



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

Not Reportable / Reportable

Case No: 2411/2022

In the matter between:

COLT TRANSPORT SERVICES CC

PLAINTIFF

And

STA WHEELS CC

FIRST DEFENDANT

KAMOGELA ISAKA

SECOND DEFENDANT

Neutral citation: *Colt Transport Services CC v STA Wheel CC and Another*
(2411/2022)

Coram: **Daniso, J**

Heard: **11 October 2024**

Delivered: **10 March 2025**

ORDER

1. The defendants are jointly and severally 100% liable for the plaintiff's damages as may be proven or agreed upon.
2. The first defendants' counterclaim is dismissed with costs.
3. The defendants shall pay the plaintiff's costs of the action incurred so far on a party and party scale including the costs of counsel on scale B.

JUDGMENT

Daniso, J

[1] The plaintiff claims damages arising from a collision involving the plaintiff's truck and trailer there and then driven by its employee Mr. Vusimuzi Anton Nyembe and the first defendant's stationery truck and trailer driven by its employee, the second defendant Mr. Kamogela Isaka. The collision occurred shortly before midnight on 29 January 2022 on the N3 Freeway near Harrismith.

[2] At the commencement of the trial the parties agreed that:

2.1. Merits and quantum be separately adjudicated accordingly, I granted an order in terms of Uniform rule 33 (4) merits and quantum were separated and the issue I had to adjudicate is liability;

2.2. Visibility on the road on which the collision occurred was inadequate as the road had no street lights;

2.3. The plaintiff's truck rear-ended the defendant's stationery truck on the path of travel of the plaintiff's truck;

2.4. The video footage from a dashboard camera (dash cam)¹ of the plaintiff's truck accurately depicts in real time the view of the road and the events leading up to the collision and the cell phone video footage recorded by the plaintiff's manager Mohamed Arshad accident depicts what he observed at the scene of the accident after the accident²; and

2.5. The plaintiff and first defendant were vicariously liable for the negligence of their respective drivers.

[3] Mr Nyembe and Mr. Joosab testified for the plaintiff's case and Mr Isaka testified for the defendants' case. What follows hereunder is the summary of their evidence.

[4] Mr. Nyembe testified that on that night he left Johannesburg between 19h15 and 19h30. He was travelling to Durban to deliver a shipment of fruit juice to a customer. The road is a dual carriageway with two lanes on both sides and has no street lights. It was very dark as a result his truck's lights were on alternating between bright and dim headlights when approaching oncoming traffic. He was driving on the left lane at a slow pace as he had intended to off ramp to Harrismith about 400 and 600 meters away when he saw the defendant's truck right in front of him stationery with its biggest part inside on the lane of his travel and the other part on the other side of the yellow lane.

[5] It was his testimony that at the time he approached the defendant's truck, he did not see any warning triangles on the road or lights on the back of its trailer. At the time he observed its presence on the road it was very close as a result he could not take any effective steps to avoid colliding into it.

¹ Exhibit "A."

² Exhibit "B".

[6] After impact, he asked the second defendant why he was stationary on the road. His explanation was that his truck ran out of diesel. As a result of the accident, the plaintiff's truck was damaged including the customer's load that was being transported with the trailer.

[7] Mr. Nyembe was shown the video footage from the dashcam. He confirmed that the video footage is from the truck he was driving on that night of the accident and it shows that before the impact, he had his head lights on bright dimming them when approaching oncoming traffic. At the time he collided into the defendant's truck, there are no lights visible from its trailer he also did not see the illuminating strip on the defendant's trailer. He was adamant there was also no warning triangle on the road indicating the presence of the defendant's vehicle on the road.

[8] Under cross-examination he did not dispute that in the video footage it appears that his truck had been moving from left to right. He however denied the proposition that this was due to him having been tired. He also did not dispute that there appears to have been no traffic on the right lane at the time of the collision and that if he has moved to the right lane the accident would not have occurred. On this aspect, he explained that he had to remain on the left lane as he was approaching his turnoff. Mr Nyembe also conceded that before the impact his truck was also partially travelling on the yellow lane and that if he did not, he would have been able to avoid colliding with the first defendant's truck. He could also not dispute that the defendant's trailer was fitted with a reflector strip except that he did not see it.

[9] Mr. Joosab arrived on the scene after the accident. He testified that he found half of the first defendant's truck still on the left lane where the plaintiff's truck was also travelling. After satisfying himself that the both drivers were not injured, he spoke to the defendant's driver who explained that the reason his truck was on stationary on the road

was because he had run out of fuel. He recorded the video³ for evidence as per his company's policy and also for insurance purposes. He climbed into the defendant's truck and switched on the ignition, indeed the fuel gauge indicated that the fuel tank was empty.

[10] It was Mr Joosab's evidence that he the defendant's truck's lights though functioning they were not activated. The hazard lights were only switched on by the tow driver whilst he (Mr Joosab) was already at the scene. He also did not notice any warning triangles behind the defendant's truck. As a result of the damage to the truck including the trailer, some of the goods (juice) that were being transported on behalf of the customer were damaged.

[11] For the defendants, Mr Isaka confirmed that at the time of the collision his truck had run out of diesel and it was stationary on the road encroaching on the left lane as he could not move his truck further away from the road due to the steel barriers on the left side of the road.

[12] It was his testimony that the speed limit on the road was 80 kilometres per hour and before his truck came to a standstill, the low fuel warning light came on he continued to drive as he was a few kilometres away from the next fuel station. The truck then started to jerk he then drove to the edge of the road and that's where the truck eventually stalled. He tried several times to start the engine without success. He then jumped off the truck and went to place the warning triangle about 15 meters away from the back of the truck and quickly went to sit inside the truck for his safety having observed people moving up and down in that area. He switched on the parking lights and the hazards. The reflector strip was also there. About 30 minutes later after many vehicles had passed by, he felt the impact of his truck being rear ended jostling him to move forward.

³ Exhibit "B".

[13] Under cross-examination he was confronted with the video evidence indicating that speed limit regulated for that road was 100 kilometres per hour and not 80 kilometres as he testified and that on the video, no warning triangles can be seen including the lights of the defendant's trailer and this is despite the fact that the lights of oncoming traffic were visible from quite a distance. It was also pointed out to him that even in his statement that he made barely two days after the incident he did not mention having placed the warning triangle on the road or activated his lights and hazards lights before impact.

[14] Mr Isaka did not dispute the video evidence. With regard to the discrepancy pertaining to the speed limit, he explained that the fact that the road sign indicates the speed limit as 100 kilometres does not mean he could drive at that speed. He further stated that the warning triangle could have been taken by the people who were walking up and down in the vicinity of the collision and although he could not explain why his truck's lights were not visible he had activated his park lights, hazards and the trailer also had a reflector strip at the back. Regarding the statement at first, he denied any knowledge of the statement he said he merely have responses to what was asked.

[15] Thus is a summary of the evidence led by the parties. In addition, to the parties' *viva voce* evidence, video footages of the moment before, and after the impact were handed by concurrence of both the parties as Exhibit "A" and "B".

[16] Plaintiff's counsel Mr Louw, reiterated the plaintiff's case that the first defendant's driver was negligent in that had he given the other road users adequate warning of the presence of his stationary truck in the road the collision would not have happened. The plaintiff's version that the first defendant's driver failed to do so is more probable and in fact corroborated by video footage of the dashboard. As a result of the collision, the plaintiff's truck including its trailer and cargo were damaged for that reason, the first defendant's counterclaim must be dismissed. The defendants must be found 100% liable jointly and severally for the plaintiff's damages. In the event that the court finds that there

is a slight degree of negligence on the part of the plaintiff's driver, damages ought to be apportioned 85/15% in favour of the plaintiff as provided for in the Apportionment of Damages Act.⁴

[17] Defendants' counsel Ms Scallan conceded that there were discrepancies in Mr Isaka's evidence regarding the placement of the emergency triangle on the road and his truck's lights and hazards lights being switched on before impact. It was her contention that Mr Isaka might have been mistaken on these aspects. As regards negligence of the respective drivers, Ms Scallan countered that the plaintiff's driver clearly failed to keep a proper lookout on the road otherwise he could have seen the defendant's truck despite the absence of the warning triangle and lights and avoided the collision by moving to the right lane. His concessions in this regard are fatal to the plaintiff's case, he was thus the proximate cause of the collision. Based on all these reasons an apportionment of 60/40% in favour of the defendant would be appropriate.

[18] A driver who stops his vehicle in the path of following traffic after dark causing an obstruction with the result that a collision occurs would be negligent if he failed to give following traffic adequate warning of the presence of his vehicle in the road.⁵ After all the evidence had been proffered the issue which remains contested between the parties is whether at the time of the collision the first defendant's truck was timeously visible to the plaintiff's driver to enable him to take effective action to avoid the collision.

⁴ Apportionment of Damages Act, 34 of 1956 (as amended).

⁵ WE Cooper *Delictual Liability in Motor Law* 1996 at 154 -160 and the authorities there cited.

[19] The drivers have proffered conflicting versions regarding whether there were any warning measures implemented by the first defendant's driver to ensure the visibility of his stationary truck on path of travel of the plaintiff's truck.

[20] The principles governing the evaluation of evidence of this nature are trite:

*"...the court must make findings on (a) the credibility of the various factual witnesses, (b) their reliability, and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v), on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it."*⁶

[21] Mr Nyembe gave a good, succinct and accurate account about why he did not see the defendant's truck on the path of his travel. His testimony that the defendant's lights were not on and there was also no warning triangle placed behind it remained intact even after cross-examination. I have no reason to doubt his evidence in this regard more so as it is corroborated by the video footage, Exhibit "A" and "B" and by Mr Joosob who arrived

⁶ *Stellenbosch Farmers Winery Group Ltd & Another v Martell et Cie & Others* **2003 (1) SA11 SCA** para 5 at 14I - 15E.

after the collision and found the lights of the defendant's truck still off. Mr. Nyembe was also an honest witness in that, under cross-examination he made concessions relating to the fact that part of his vehicle also travelled on the yellow lane and that if he drove on the right lane, he could have avoided the collision. Mr. Joosab was also a satisfactory witness. He only told the court what he observed at the scene of the accident and what he heard from the drivers. I have no reason to doubt the veracity of the evidence tendered by the plaintiff's witnesses, accordingly, their evidence is accepted as the truth regarding the non-visibility of the defendant's stationary truck on the road before impact.

[22] On the other side, Mr Isaka gave conflicting versions regarding the status of his vehicle's lights immediately before the impact. He insisted that the speed limit on the road was 80 kilometres per hour and that the road was a single carriage-way. As regards the disputed material facts, he was also adamant that he had placed a warning triangle behind his truck and activated the truck's lights after the truck stalled and this is despite the fact that his whole evidence in this regard was gainsaid by video footage and his own statement. It does not end there, Mr Isaka also sought to dispute the contents of the statement he attested to after the accident in which he admitted to not having implemented any warning measures on the road to warn other road users of his stationary truck on the road. Given the material discrepancies in Mr Isaka's testimony, more so when the truth of his version was tested under cross-examination, I have come to the conclusion that he was not truthful. His version was clearly a contrived afterthought invented to avoid liability.

[23] A driver's duty to keep a proper lookout so as to avoid colliding with a road user who has suddenly loomed in front of him only arises where it has been established on a preponderance of probabilities that the encroaching vehicle was timeously visible at the time of the collision.

[24] On the accepted evidence, the first defendant's truck posed an obstruction on the path of travel of the plaintiff's truck and it was not timeously visible to the plaintiff's driver with the result that when he became aware of the obstruction it was too late to take evasive steps to avert the collision. There was not even an attempt by the defendants to explain why Mr Isaka, a driver with 15 years' experience, drove the truck without ensuring that he had enough fuel to reach his destination or stopped the truck immediately when the fuel warning light came on.

[25] Attributing negligence to Mr Nyembe on the grounds that he conceded that he failed to keep a proper lookout and the collision was avoidable is, in my view, unsound. The concessions on these aspects do not constitute admissions of negligence on a preponderance of probabilities. As it was stated in *Rondalia Assurance Corporation of SA LTD v Mtkombeni*:⁷

"Negligence can only be attributed by examining the facts of each case. Moreover, one does not draw inferences of negligence on a piecemeal approach. One must consider the totality of the facts and then decide whether the driver has exercised the standard of conduct which the requires. The standard of care so required is that which a reasonable man would exercise in the circumstances and that degree of care will vary according to the circumstances. In all cases the question is whether the driver should reasonably in all the circumstances have foreseen the possibility of a collision."

[26] As correctly pointed out by Mr Louw the assertion that Mr Nyembe was fatigued is merely a speculation. It is also important to note that no evidence was proffered on a balance of probabilities to substantiate the contention that the reflector strip on the defendant's trailer was in a working condition and his evidence that he could not change lanes before the collision as he was due to exit the Freeway remains undisputed. That aside, on the established evidence the defendant's truck was straddling both the left lane

⁷ *Rondalia Assurance Corporation of SA LTD v Mtkombeni* **1979 (3) SA 967** (AD) at 972A.

and the yellow lane with its most part encroaching on the left lane therefore even if Mr Nyembe maintained his path without partly traveling on the left lane the collision was inevitable.

[27] Having regard to the facts of this matter, I am not persuaded on a preponderance of probabilities that the defendant's truck was timeously visible at the time of the collision. I am satisfied that the plaintiff has discharged the onus of proving on the balance of probabilities that second defendant acted negligently, not only that Mr Isaka was negligent by failing to warn other road users of the presence of his stalled vehicle on the road, but that such negligence was the sole cause of the collision. In the premises, liability is determined in favour of the plaintiff.

[28] On the aspect of costs, I have found no reason for the departure from the general rule that costs follow the result.

[29] In the circumstances, I make the following order:

ORDER

1. The defendants are jointly and severally 100% liable for the plaintiff's damages as may be proven or agreed upon.
2. The first defendant's counterclaim is dismissed with costs.
3. The defendants shall pay the plaintiff's costs of the action incurred so far on a party and party scale including the costs of counsel on scale B.


The Honourable Justice
2025-03-10
S. DANISO, J
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APPEARANCES:

Counsel on behalf of the plaintiff:

Instructed by:

Adv. M. Louw

Cilliers & Reynders

PRETORIA

C/O Phatsoane Henney Attorneys

BLOEMFONTEIN

Counsel on behalf of the defendant:

Instructed by:

Adv. J. Scallan

Wiese & Wiese INC

PRETORIA

C/O Badenhorst Attorneys

BLOEMFONTEIN