardloop op die teerpad. Ek het die voertuig se remme getrap ongelukkig dit was te laat toe het ek  n bees gestamp.

Tydens die ongeluk het ek 80 km per uur gery, na die ongeluk het ek opgemerk dat 'n passasier wat voor links geklim het beserings gekry by sy linker been. Die is al wat ek kan sê of verklaar."

- [18] When the second defendant was confronted with the contents of the statement he tried to justify the statement by stating that he saw it after the accident when he was driving to his home. The explanation he gave does not make sense at all.

- [19] The plaintiff in his statement to the police said that he made about three weeks after the accident also mentioned that they had passed a herd of cattle before the accident occurred see bundle B, paragraph 3 on page 12.

- [20] On careful evaluation and analysis of the evidence I am satisfied that just before the accident happened the vehicle passed a herd of cattle.

- [21] In my view, the second defendant's denial of having seen same is rejected. On seeing the cattle he should have known that there are cattle on the road and should have reasonably foreseen a possibility of other animal(s) on the road and adjusted his speed accordingly.

- [22] The plaintiff and his witness testified that they saw the animal before the collision. I therefore, think that the second defendant did not keep a proper look out and/or drive at an excessive speed in the circumstances.

[23] The defence of sudden emergency raised in his evidence is in my view, a fabrication and it was not even raised in his plea. The existence of other animal(s) or the road should have been reasonably expected. Furthermore, the plaintiff's version on how the accident happened is more probable.

[24] I therefore, make the following order:

- (i) The first and second defendants are jointly and severally liable to pay the plaintiff's proven damages, less R 25 000 or agreed damages.
- (ii) The first and second defendants are jointly and severally liable to pay the plaintiff's costs.

A. P. LEDWABA
JUDGE OF THE HIGH COURT

