

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

Case No.: 1278/2002

In the case between:

TONY'S TRANSPORT CC

Plaintiff

and

M A TRANSPORT

1st Defendant

O Y SHERIFE 2nd Defendant

JUDGMENT: MILTON, AJ

HEARD ON: 6 JUNE 2006

DELIVERED ON: 17 AUGUST 2006

[1] **INTRODUCTION**

1.1 The plaintiff, a registered CC in this matter, seeks payment from the 1st defendant and 2nd defendant jointly and severally in the amount of R319 380 being the damage suffered to the plaintiff's motor vehicle in a collision with the defendant's motor

vehicle, both vehicles being heavy duty trucks.

1.2 **Defendant's defence**

Defendants deny liability, their case being that the 2nd defendant was obliged to take emergency evasive action to avoid a head on collision with an unidentified motor vehicle that was travelling on the wrong side of the road and in the event collided with that unidentified vehicle, thereafter colliding with the plaintiff's vehicle. The defendants contended that the collision was caused by the negligence of the unidentified third party alternatively a sudden emergency that the second defendant found himself in.

1.3 Before closure of the plaintiff's case, Mr. Myburgh, on behalf of the plaintiff, handed in by means of a second witness for the plaintiff, an original written statement by the driver of the plaintiff's vehicle at the time of the accident and who had since died during 2004. Mr. Myburgh thereafter proceeded to bring an application in terms of Section 3(1) of the Law of Evidence Amendment Act no 45 of 1988, so that the written statement of driver, Johannes Mbatha may be admitted as evidence thereby circumventing the hearsay rule.

On hearing the respective arguments the court allowed the statement provisionally, a final decision to its admissibility to be made at the end of the case.

[2] **COMMON CAUSE**

The parties agreed that

2.1 The quantum and the merits of the matter were to be separated, and an order was made accordingly.

2.2 It was common cause further that the accident took place on the 14th May 1999 at ± 4h15 in the morning, 20km from Harrismith on the Van Reenen's pass. Weather conditions were misty, the road wet from the mist but not raining.

2.3 It is also common cause that the accident took place on the plaintiff's side of the road.

2.4 Defendant's vehicle was on its incorrect side of the road after the accident.

2.5 That the driver of the plaintiff's vehicle was unable to

give evidence since he was deceased.

3. **EVIDENCE**

3.1 The plaintiff called two witnesses, the first being Mr. David Sithole, who was a co-driver in the Plaintiff's vehicle at the time of the accident and who was lying on the bed sleeping in the cabin. He did not see the accident happen but heard the driver screaming, and then a bang sound after he awoke. The truck was travelling on the slow lane, travelling approximately at 30-40 km an hour. After the accident, the driver fell between the gear lever and the bed, and the truck moved backwards towards the yellow line. Right after the accident he saw the other truck with which they collided facing towards Durban and the Plaintiff's truck facing towards Johannesburg – facing each other on their side of the road. The witness indicated on photo 6 of page 24 of bundle B where the accident took place. This witness placed no evidence on record where the vehicles were damaged and hardly

any evidence of how the accident happened.

3.2 The plaintiff thereafter called a Mr. Potgieter, who handed in the original statement of the plaintiff's driver, Mr. Mbatha. Mr. Wolmarans on behalf of the defendant's, withheld their rights in this regard. Mr. Potgieter testified that he was employed by the plaintiff at the time of the accident and primarily handled all the accidents of the plaintiff by taking statements of the drivers and making copies of all the necessary documents which would be necessary to report a claim for insurance purposes. This witness confirmed that the contents of the statement was told to him by the deceased driver personally. The witness, who is Afrikaans speaking cannot remember which language was spoken to the deceased driver, but thinks it was Afrikaans and he then translated the contents of this statement into English. He conceded that the deceased driver was in fact Zulu speaking. He cannot remember what date the statement was taken but said that it was taken just after the accident, maybe three days thereafter and that the handwriting that appears on this exhibit is his own and that the deceased signed it in his presence.

3.3 The contents of the statement of the plaintiff's driver contains briefly the following facts. He was the driver of the vehicle BLC679GP belonging to the plaintiff and he was travelling from Durban to Johannesburg. In the Van Reenen's pass a truck came from the front over to his side of the road while travelling in the left lane. He pulled the air horn and flashed headlights as a warning, but the truck kept coming. He moved into the yellow line but the truck collided head-on with his vehicle. He was standing still at the time of the accident.

3.4 Defendant thereafter called their only witness, Mr. Sheriff, who testified that at the time of the accident he was employed as a driver for defendant and had 6 years prior experience. He was travelling south bound from Harrismith to van Reenen's pass approximately 20km from Harrismith. There is a small curve to the left, travelling on extreme left, heading southbound. Another truck approach from the opposite side in the same lane and moved over to his side of the road. Sheriff moved over into the right lane, still on his side of the road and simultaneously the unidentified truck did the same moving back to the same lane Sheriff was travelling

in causing an accident. The first time he saw the vehicle it was about 150m away. He could not swerve away to the left since there were hills, trees and a dam to the left. After the impact, his truck tilted to the right, left wheels in the air. Before the accident he flashed lights and hooted when moving into the fast lane. By moving into the fast lane he attempted to avoid the accident, but seemingly the hooter alerted the other vehicle and he reacted by moving back into the fast lane. As he just passed the unidentified vehicle, with the front of his truck he felt a bump, it felt like the bull bar had collided with his vehicle. After the truck hit his truck on the side he lost control and could not apply brakes as the truck tilted to the right end he felt he could no longer reach the pedals, and had no control of the vehicle moving to the right in front of oncoming traffic in the opposite lane. After the accident, he fell out of the truck and while lying outside he heard the unidentified driver start his vehicle and leave the scene of the accident.

3.5 Exhibit "C" was also handed in and contains certain admissions regarding the damage to the vehicle of the defendant as well as photographs that were attached thereto. Therein the following is admitted:

3.5.1 That the plaintiff's *locus standi* is admitted;

3.5.2 That the defendant's vehicle was examined by J. Mitchell Loss Adjustors who found damage to the vehicle as reflected on the photographs 1, 3, 6, 11, 12 and 14. Defendant admits that the photographs represent damage as seen by them. These admissions do not constitute the admission, of the presence of a third vehicle.

3.6 During the extensive cross-examination by Mr. Myburgh

of the witness the following transpired:

- that he could not move into the yellow line since this distance was approximately 1,2m wide which was not sufficient to allow the

truck's width.

- he could not stop in the left lane as was suggested by Mr. Myburgh since the other truck would have driven head on into him.
- he denied that the slowing down would have lessened the impact, it would have had the same effect.
- he denied not applying any evasive measures. He was adamant that he evaded the accident by moving into the fast lane but the unidentified vehicle after hearing the hooter, went back to his original lane which was the lane that defendant's driver sought to use as an evasion.
- he could not apply brakes since the angle that the vehicle travelled

after impact prevented him from reaching the brakes.

- at the stage that he moved into the fast lane, he did not see on coming traffic.

[4] **ISSUES TO BE DECIDED**

The only dispute between the parties is:

- 4.1 Was defendant's driver negligent, and if so did his negligence cause the accident.
- 4.2 Secondly, if the written statement of the driver of the plaintiff's vehicle, Johannes Mbatha, may be admitted as evidence.

[5] **LEGAL PRINCIPLES**

- 5.1 The plaintiff has the onus to prove that the defendant's driver was negligent, and it must be proven on a balance of probabilities.

See **NTSALA v MUTUAL & FEDERAL INSURANCE**

CO LTD 1996 (2) SA 184 (T) on 190 E – F:

“I am satisfied that the *onus* rests throughout on the plaintiff to prove negligence on the part of the defendant. Once the plaintiff proves an occurrence giving rise to an inference of negligence on the part of the defendant, the latter must produce evidence to the contrary: he must tell the remainder of the story, or take a risk that judgment be given against him.”

See also **KRUGER v COETZEE** 1966 (2) SA 428 E op 430

E – F where Holmes, JA said:

“For the purposes of liability *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of this conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence.”

6. **IPSA RES LOQUITUR**

6.1 From the evidential facts of this matter it is clear that this is a classical *ipsa res loquitur* case. In **WATT v VAN DER WALT** 1947 (2) SA 1216 (W) on 1221 Millin J set out the maxim as follows:

“.... that a thing tells its own story – not always but sometimes;
(2) but although a thing tells its own story, that is not necessarily the whole story. Accordingly (3) when the story would seem to be relevant to infer liability for some occurrence out of the usual, the remainder of the story may displace the inference but (4) if the remainder of the story does not do so, the inference remains – *res ipsa loquitur* .”

6.2 There are three requisites, namely:

6.2.1 that the thing which does the damage be
under the **management of the defendant**;

6.2.2 that the accident be such as **does not ordinarily happen** without negligence; and

6.2.3 that the defendant gives **no acceptable explanation**.

See **ARTHUR v BEZUIDENHOUT & MIENY** 1962 (2)

SA 566 (AD) at 573 to 576.

- 6.3 In application of the maxim it gives rise to an inference, rather than a presumption, for the court is not necessarily compelled to draw an inference of *culpa* where the inference arises. The defendant must give evidence to counter it.

In this regard see **GROENEWALD v AUTO PROTECTION INSURANCE CO LTD** 1965 (1) SA 184 (AD) at 187 F per Rumpff JA said the following:

“Ten slotte is dit wenslik om te beklemtoon dat die gebruik van die uitdrukking *res ipsa loquitur*, strenggesproke, alleen dan van pas is wanneer dit nodig is om enkel en alleen na die betrokke gebeurtenis te kyk sonder die hulp van enige ander verduidelikende getuienis. Alleen as die gebeurtenis op sigself in sy eie lig beskou word, behoort die uitdrukking gebesig te word omdat anders die beperkte betekenis daarvan vertroebel mag word.”

6.4 The inference is displaced when:

6.4.1 Defendant produces evidence that shows that the accident may have occurred **without negligence on his part.**

6.4.2 His explanation must be **reasonable.**

6.4.3 The degree of persuasiveness required of the defendant will vary according to the **probability or improbability** of his explanation.

See **RANKISSON & SON v SPRINGFIELD OMNIBUS SERVICES (PTY) LTD** 1964 (1) SA 609 (D) at 616.

6.4.5 Defendant's evidence is not to be considered in isolation from the rest of his evidence merely because owing to death or some other cause, there is no room for contradiction. See **GROOTFONTEIN DAIRY v NEL** 1945 (2) PH O.15 (AD).

[7] **SUDDEN EMERGENCY**

7.1 The defendant has in his pleadings indicated that the cause of the accident was owing to the negligence of another unidentified vehicle. Alternatively sudden emergency which would negate any negligence on his part.

7.2 Sudden emergency can be defined as someone who finds himself in a position of imminent danger, not of his own doing and cannot be held guilty of negligence

merely because in that emergency he does not act in the best way to avoid danger.

7.3 This doctrine of sudden emergency applies where a person's conduct is *prima facie* negligent.

7.4 That would apply especially in the *res ipsa loquitur* cases. If a defendant therefore succeeds in convincing the court that the accident was caused by sudden emergency and not as a result of his negligence, the *ipsa res loquitur* inference will be rebutted.

7.5 Sudden emergency however does not apply where:

7.5.1 the emergency has been created by the negligence of the person who is raising it as a defence.

7.5.2 The defendant has had an opportunity for the deliberation of the situation and can make a conscious decision.

7.5.3 The Defendant's conduct was not reasonable.

7.5.4 The defendant had a warning of the emergency that subsequently arose.

[8] The court must therefore test the defendant's evidence regarding the accident, see **NTSALA AND OTHERS v MUTUAL AND FEDERAL INSURANCE CO LTD** 1996 (2) SA 184 (TPD) at 193 J – 194 A.

“...the onus is on the plaintiff to show (a) that a reasonably careful

and skilful driver in the position of the driver of the insured vehicle would have appreciated the danger at an earlier stage than he did, and (b) that such a reasonably careful and skilful driver would at such earlier stage have been able successfully to avoid the collision. In other words, that the reality of the situation was apparent or reasonably discoverable at a sufficiently early stage to enable a reasonably skilful driver to avoid the danger and a possible collision.”

[9] **SECTION 3(1), LAW OF EVIDENCE AMENDED ACT 45 OF 1988**

9.1 The statement of the plaintiff’s driver that has been handed in provisionally, must be evaluated in the light of section 3 of the Law of Evidence Amendment Act 45 of 1988 which states that any hearsay evidence is inadmissible. Hearsay evidence is defined in section 3(4) of the said act:

“... means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.”

The statement of Johannes Mbatha is *per se* hearsay since, Mr. Mbatha has since died and could not be called as a witness.

9.2 In terms of section 3(1)(c) the court has a discretion to allow such evidence in the interest of justice and in doing so the court must evaluate the evidence in the light of the following:

“(c) the court, having regard to-

- (i) the nature of the proceedings;
- (ii) the nature of the evidence;
- (iii) the purpose for which the evidence is tendered;
- (iv) the probative value of the evidence;
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account,”

9.3 “Hearsay evidence is evidence of statements made by persons not called as witnesses which is tendered for the purpose of proving the truth of what is contained in the statement.”

Per Watermeyer J in **ESTATE DE WET v DE WET** 1923 CPD 341.

In **HEWAN v KOURIE N.O. AND ANOTHER** 1993

(3) SA 233 T on 239 B – C the following was said:

“Section 3(1)(c) requires the Court, in the exercise of its discretion, to have regard to the collective and interrelated effect of all the considerations set out in paras (i)-(vi) (my underlining) and also to 'any other factor which should in the opinion of the court be taken into account' (para (c) (vii)). When doing that, the reliability of the evidence will no doubt play an important role: para (iv) requires the Court to have regard to the probative value of the evidence. It stands to reason that the less reliable the evidence, the less its probative value will be.”

See also **SKILYA PROPERTY INVESTMENTS (PTY) LTD V LLOYDS OF LONDON** 2002 (3) SA 765 (TPD).

9.4 The admissibility of documentary evidence as to the facts is also subject to section 34(1)(b) read with section 35 of Civil Proceedings Evidence Act 25 of 1965. Section 35(1)(b) reads as follows:

“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided-

(a) the person who made the statement either-

(i) had personal knowledge of the matters dealt with in the statement; or

(ii) ...

(b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental

condition to attend as a witness...”

In weighing up the inadmissibility of the statement the guidelines in the section 35 should also be applied, which reads as follows:

“(1) In estimating the weight, if any, to be attached to a statement admissible as evidence under this Part, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the person who made the statement had any incentive to conceal or misrepresent facts.”

[10] **APPLICATION OF THE LEGAL PRINCIPLES**

10.1 It would be apt firstly to consider if the statement of the deceased, Mr. Mbatha be allowed as evidence in terms of section 3 of the Law of Evidence Amendment Act no. 45 of 1988 read with section 34(1)(3) and section 35 of the Civil Procedure Act 25 of 1965. Clearly from the above legal discussion the

court has discretion to allow a written statement of a witness that is not able to give evidence as in this case as a result of his demise.

10.2 Mr. Wolmarans, on behalf of the defendant contended that the two factors should be taken into account namely, the reliability thereof since there are a few worrying factors, namely the fact that it was not sure what language was spoken to the witness when statement was taken, and there were contradictions therein and lastly the defendant will definitely be prejudiced thereby in that this evidence is not being able to be tested in cross-examination. Mr. Myburgh on the other hand argued that the court should exercise his discretion judicially especially by applying all the factors set out in rule 3(1). He contended that:

- the nature of the evidence was to record the accident for insurance purposes and could not be tainted

and must have been done in sincerity, shortly after the accident.

- the only purpose of tendering at the statement was that the witness was since deceased.
- the probative value must be taken into consideration. No direct inference of negligence was mentioned in the statement.
- there was no prejudice (although he never elaborated on this).
- all other factors regarding the surrounding evidence must be taken into consideration.

10.3 It is common cause that the accident took place on the wrong side of the road giving rise to a *res ipsa loquitur* case. The contents of the statement to a certain extent corroborates the co-driver's evidence and that of the defendant. It is my opinion that the

facts therein have already been placed on record by the defence and the plaintiff's one witness. Allowing the statement would not be prejudicial to the defence's case and takes the plaintiff's case no further. The defence was one of sudden emergency. Defendant has also admitted that his vehicle was on the wrong side of the road, a fact that plaintiff did not have to prove.

10.4 I have taken all the circumstances into account and am of opinion that the contents of the statement for the reasons above will not be prejudicial to the defendant if admitted as evidence, and is therefore allowed.

10.5 The plaintiff has the onus of proving that the defendant's driver acted negligently and in so doing will have to place sufficient evidence before the court that the defendant's defence of sudden emergency is thereby rebutted.

10.6 From the evidence placed before the court, there can only be one inference and that is that it is a classic

case of *ipsa res loquitur*. A head on collision took place on the plaintiff's side of the road, and without other evidence this court could without a doubt infer negligence on the part of the defendant's driver and therefore liability for the accident, since this type of accident does not ordinarily happen and negligence must then be inferred. The defendant's driver should be found negligent if he has given no acceptable explanation to counter the inference or if the plaintiff has succeeded in rebutting the defendant's explanation.

- 10.7 The only evidence that the plaintiff has put forward is that the head on collision took place on the side of the road of his driver. It is common cause that neither the evidence of David Sithole, nor contents of the admitted statement of the deceased driver of the plaintiff's vehicle make any mention of another unidentified vehicle that could have been the cause of the accident. Neither was any questions put to the only witness, David Sithile by Mr. Myburgh if he was

perhaps aware of another vehicle at the scene of the accident. The plaintiff could not deny, admit or rebut the evidence lead by the defendant, namely that its driver was placed in a situation of a sudden emergency which was not of his own doing.

10.8 Mr. Myburgh on behalf of the plaintiff admitted that the photos 1,3,6,11,12 & 14 attached to annexure “C” reflected damage to the defendant’s vehicle without admitting that it was caused by a third vehicle.

10.8.1The defendant’s driver, Mr.

Sheriff however testified that he was driving on his correct side of the road before the accident and that another unidentified vehicle approached from the opposite side but in the same lane he could not swerve out to the left and could only in the circumstances swerve into the right lane. Simultaneously

flashing lights and hooting. The unidentified vehicle thereafter also swerves back to the right lane. He had almost passed the vehicle when he felt a bump against his truck causing him to lose control of the vehicle since the vehicle tilted to the right and moved into the oncoming traffic's lane. At this stage he had no control of the vehicle and applying brakes was not possible as a result of the angle of the truck. He never saw the unidentified truck leave the scene of the accident but heard it start up and depart.

10.8.2 On a question from the court, the witness indicated that the damage caused by the

unidentified vehicle was reflected by the photographs 1, 3, 6, 11, 12 & 14. This evidence could not be rebutted by the plaintiff's witnesses.

10.8.3 The witness further testified that the unidentified vehicle was 150m away when it was first observed, a very short space of time in which he could act to try and avoid the accident. The question is would or could a reasonable man in the same position as the defendant's driver have acted differently and would he have been able to avoid the accident. In the light thereof the plaintiff could not prove on a balance of probabilities negligence on the part of the

defendant's driver as set out in his particulars of claim and accordingly in absence of any other evidence to the contrary the defendant's evidence must be accepted as reasonable and probable.

11. The plaintiff's claim is therefore dismissed with costs.

D. MILTON, AJ

On behalf of the Plaintiff:

Adv. P. Myburgh
Instructed by:

Webbers
BLOEMFONTEIN

On behalf of the Defendants:

Adv. J.W.P. Wolmarans
Instructed by:

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