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~~REPORTABLE~~ / NOT REPORTABLE

Case number 634/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

TANKER SERVICES (PTY) LTD

Appellant

and

SA BOTSWANA HAULIERS (PTY) LTD

Respondent

CORAM : E M GROSSKOPF, SCOTT JJA et

PLEWMAN AJA

DATE OF HEARING : 1 MARCH 1996

DATE OF JUDGMENT : 19 MARCH 1996

J U D G M E N T

E.M. GROSSKOPF / JA.....

E.M. GROSSKOPF JA:

The appellant was the defendant in an action in the Transvaal Provincial Division in which the respondent claimed damages arising from the collision of two motor vehicles. For convenience I shall refer to the parties as plaintiff and defendant respectively. The plaintiff claimed for the destruction of a mechanical horse and damage to a trailer belonging to associated companies from whom the plaintiff had obtained cession of action, but to avoid unnecessary verbiage I shall deal with the matter as if the plaintiff were the owner. The plaintiff's horse and trailer collided with a mechanical horse, tanker and pup-tanker belonging to the defendant. The defendant denied liability and counterclaimed for the damage to its vehicles. Both parties alleged that the collision was caused by the negligence of the driver of the other party's vehicle. It was accepted that both parties were vicariously liable for the acts of their drivers.

The trial court (Hartzenberg J) made an order separating the merits of the claim and the counter-claim from the quantum thereof. After hearing evidence, the court held that the collision was caused solely by the negligence of the defendant's driver and that the defendant was liable to the plaintiff for the damages caused by the collision. The counter-claim was dismissed and an appropriate costs order was made. With the leave of the trial court the matter now comes on appeal before us.

The collision occurred at about 23.30 on the night of 18 May 1990 in Zimbabwe about 108 kilometres south of Harare on the main road between Harare and Beit Bridge. The plaintiff's vehicle, which had a load of two large granite blocks on the trailer, was travelling roughly south in the direction of Beit Bridge. The driver, one Herbert Shereni, had his wife and three children with him in the cab. The defendant's vehicle was driving in a northerly direction. The tanker carried hexane, which is a highly

inflammable substance. The collision caused it to ignite. Both drivers and all the passengers died in the resulting conflagration. There were accordingly no eye-witnesses to the collision.

On behalf of the plaintiff evidence was led of persons who came upon the scene after the accident, and a number of photographs of the wrecks of the vehicles and the scene of the collision were handed in. In addition evidence was given by an expert witness, prof G. Lemmer, an associate professor of applied mathematics. The defendant led evidence only of an expert witness, prof T.O. Duggan, an engineer. It is not necessary to set out the evidence of the lay witnesses in detail. In the result there was little dispute about the facts upon which the experts based their theories. These facts were very few. The fire, and the efforts of the fire brigade to extinguish it, caused so much damage to the vehicles and to possible marks on the road surface that few clues as to the probable cause of the

collision remained. And the experts never saw the wrecks of the vehicles. They only had the photographs upon which to base their views.

The facts which were ultimately undisputed may be summarised as follows.

1. The road had a good tarred surface. It was approximately 6,8 metres wide.

2. The two vehicles were both approximately 2,5 metres wide. There was accordingly not a great deal of space for them to pass.

3. The plaintiff's vehicle was travelling from north to south; the defendant's from south to north.

4. The left front of the defendant's horse collided with the right front of the plaintiff's horse.

5. After the collision the two horses were locked together just off the road on the eastern side. The plaintiff's trailer straddled the road, with its rear on the western side. The defendant's tanker was off the road

on the eastern side while the pup was on the eastern half of the road.

6. There was a gouge mark on the road which represented the first manifestation of the collision. It was approximately opposite the point where the two horses came to rest. It commenced about 0,8 of a metre from the centre of the road on the eastern side and extended about a metre in an easterly direction. This mark was accordingly entirely on the plaintiff's correct side of the road.

7. The larger of the two granite blocks which had been loaded on the plaintiff's trailer (weighing approximately 12 tons) landed in the western half of the road approximately 12 metres north of where the trailer came to rest.

On the basis of this evidence there was a substantial degree of agreement between the experts. They both accepted that at impact the north-south momentum of the two

vehicles was approximately equal. This was the reason why they came to rest near the point of impact, i e, there was no significant north-south displacement of either vehicle. Since it seems that there was no great difference in their respective masses their speeds must have been much the same. The displacement of the vehicles towards the east (shown by the fact that the vehicles were on the eastern side of the road, or even off the road on that side) indicates that there must have been a component of momentum to the east just prior to the collision.

It is mainly in their views regarding the nature and extent of this momentum to the east that the experts differed. Prof Lemmer's view was expressed as follows in his expert summary:

"In all probability this component of momentum was supplied by the tanker (i e, the defendant's vehicle) in moving across the centre of the road into the line of travel of the Cargo vehicle (i e, the plaintiff's vehicle). Such a movement would not only have provided the required component of momentum but would have caused impact between the left front of the

tanker and the right front of the Cargo vehicle. The gouging of the road surface would most probably have been caused in the immediate area of contact between the vehicles and the fact that gouging occurred on the Cargo vehicle's correct side of the road is in accordance with this reconstruction."

Prof Lemmer rejected an alternative suggestion that both vehicles were moving from the western half of the road to the eastern half immediately prior to the collision. During cross-examination he was asked what the reasons were for his conclusion that it was the tanker which supplied the momentum to the east. His answer was not very convincing. His first reason was "something which is probably a legal point" namely that

"...where ... there is something like a head-on collision and both vehicles are on one side of the road and very often you have to try and determine the point of impact, that is not known and my experience from being in court is that there is usually some kind of a presumption that the collision is on that side of the road where the vehicles ended, unless there is something like an eye-witness who says, no, but I saw this vehicle go across and coming back ...".

This reason requires no comment. His second reason was

that there was not a great deal of movement and a great deal of rotation of the vehicles. Why the slight extent of the movement and rotation should indicate that it was only the tanker, and not the two vehicles combined, which supplied the momentum to the east is not apparent. Further in cross-examination Prof Lemmer accepted that the plaintiff's vehicle may also have swerved to its left prior to the collision.

Prof Duggan, for his part, espoused the theory that prof Lemmer rejected. He said:

"In my opinion the vehicles, the horses, were both inclined towards the east at the time of the collision. They were both moving from the west towards the east so that the right front corner of the [plaintiff's] vehicle was in the vicinity of the centre line and the left front corner of the [defendant's] vehicle was also in the vicinity of the centre line and both trailers ... were coming from the western lane of the road."

Prof Duggan in turn rejected Prof Lemmer's view that the plaintiff's vehicle was probably on its correct side immediately before the collision.

The court *a quo* analysed the evidence of the two experts and came to the conclusion that it was not necessary to choose between them. It decided the case on the basis of *res ipsa loquitur* - the collision occurred on the plaintiff's correct side of the road and the defendant did not tender any evidence displacing the inference of negligence arising from that fact.

The correct role of the maxim *res ipsa loquitur* is well settled in our law. In *Sardi and Others v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A) at 780G-H Holmes JA said the following:

"At the end of the case, the Court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence. In this final analysis, the Court does not adopt the piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a *prima facie* case; and then (b), deciding whether this has been rebutted by the defendant's explanation."

See also *Madyosi and Another v S A Eagle Insurance Co Ltd*

1990 (3) SA 442 (A) at 444D-G.

The correct enquiry therefore is whether there is proof on a balance of probabilities that the collision was caused by the negligence of the defendant's driver. The plaintiff's counsel, in his heads of argument, oral address and again in supplementary heads of argument tendered after the hearing of the appeal, contended (I quote from the last-mentioned document) that the "case was conducted throughout on the basis that both parties agreed that the point of impact took place on the plaintiff's correct side of the road." This contention is not borne out by the record, unless the expression "point of impact" is given some special interpretation. It is true that the parties' expert witnesses agreed that the gouge mark on the surface of the road represented the first manifestation of the collision and that the gouge mark was on the plaintiff's correct side of the road. There was nothing else to indicate on which side of the road the impact occurred.

The experts differed, however, on how the nature and position of the gouge mark were to be interpreted in the light of all the known circumstances, as I have indicated above. One point was clear at any rate - the gouge mark did not necessarily represent the specific point where the left front of the defendant's vehicle collided with the right front of the plaintiff's vehicle. Prof Lemmer conceded in cross-examination that "the gouge mark is the point at which immediately after the impact between the two vehicles some part of one of the vehicles gouged into the road" and cross-examining counsel intimated that he would be calling it "the point of impact in that sense". Prof Duggan explained the effect of the gouge mark in his evidence. After stating that the gouge mark "is the only evidence we have of which I am aware of the approximate area in which the vehicles first made contact" he continued:

"Of course the mark would not have appeared

immediately at first contact, it would have appear shortly afterwards, so the vehicles may have been further west when they first made contact and because we don't know what part of the vehicle made that gouge mark, we don't quite know where the vehicle was in relation to that mark when they first made contact. To be, just to give an illustration, suppose that mark had been made by something in the centre of the vehicle, then the vehicle would have been further to the west. It couldn't have been further to the east."

Both experts agreed that it was probably a part of the plaintiff's vehicle that caused the mark but neither hazarded an opinion as to what part of the vehicle was responsible. If one takes into account that the vehicle was approximately 2,5 metres wide, and the mark started 0,8 metres from the imaginary centre line, it is apparent that it would have been consistent with the mark if the plaintiff's vehicle had been a metre or more over the centre of the road onto its incorrect side. Indeed, as I have mentioned above, Prof Duggan's reconstruction places both vehicles more or less in the middle of the road at the time of impact.

It seems to me wrong therefore to accept as an *a priori* assumption that there was a point of impact which was on the plaintiff's correct side of the road. The gouge mark indicates no more than that the plaintiff's vehicle was to some extent on its correct side when the collision occurred. Where it was immediately prior to the collision is unknown.

According to Prof Duggan's theory the plaintiff's vehicle must have been moving from its incorrect side to its correct side. During argument before us the defendant's counsel contended that the position of the plaintiff's trailer straddling the road immediately after the collision, and the fact that the heavy concrete block landed substantially on the western side of the road, were strong indications that the trailer must have been on its incorrect side immediately before the collision. How did the rear of the trailer land in the western side of the road, he asked, if it had been travelling due south in the

eastern lane? And what force could then have projected the block to the western side? Prof Duggan found only one acceptable explanation for this: the trailer must have been on its incorrect side. Prof Lemmer, on the other hand, explained both these facts by postulating an anti-clockwise rotational movement of the trailer caused by the impact. These issues were much canvassed in cross-examination but at the end it seems to me that the views of both experts were largely speculative and that there was not enough evidence to support either. They are nevertheless helpful as indicating what possibilities emerge from the few available facts.

Ultimately we are therefore left with the fact that the defendant's vehicle was veering to the east prior to the collision, and so probably was the plaintiff's. The collision occurred near the gouge mark and at least some part of the plaintiff's vehicle was on its correct side at that time. Where the vehicles were immediately before the

collision, and what caused them to move to the east, is unknown. In my view these facts are not enough to justify an inference of either driver's negligence.

I consider therefore that the appeal should succeed.

The following order is made.

The appeal is upheld with costs. The order of the court a quo is set aside and replaced with the following:

Absolution from the instance is ordered in respect of the claim-in-convention as well as the claim-in-reconvention. Each party is to pay its own costs.

E.M. GROSSKOPF

JUDGE OF APPEAL

SCOTT JA 1 CONCUR

PLEWMAN AJA 1

EMG/al