

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 16/2004

In the case between:-

KEARLEYS TRANSPORT (PTY) LTD

Plaintiff

and

THE MINISTER OF DEFENCE

Defendant

HEARD ON: 28 FEBRUARY 2006 AND 3 MARCH 2006

JUDGMENT BY: CILLIÉ J

DELIVERED ON: 9 MARCH 2006

[1] The plaintiff's claim against defendant is for damages to plaintiff's MAN 26-442 truck tractor combination (the truck) sustained in a collision with defendant's Toyota Venture Kombi (the Kombi) on the N1 between Kroonstad and Ventersburg on 11 March 2003 when the Kombi was driven by defendant's servant in the course of his employment.

[2] At the Rule 37 conference it was agreed between the parties that the matter proceeds on the “merits” only and that quantum of damages would stand over for later determination. It was thus ordered in terms of Rule 33(4) at the beginning of the trial.

[3] The “merits” referred to, *supra*, concerns the plaintiff’s allegation in its particulars of claim that the collision was caused by the negligent driving of the Kombi by the defendant’s driver. The defendant’s plea of contributory negligence by the driver of the truck needs no further comment as the defendant did not persist therewith during the trial.

[4] In paragraph 6.2 of its plea defendant states that

“... the collision occurred following a sudden and unexpected tyre burst”

of the Kombi, thus denying any negligence on the part of the driver thereof. Eventually this was the only issue the court

was called upon to determine during this part of the trial.

- [5] John Mattheus Gertse was the driver of the truck. His evidence is straightforward and simple. He says that on the day in question at ± 6 am he drove the truck in a southern direction on the N1 on his way to Cape Town. The truck consisted of a horse and two trailers with a 28 ton load. On a straight stretch of the road between Kroonstad and Ventersburg he saw the Kombi approaching from the opposite direction. At a distance of $\pm 100 - 150$ metres away it swerved first to its left and thereafter sharply to the right, overturned and skidded sideways on its left side across the road onto the truck's side of the road. Despite his attempts, a collision was unavoidable. The point of impact was on the truck's correct side of the road. The shoulder of the road is on the same level with the surrounding area. Trees next to the road prevented him swerving to his left. Nothing, however, prevented the Kombi to continue its move to its left being the direction whereto it swerved initially. He cannot deny or confirm a tyre burst as the cause of the Kombi's unusual movement.

- [6] Lesley Simpson, a witness for the defendant, is an insurance assessor. He examined the Kombi the day after the incident. His expertise, however, is mechanical and in quantifying damages. He emphasized that he is neither a tyre nor an accident reconstruction expert. If an opinion on tyres is to be obtained, he takes the tyre off and sends it to be inspected by an expert in that field. However, after looking at the tyres, he would think that the incident is consistent with a right-rear tyre burst. The tread of all four tyres was within acceptable norms.
- [7] Sergeant Barnard is the transport officer and in charge of the defendant's vehicles at 3 Military Hospital, Bloemfontein. On 10 March 2003 he booked the Kombi out for a trip to Pretoria. It was in a sound mechanical condition. The driver of the Kombi, as well as the passengers with the exception of one, was killed in the collision. The only surviving passenger is still in the employ of the defendant and stationed in Bloemfontein.

[8] That concluded the evidence. I approach the matter on the basis that nothing more than an evidential burden is cast on the defendant when raising a defence of this nature. The onus of proving negligence remains on the plaintiff. The court has to decide at the end of the trial whether the plaintiff has discharged the onus of proving on a balance of probabilities that the driver of the Kombi was negligent. See **SARDI AND OTHERS v STANDARD AND GENERAL INSURANCE CO LTD** 1977 (3) SA 776 (A) op 780 D – E.

However,

“Once the plaintiff proves the occurrence giving rise to the inference of negligence on the part of the defendant, the latter must adduce evidence to the contrary. He must tell the remainder of the story or take the risk of judgment being given against him”.

See **ARTHUR v BEZUIDENHOUT & MIENY** 1962 (2) SA 566 (A) on 574 H – 575 A.

How far the defendant's evidence need to go to displace the inference of negligence arising from proof of the occurrence complained of by the plaintiff, depends upon the facts of the particular case.

"The defendant must produce evidence sufficient to destroy the probability of negligence presumed to be present prior to the testimony adduced by him."

NAUDE N.O. v TRANSVAAL BOOT AND SHOE

MANUFACTURING CO 1938 AD 379 at 399.

"The defendant in order to succeed had to produce evidence sufficient to displace the inference of negligence which the *prima facie* evidence, unless answered, justified the court in drawing against her."

SALMONS v JACOBY 1939 AD 588 on 594.

The last two passages were quoted with approval by Ogilvie

Thompson JA in **ARTHUR v BEZUIDENHOUT AND MIENY,**

supra.

- [9] What evidence did the defendant produce in order “to displace the inference of negligence”? The highwatermark in the defendant’s case is the evidence of a non-expert who could do no better than stating that the collision is consistent with a tyre burst of the right-rear tyre. His later attempt to elevate this to a probability was unconvincing and in any event remains the opinion of a layman. Mr. Motaung, for the defendant, invited me to look at photo exhibit A4 in this regard. I did so and it is evident on that photo that the tread of the tyre is missing. I must, however, admit that I am unable to find that photo A4 is conclusive enough to convince the layman, as I am, of a tyre burst. According to the witness, Barnard, the tyres of the Kombi were sound and no retreaded tyres are used by the defendant. I am unable to say, after observing the tyre on photo A4, whether the condition of the tyre was caused by a coming away of the tread from the casing before or during or after the collision and what caused it. The defendant was in the position to

have the tyre examined by an expert. Why this was not done, was not revealed to the court during the trial.

[10] Further, the evidence of Simpson, insofar as note, can be taken of it in this regard, is in any event to the effect that a rear righthand tyre burst would lead to a sudden jerk of the vehicle to the right. The evidence of Gertse, however, was that the vehicle first went to the left and then swerved to the right.

[11] The defendant's failure to call the surviving passenger as a witness resulted in the court being unable to establish what really happened. In the absence of any indication whether he is well and able to testify no negative inference is made from the failure to call him as a witness.

[12] I remain uncertain what caused the Kombi to move to its incorrect side of the road. A tyre burst is but one of more speculative possibilities. In the result I find that the defendant did not "produce evidence sufficient to displace the inference of negligence" which the incident itself presents.

It is therefore ordered that the defendant is liable to the plaintiff for such damages that plaintiff may prove he suffered as a result of the collision. The costs, thus far, is costs in the matter.

C.B. CILLIé, J

On behalf of plaintiff:	Adv. Myburgh Instructed by: Claude Reid Inc. BLOEMFONTEIN
On behalf of defendant:	Adv. Motaung Instructed by: State Attorney BLOEMFONTEIN

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