



ORIGINAL
DITTO

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	
Of Interest to other	YES/NO
Judges:	YES/NO
Circulate to	YES/NO
Magistrates:	

Case no: **1707/2016**

In the matter between:

VITASH TRUCKING CC

First Plaintiff

JCB TRANSPORT (PTY) LTD
t/a C J PARTNERS

Second Plaintiff

and

ROOS VERVOER

First Defendant

BIKINYANA DLAMINI

Second Defendant

ROOIKUIL BELEGGINGS TRUST

Third Defendant

CORAM: **P R CRONJÉ, AJ**

HEARD ON: **29 – 30 AUGUST 2023, 12 - 13 DECEMBER 2023**

DELIVERED ON: **16 MAY 2024**

JUDGMENT ON MERITS

- [1] After hearing the evidence of the Plaintiffs, the Defendants brought an application for absolution from the instance. I issued a written judgement and dismissed that application with costs. There was, however one correction to be made to that judgment. I recorded that the left indicator of the Defendants' vehicle' rear trailer (I refer to the combination of the Hino truck-tractor and two trailers as "the Hino") was switched on whilst the evidence was that the right indicator of the rear trailer was on.
- [2] After completion of all the evidence, the parties requested that the matter be postponed to the pre-trial roll in 2024 as they wished for a transcription of the record to be made and thereafter filing of heads of argument. The Plaintiffs' heads of argument was filed on 8 March 2024 and that of the Defendants on 25 March 2024. This explains the reason for the delay in finalisation of the judgment.
- [3] The test at absolution stage differs from the test at the end of the case, which is the balance of probabilities.

Plaintiffs' case

- [4] It is common cause that a motor vehicle accident took place on 22 May 2014 on the N1 highway near Ventersburg. It is alleged that at time of the accident, the Second Plaintiff (herein referred to as JCB), leased an Argosy truck-tractor and two top trailers (herein referred to as the Argosy) from the First Plaintiff (herein referred to as Vitash) and accordingly carried the risk of loss and damage as a *bona fide* possessor. It is pleaded that JCB insured the vehicles with Santam and that the action was instituted on the basis of subrogation.
- [5] Vitash's *locus standi* is challenged, as is the allegation that JCB bore a risk. The parties agreed that only the merits have to be adjudicated. The Plaintiffs called two witnesses.

Evidence of Mrs Charmaine Lamprecht

- [6] Mrs Charmaine Lamprecht is employed by JCB which transports goods for clients by employing subcontractors of which Vitash was one, and also uses its own staff. A Transport Suppliers Agreement was concluded between the JCB and Vitash - only signed by Vitash - on 22 May 2014. The service to be rendered is the transportation of goods under sub-contract by the carrier (Vitash). Clause 7.1 provides that Vitash shall be liable to indemnify JCB against all liability of any nature whatsoever, howsoever arising directly or indirectly from handling of the goods and Vitash's maximum liability to JCB shall be R1 million, which liability shall be underwritten by an insurance policy.
- [7] Clause 9.1 provides that Vitash will effect in its own name policies of insurance to the satisfaction of JCB, and will produce same on demand. Should Vitash fail to do so, JCB may effect insurance and Vitash will be liable to pay JCB the costs of so doing.
- [8] Vitash provided their own trucks and drivers and used JCB's trailers. JCB pays the premiums on the insurance contracts to prevent them from lapsing. Policy Endorsement #45 shows that the Santam was the insurer and that the vehicles were insured by JCB, insured from 1 May 2014 to 31 May 2014, with the effective date 9 May 2014, thereafter renewing monthly. The Argosy (item 24 in the Schedule) was insured for R1 220 000.00. Items 75 and 76 in the Schedule for JCB's own vehicles, show that the two trailers are insured to the sum of R150 000.00 respectively. The policy in respect of the trailers shows that the inception date of the policy was 1 September 2013, effective from 1 February 2014 until 28 February 2014 and renewing monthly thereafter.
- [9] The collision was reported and Santam paid the monies into JCB's account, whereupon it indemnified Vitash. Mrs Lamprecht conceded that JCB does not have a direct interest in the patrimonial value of the Argosy and that JCB did not suffer any damages in respect of the Argosy. Although Mrs Lamprecht stated that there are separate insurance policies for each subcontractor, one should keep in mind that this is a subrogation claim where Santam steps into the shoes of insureds. I am satisfied that the policy and schedules relied upon by the Plaintiffs clothes Santam, with *locus standi* and that cover existed for

the period in which the accident took place.

- [10] The certificate of registration in respect of the Argosy shows that Mercedes Benz Financial Services was the titleholder and Vitash the owner.

Evidence of Mr Barry Grobbelaar

- [11] He was called as an expert. A camera was mounted in the grill (grill-cam) of the Argosy. The video recording does not depict real time. The Joint Minutes prepared between him and Mrs Badenhorst on 29 August 2023, record that they accept that the accident took place at an intersection that changed substantially since the accident. The Argosy collided with its right front part with the left rear part of the Hino's last trailer. There was unrestricted visibility for the driver of the Argosy of approximately 500 metres and the driver of the Hino truck would have been able to see behind his vehicle for the same distance as the road is straight and relatively flat.
- [12] The Argosy was traveling at approximately 91 km/h before braking. The speed limit for the Argosy on that road was 80 km/h. It could not be established from the video whether the Hino truck was initially stationary or moving slowly in the emergency lane prior to the accident.
- [13] The Argosy was approximately 86 to 100 metres from the Hino when the Hino started turning to the right from the emergency lane, approximately 4 seconds before the accident. There was insufficient time for the Hino to complete his turning manoeuvre. The indicator on the right of the rear trailer of the Hino is visible on the video just prior to the Argosy colliding with the trailer. Maximum braking effort always poses a danger that a truck may jackknife. If the Argosy truck applied maximum braking effort after seeing the Hino truck starting to turn, he would probably have been able, or almost have been able to bring his vehicle to a stop prior to the accident, in a non-jackknife scenario. The Hino blocked the whole width of the road shortly prior to the collision. The rear part of the rear trailer was still in the emergency lane moments prior to the collision.

- [14] He is of the opinion that it was not necessary for the Hino driver to execute a right turn manoeuvre from the emergency lane, as there was more than sufficient space to have done so from his lane of travel.
- [15] It appears that the Argosy, before the accident, may have passed over the centre line and it could be as a result of the Hino being in the emergency lane. It can be seen on the video that the Argosy thereafter suddenly moved to his left. If the Argosy swerved to the right it would have hit the Hino truck and if swerved to the left it would have had a better chance of avoiding the Hino. It would have however caused the Argosy to jackknife. There were also pedestrians on the left side of the road.
- [16] When put to him that the driver of the Hino will testify that he indicated that he would turn to his right from the emergency lane and was then hit from behind, Mr Grobbelaar stated that the manoeuvre was not necessary for an optimal turn to the right.

Defendants' case

Evidence of Mr Bikayana Johannes Dlamini

- [17] He was the driver of the Hino with two trailers on the date of the accident. The first trailer was 6 and the second 12 metres long - a combination of 18 metres excluding the truck-tractor. He has driven trucks since 2009. He was on his way from Winburg to Ventersburg. He had to turn to his right into a farm road to load Soya and noticed that the turnoff would be difficult to negotiate. He had to enter the emergency lane to make the turn. Before he turned he observed a vehicle approaching him from behind but it was still far away. He switched his right indicator light on and waited for approaching vehicles from his front. He again observed Argosy but it was still far away. The Argosy was at that stage in the middle of the road. He could not tell how fast the Argosy was approaching but it was a "heavy" vehicle. He later ventured to state that the Argosy was driving fast and if it did not, it would not have collided with his truck. He had to take a wider turn as the rear trailer would have collided with

a pole at the entry point of the road into which he intended to turn. After the approaching vehicles passed, he turned to his right. He turned slow as his vehicle was heavy.

- [18] In cross-examination he denied that when he turned, it created an obstruction over the road. According to him, vehicles from behind should have stopped as they knew that he was turning. He could not give an estimation of the distance between him and the Argosy but estimated it to have been 10 metres (10 steps in the Court). The Argosy was not stopping at that stage. He does not know whether the Argosy had preference in the lane that it was travelling. He had the right to turn and the Argosy should have stopped until he executed the turning manoeuvre. He conceded that there was no way that the Argosy could have passed his vehicle and should have stopped as he had his indicator light on and was already turning. He speculated that the Argosy's driver may have been on his phone or drowsy. He denied that he already passed the turn-off. He conceded that the Argosy would have jack-knifed if it swerved fast to avoid an accident.

Evidence of Mrs Wilna Badenhorst

- [19] She prepared an expert report and was a co-author of the Joint Minutes. The minutes states that the Court has to determine whether: the Argosy's driver could have been expected to apply maximum braking power under the circumstances; whether the Hino blocked the whole width of the road shortly prior to the collision; and whether the Argosy should have taken any action, such as slowing down and/or moving to the right upon seeing the Hino in the emergency lane.
- [20] She is of the opinion that it is not uncommon for drivers to widen their turning circle.
- [21] At the stage when the front portion of the Hino appeared to be closer to the centre line, the Argosy was still travelling at approximately 91.58 km/h. At the point where the Hino crossed the centre line of the road, the Argosy was

travelling at approximately 88 km/h. The rear portion of the second trailer was still in the emergency lane. The Argosy reduced speed to 79 km/h when the Hino was in an advanced turning stage. Just before impact, the Argosy was traveling at approximately 74 km/h. According to legislation, the speed limit for these types of trucks is 80 km/h. The reaction time for a driver would be approximately 1.6 to 2 seconds. The grill-cam at a stage showed that the Argosy moved to his right and if the Argosy applied maximum braking power, it ran the risk of jack-knifing. Mrs Badenhorst stated that the Hino driver could technically have stayed in his lane of travel and performed the turn from there but it is not uncommon for drivers to go to the left in order to perform a turning manoeuvre to the right.

- [22] The Argosy may have collided with the Hino whether it was travelling 80, 72 or 50 km/h. Prior to the Hino driver committing to turn, an accident would not have occurred if he did not turn.
- [23] On my question whether it appears on the video that the rear trailer may be in the midline of the gravel road to the right, she stated that it would be a bit far from the pole.

Factual findings

- [24] In respect of *locus standi*, the insurable interest and subrogation, I am satisfied that the Plaintiffs presented sufficient evidence to discharge the onus resting on them.
- [25] The driver of the Argosy did not testify. Explanations were proffered why he did not come even though subpoenaed.
- [26] The only real evidence of the accident that the Plaintiffs presented was the video, which was admitted by agreement. This evidence was considered by both experts and they agreed on the majority of their observations made from the video. Due to the changes to the road at the point of impact, the only evidence of how the area looked like were satellite images taken by Google

Earth.

- [27] The evidence that the Hino was stationary in the emergency lane whilst the Argosy approached is common cause. I accept that the right indicator of the Hino was at some stage on to indicate that it intended to make a manoeuvre to the right. I specifically refer to a manoeuvre and not a turn. Whether a vehicle from behind would have deduced or accepted that the vehicle intended to cross over the road to the other side is debatable.
- [28] I accept that both vehicles were "*heavy vehicles*" and accept that maximum braking power would on probabilities have caused the Argosy to jackknife. This is common cause on the evidence of the experts and Mr Dlamini. There was no space for the Argosy to pass the Hino to the right after it made the turn to the right. There were pedestrians visible to the left of the rear trailer.
- [29] Did the speed of the Argosy play a role causing the accident? It is common cause that the Argosy exceeded the maximum speed prescribed for a vehicle of that class. My understanding of the experts' opinions is however that the speed *per se* would not have made a difference.
- [30] Estimations of distances are notoriously difficult. Mr Dlamini himself, however, gave estimations of how far the Argosy was behind him when he commenced his turn - approximately 10 metres. Notwithstanding, he placed a burden on the Argosy driver to stop to give him time to complete the turn. Mr Dlamini testified that it would have been best for him and the Argosy driver to have been cautious.
- [31] Reference to a U-turn was made by Mr Dlamini. Whether Mr Dlamini intended to make a U-turn is neither here nor there. He commenced a turn which could either have been for a U-turn or turning into the road to his right. The commencement of the manoeuvre is the same.

Legal principles

- [32] Mr Van Rensburg refers to AA Mutual Insurance Association v Nomeka,¹ where the Court held:

"In a long line of cases both in the Provincial Divisions, as well as in this Division, it is clearly stated that to turn across the line of oncoming or following traffic is an inherently dangerous manoeuvre and that there is a stringent duty upon a driver who intends executing such a manoeuvre to do so by properly satisfying himself that it is safe, and choosing the opportune moment to do so."

- [33] In Madzunya and another v RAF ² reference is made to Milton v Vacuum Oil Co of SA Ltd³, which dealt with traffic in opposite directions. A person is entitled to assume that those who are travelling will continue on their course and that they will not suddenly and inopportunistically turn across the line of traffic. A person may only assume that, until he is shown a *clear intention* to the contrary. When a *clear and undoubted warning* is given, there is no longer any room for the assumption that the other person will continue in his former course. Applied to the instant matter, I cannot find that Mr Dlamini gave an undoubted warning that he intends to cross over the whole of the road and not merely an intention to move to the right.

- [34] In Bohlolo v Road Accident Fund ⁴ the Court made reference to S v Olivier where it was held:

"[29] ... But not so, I think, in the case of a driver who is travelling along a national road on which it is a common experience to be overtaken at high speed by

¹ 1976 (3) SA 45 (A) at 52

² 2007 (1) SA 165 (SCA)

³ 1932 AD 19 at 205

⁴ (27227/2020) [2023] ZAGPPHC 713

other vehicles. Such a driver would, I think, if he were reasonably diligent, before or at the time of giving a signal of his intention to turn right, make a special point of ascertaining, with the aid of his rearview mirror, or otherwise, whether there were any vehicles coming on behind him. And, a fortiori, he would also keep a keen look out ahead for vehicles approaching from the opposite direction and into whose line of travel the proposed right turn would necessarily take him. If the route ahead were entirely free of danger but the vehicle were to be seen by him approaching from behind it's not great distance but it speed, he would in my opinion be taking an unjustifiable risk if, without paying any further attention to the movements of that vehicle, he were simply to execute his right-hand turn on the blithe assumption that the driver thereof had seen and understood his signal and would heed it." [my emphasis]". [own emphasis]

[35] In *Pienaar v Road Accident Fund*⁵ it was held:

"[60] ... It is not sufficient, however, that the driver of the vehicle which is about to turn signals his intention to do so, even if the signal is given in good time. His further obligation is to refrain from making the turn until an opportune time. An opportune time in that context is a time when the motorist who wishes to turn can carry out his intention without endangering or even materially impeding the progress of any other person or vehicle lawfully on the road. It is the duty of the driver who wishes to make the turn to satisfy himself by full and careful personal observation that the time is opportune in the sense indicated above." [own emphasis]

[36] The *prima facie* view that usually applies in situations where a vehicle collides from the back with a vehicle in front of it, and where it is then usually said that the driver of the back vehicle is negligent,⁶ can I my view not apply in these circumstances.

[37] Ms Bronkhorst argues that Mr Grobbelaar could not exclude the possibility that the Hino utilized the left lane in order to secure a right-hand manoeuvre for the turn. Mr Grobbelaar also conceded that the video limits the detail and the

⁵ (2011/ 43693) [2015] ZAGPJHC 205

⁶ HB Kloppers: The Law of Collisions in South Africa (7th Edition), page 78

extent to which one can examine the footage and give an opinion thereon. The Argosy exceeded the maximum permissible speed and Mr Grobbelaar confirmed that the higher the mass of the vehicle, the more energy is needed to be dissipated to stop the vehicle engaging in a collision or bring it to a stop by braking. She argues that Mr Grobbelaar conceded that the Hino could make use of a wider turning manoeuvre where the entrance is too small but he also stated that the video shows that there is plenty of room. He did not need to visit to the scene to be able to make that conclusion.

- [38] With reference to the Plaintiffs not presenting the evidence of the driver of the Argosy, she refers to Wigmore on Evidence: Third Edition, Volume 2, para 185 at 162, where it is stated:

*"The failure to bring before the Tribunal some ... witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate as the most natural inference, that the party fears to do so, and this fear is some evidence that the ... witness if brought, would have exposed facts unfavourable to the party. Late, the inference ... is, of course, that the tenure of the specific unproduced evidence would be contrary to the parties' case or at least would not support it."*⁷

- [39] Whilst I agree with these principles, I am satisfied that the Plaintiffs have shown to what extent they went to secure the presence of the driver at Court. I cannot under these circumstances make an adverse finding against the Plaintiffs where they intended to call the driver and made effort to secure his attendance. A Court is called upon to consider the evidence holistically.⁸ In this case, and in respect of the accident, the video evidence, the experts and Mr Dlamini's evidence are considered.

- [40] She argues that the Argosy drove at an excessive speed and increased speed notwithstanding the Hino being visible. Mr Grobbelaar did not attend the scene nor obtained the version of the Argosy's driver. According to her, the Court has to determine what was visible to the Argosy driver, what was he doing

⁷ Reference was made to *Galante v Dickenson* 1950 (2) SA 460

⁸ *Auret N.O obo Kieser v Road Accident Fund* (14206/2014) [2020] ZAWCHC 192

prior to the collision, would the Hino have utilized the emergency lane to execute the turning manoeuvre and why maximum braking capacity was not applied. She argues that there is no version as to these questions.

- [41] I accept that a motorist that uses the emergency lane does not necessarily act unlawfully. It is also trite that a car following another should not travel either too closely behind or at such a speed that he is unable to pull up or swerve in the event of sudden stoppage or movement on the part of the driver in front.⁹
- [42] She submits that the Argosy driver was either travelling too fast, or did not keep a proper lookout, and only realized that the truck was travelling slower than he was when it was too late to avoid the accident.¹⁰ In Ditsela v Road Accident Fund, however, the principles were applied to a truck travelling slower than the one following and not a truck that stood stationary and not one that crossed over all the lanes of travel.
- [43] I am of the view that there is no room for applying the principles applicable to mutually destructive versions. The video material depicts the circumstances prior to the accident occurring. Mr Dlamini executed a turn which was inherently dangerous. His explanation for why he did so and at what time is not in dispute. The question is at what time did he observe the Argosy and whether it was safe to make the turn at that time? The principles in National Employer's General Insurance v Jagers¹¹ do not find application.
- [44] She submits that the witnesses for the Defendants were credible and that the testimony was supported by the video evidence, all of which can be accepted by the Court. I cannot make an adverse finding about the credibility of any of the witnesses. The experts disagree on a singular issue – whether it was necessary for Mr Dlamini to make the wider turn or not.

⁹ *Reemers v AA Mutual Insurance Association Limited* 1962 (3) SA 823 (WLD) at 825 E

¹⁰ *Ditsela v Road Accident Fund* 2019 JDR 2317 (GP) at [9]

¹¹ [1984] 4 All SA 622 (E) 624 – 625

- [45] The facts in Louw and others v Road Accident Fund,¹² differed from the matter before me. Mrs Badenhorst and Mr Grobbelaar agreed on virtually every fact and only differed on whether it is common or not for truck drivers to make a wider turn.

Conclusion

- [46] The video footage was accepted by agreement. It shows that the Hino was stationary in the emergency lane and the right indicator light was switched on, at least at some point. I accept that this would have or should have been visible for the Argosy and was an indication that the Hino *intended* to enter the lane of travel in which the Argosy was. I also accept that by not switching on the hazards of the Hino, the Argosy driver would not have accepted that the vehicle had mechanical issues and would remain stationary.
- [47] Mr Dlamini was adamant that the Argosy was close to his vehicle when he decided to commence the right turn. His initial evidence was that there rested an obligation on the Argosy driver to stop and allow him to make the right turn. If the Argosy followed him and he was driving slowly, one may criticise the Argosy driver for not following at a distance that would enable him to stop. This is not the case. He later stated that there in fact rested an obligation on both drivers to take care. This is more in line with the general principles.
- [48] The fact that he knew that he was driving a heavy vehicle and saw that the Argosy was approaching "*fast*", placed an additional duty on him to take care that he does not create the potential for an accident. He did not do so and resigned himself to the erroneous belief that the Argosy would stop.
- [49] The experts could not say whether the accident would have been avoided if the Argosy drove slower or within the speed limit. Driving in excess of the speed limit does not in itself equate to negligence.

¹² 2024 JDR 0118 (GP)

[50] Although one may argue that Mr Dlamini did not intend to turn into the gravel road but intended to make a U-turn, which may explain why he turned so far beyond the intersection, the question is whether it was safe at all for him to depart from the emergency lane when he saw the Argosy approaching.

[51] The Argosy driver, when he saw or should have observed the right indicator lights should in my view have been cautious that the Hino may intend to enter his lane of travel. The Argosy's movement to the right of the road may be because he thought that he will overtake with safety. This did not absolve him from keeping a proper look-out.

[52] In my view, both the drivers contributed to the accident occurring. An apportionment of negligence should therefore be made. In my view, the Defenant's driver acted unreasonably when he observed the Argosy, judged it to be driving fast, knew that it was a heavy vehicle, and decided when it was close (10-15 meters) to him to make the turn across all the lanes. The Argosy diver had a clear view of the road ahead and the video shows that the Hino was observable and the indicator light on. In view of the aforesaid, a larger percentage of negligence should be apportioned against the Defendants. I apportion 80% negligence to the Defendants and 20% to the Plaintiffs.

[53] The Plaintiffs have been substantially successful and costs should follow the result.

[54] I therefore make the following order.

ORDER

1. The Defendants are ordered to pay 80% of the Plaintiff's damages, as may be proved or agreed.

2. The Defendants are directed to pay the Plaintiff's costs in relation to the determination of the merits.



P R CRONJÉ, AJ

On behalf of the Plaintiffs:

Adv G S K Van Rensburg

Welgemoed Attorneys

Graham Attorneys

Bloemfontein

On behalf of the Defendants:

Adv M Bronkhorst

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