REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

APPEAL COURT CASE NO: A5029/06

In the matter between:

UNITRANS FUEL & CHEMICAL (PTY) LTD Appellant

and

DOVE-CO CARRIERS CC Respondent

J U D G M E N T

HALGRYN, AJ:

Nature of appeal

[1] This appeal came before us with leave granted by the Supreme Court of Appeal.

[2] The appeal lies against the whole of the Judgment and Order by Jajbhay, J, in the Court *a quo*, where, in an action for damages resulting from a collision between two trucks, the learned Judge granted absolution from the instance with costs.

Condonation

[3] The appeal was not prosecuted timeously; in that the appellant failed to make application for a date of hearing and serving and filing of the record of the proceedings in the Court *a quo*, within 60 days of the filing of the notice of appeal, as is required in terms of Rule 49(6) and (7) of the Rules of the Conduct of Proceedings in the High Court.

[4] The application for a trial date and the serving and filing of the record of the proceedings in the Court *a quo*, was late by some 3 years.

[5] This notwithstanding, condonation was granted at the outset of the argument herein, without much ado and largely due to the fact that respondent indicated that it agreed that condonation be granted.

[6] I confess that I was dead opposed to granting condonation herein. I have yet to come across a longer period of delay and it is the specific excuse for the delay herein, i.e. a delay of some 3 years by the transcribers to finalize

the record for the purposes of this appeal, which require of me to include my views on the condonation application in this judgment. It was my learned and more senior Brothers Moshidi J and Mathopo J who convinced me, with respect, that it does happen often that the transcribers, who contract with the Department of Justice, cause delays and that the appellant should not be held accountable for their delays herein. I, very reluctantly, agreed. This having been said, the matter cannot rest there; lest it happens again.

[7] The law on condonation is trite and I do not propose to restate it herein. Primarily and principally, an applicant for condonation seeks an indulgence from the Court and has to show that it bears no fault for the delay. It is as simple as that and in so doing, an applicant is required to be candid and thorough in explaining the entire period of the delay and the reason/s for it.

[8] *In casu*, the appellant, on the face of it, admittedly did its level best to explain the delay of three years. The condonation application comprised of some 200 pages, detailing the process over a period of 3 years, of the many attempts to get the transcribers to do, what they are contractually bound to do, *inter alia*, provide appeal transcripts timeously and without undue delay.

[9] The appellant was represented by new attorneys in the appeal and they took great care to meticulously record everything that their predecessors did in order to obtain the transcript. Understandably, they could not better these efforts and merely gave, as full account of what did take place, as they

were able to, given the contents of the files they took over from their predecessors.

[10] The appellant's attorneys were undoubtedly aware of the fact that, on the face of it, the clear undue delay, warranted a very good explanation and they left no stone unturned in their efforts to include everything they possibly could in the application for condonation.

[11] This included many communications between the applicant's attorneys and the transcribers, between the appellant's attorneys and the respondent's attorneys, file notes by various persons dealing with the file such as candidate attorneys, secretaries and attorneys.

[12] The reason I mention this is that all of this made for excruciatingly painful reading, more particularly so, as I was not at all convinced that condonation ought to be granted; and I initially set out to write a judgment refusing condonation.

[13] This has now become academic and the real purpose of my addressing the condonation application herein is to express the Court's dissatisfaction at the dismal service delivery herein by the contracted transcribers. A few brief remarks regarding condonation applications in general, are also called for, bearing in mind the peculiarities of this matter.

[14] Firstly; it is often and undesirably so, in our Courts, that the length of the delay in condonation applications, determines how detailed the explanation is.

[15] To illustrate: if a delay of a few days has to be explained, then the failure to deal with a day or two may well prove fatal to the application. Likewise, if a delay of some 3 weeks has to be explained, then a failure to deal with 3-4 days, may lead to the failure of the application.

[16] In the case of much longer delays, such as the case *in casu*, (of some 3 years), applicants somehow, (but too often), regard the failure to explain 3-4 days as negligible. In fact, much longer, unexplained periods seem to pale into insignificance, simply due to the length of the total delay, seemingly under the impression that a few days or even weeks, here and there, will not "*brak the camel's back*".

[17] This is unacceptable. The test does not change due to the length of the delay and the duty to fully explain the entire period of the delay, remains the same, quite irrespective of the period of the delay.

[18] *In casu*, I made the painstaking effort of compiling a chronology of the events which took place over the period of 3 years and my very conservative calculations led me to conclude that over the period of 3 years there were in total, some 86 weeks, which were not sufficiently explained.

[19] Even if I were to take into account only a third of this period, to give the appellant the benefit of the doubt, it still leaves a period of not less than nearly 28 weeks, which were not sufficiently explained or not explained at all. This is in itself, is far longer than the 60-day period, which had to be complied with in the first place.

[20] It is so that the reason, throughout, for this excessive delay was the non-cooperation by the contracted transcribers, first of all, Sneller Verbatim (Pty) Ltd and thereafter its successor, L.O.M. Business Solution, but there were still large portions of the period which were not sufficiently explained and where it did not suffice in my view, to simply have waited to see what the transcribers came up with from time to time.

[21] The aforesaid non-cooperation by the transcribers ranged from:

21.1 the typist being sick;

21.2 the typist not being proficient in any of the languages used in the trial, causing the "*record to be a mess*";

21.3 missing portions of the evidence;

21.4 incompetence of LOM's predecessor by using a "*deaf transcriber*";

21.5 Volume 2 was still "*half baked*" after it was received;

21.6 LOM being unable to open the computer program that Sneller used;

21.7 not allowing the attorneys to get a copy of the CD containing the evidence for the purpose of listening to it in order to correct the transcripts;

21.8 that "*… Sally had returned the typing of the transcript to Rika and that Rika in turn had appointed someone else to do the typing …*";

21.9 "… *the original transcript was of such poor quality that he had to omit certain words which were not said* (spoken)*, changed words that were typed incorrectly and which caused, according to him, certain words to have a different meaning as to what was really said, commented on the fact that the typist had no understanding of the English language whatsoever and that, in his view, the poor punctuations and lack of proper paragraphing made a huge difference to what the transcript had to reflect …*";

21.10 "… *the entire transcript had to be gone through and corrected and stated that he did not know what would happen if an Appeal Court Judge read 'this crap' …*";

21.11 Nel's evidence does not accord with the amendments made by the attorneys;

21.12 only receiving Volumes 1 and 3;

21.13 employees being on leave;

21.14 computer being in for repair;

21.15 and so on.

[22] None of the explanations/excuses by the contracted subscribers suffice and on the whole I find their services, or better put, the lack thereof, shocking. This is especially so, as they hold the monopoly and the appellant could not shop around for better services elsewhere. The appellant's erstwhile attorneys' frustration was evident from the papers.

[23] At the end of the day, the real issue with the seemingly nonplussed attitude of the transcribers herein, is that three Judges on appeal were subjected to read an application for condonation, of over 200 pages, attempting to explain a delay of 3 years, before even dealing with the merits.

[24] The transcribers herein seem oblivious of the fact, that once they had eventually provided what they were obliged to provide, the transcript is not automatically before Court and that their unacceptable delays and flimsy explanations and often ridiculous excuses still had to be the subject matter, before a Court, in a lengthy voluminous condonation application, which burdened the Court unacceptably.

[25] Significantly, the transcribers herein were of course always quick to assist on payment and the appellant did not default once, but this did not serve as any encouragement for them to speed up the process.

[26] By ant analysis, a delay of three years is so wholly unacceptable, that something had to be said, to ensure its non-occurrence in the future. I engaged some of this Division's more senior Judges on this topic and they are

agreed that this judgment ought to address this issue and also suggested to me that I request the Registrar to send copies hereof to the Director-General of the Department of Justice and to the contracted subscribers.

[27] It is precisely this, which constrained me to write this, in order to attempt to ensure that there is no repeat of what happened herein. This judgment must not be seen as authority that equally long delays will be condoned in future. On the contrary, this judgment serves to ensure that this never happens again.

[28] Applicants for condonation in our High Courts must take note of two fundamentally important issues which arise from this judgment, i.e.:

28.1 The entire period of the delay has to be explained thoroughly and the longer the period of delay, does not detract from this fact; and

28.2 if the reason for the delay is the non-cooperation by the contracted transcribers, then substantial delays such as the one herein will not constitute a sufficient reason/explanation for the delay, without proof of attempts to compel the transcribers to provide the transcripts.

[29] Significantly, in our Administrative Law and Labour Law, such a delay is inconceivable and will hardly ever be condoned. There are particular processes in terms of which decision makers, statutory bodies and tribunals

can be and must be compelled to provide records of proceedings timeously and the failure to follow such compulsory procedures, is fatal to condonation applications, where the reason for the lateness is the failure to provide such a record of the proceedings timeously.

[30] Litigants in our Civil Courts have no choice but to utilize the transcribers, contracted to the Minister of Justice, and although not party to that contract, they undoubtedly have the necessary *locus standi* to bring an application to compel them and/or the Minister of Justice to provide the transcripts, in the event of their defaulting on their contractual obligations.

[31] It is indeed a sad day that it has come this, but to burden Judges of Appeal with condonation applications where the delays are of such magnitude, is simply unacceptable. In future, applicants for condonation in matters such as this will have to show their attempts at compelling the transcribers to provide the record, including but not limited to, the bringing of an application to Court, to compel compliance, as part of their explanation for the delay and to show that they are not at fault.

[32] It goes without saying that, if granted, the transcribers and/or the Minister may be ordered to pay the costs of such applications.

The merits of the appeal

[33] I now turn to deal with the merits of the appeal.

[34] At around 18h45 on 4 July 2004, a collision occurred between a Mercedes 284 Actros truck-tractor, (bearing registration letters and numbers PYM 970 GP), the property of the appellant, ("*the appellant's vehicle*"), and a MAN truck and Henred Fruehauf trailer combination, (bearing registration letters and numbers FC B311N), belonging to one Duvenage, who ceded all his right, title and interest in respect of any and all claims relating to this vehicle to the defendant, ("*the respondent's vehicle*").

[35] This collision occurred approximately four kilometres north of the Mooiriver Toll Plaza on a fairly straight stretch of road.

[36] Immediately prior to the collision, the appellant's vehicle was travelling from south to north and the respondent's vehicle from north to south.

[37] The road on which the vehicles involved in the aforesaid collision, were travelling is a dual carriage highway, having three lanes in each direction, the left one on which is an emergency lane, demarcated with a solid yellow line.

[38] The lanes for travelling north and south are separated by a median of approximately 20 meters, consistent of a grass margin, a steel hedge, a concrete storm water gutter and another grass margin.

[39] The collision occurred in the fast lane, (the lane most right of the emergency lane), on the north bound side of the highway, i.e. on the respondent's incorrect side of the road.

[40] It is common cause that shortly prior to the collision, a ferocious storm broke loose and freshly fallen hail was covering the road, "*… like a sheet* …".

[41] It is so that where a motor collision occurs on a party's incorrect side of the road, *prima facie*, and saving an explanation by such a party, negligence would be inferred because of *res ipsa loquitur*.[1]

[42] The explanation, for the accident occurring on its incorrect side of the road, proffered herein by the respondent, is one of sudden emergency.

[43] The driver of the respondent's vehicle at the time of the collision was one Christoffel J Nel, ("*Nel*") and this is what he told the Court *a quo* happened on the evening of the accident.

[44] Nel testified that he was towing two trailers, heavily laden with granite blocks, on the night in question; and at the time of the accident it was already dark.

[45] A short distance from the accident scene, he pulled off, urinated and checked his vehicle. He then crested a hill ("*opdraande*"), and then found, at

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[1] See *Rankinsson & Son v Springfield On the Bus Services* 1964 (1) SA 609 (D & CLD).

the top of it, a white sheet of hail covering the road, ("*En toe ek bo-oor kom toe sien ek dit is net 'n wit laken voor my*.")

[46] He was travelling in the slow lane, i.e. the one between the fast and the emergency lane at the time and noticed vehicle tracks in the right hand lane, i.e. the fast lane. He decided to move over to the right and to travel in these tracks, because he thought them to be drier and more solid, ("*Ek het gereken die spore is droger and dat ek kan vastrap plek kry*.") and to there attempt to bring his truck to a standstill.

[47] It was not raining very hard and at this point in time he used his wipers only intermittently.

[48] Nel did what he considered best at the time and moved over to the tracks in the right hand lane. Once he was there, he applied his brakes, but immediately felt that he did not have good control over his truck and he then used his "*retarder*" to slow down.

[49] Whilst Nel was struggling to get his truck under control, a kombi overtook him on his left hand side, in the slow lane. After overtaking him, the kombi also moved over to the right hand lane. The kombi then lost control; started spinning and the truck he was driving, collided with the kombi, notwithstanding his attempts to break hard at that time.

[50] Nel then lost control of his truck, which jack-knifed and veered off the road to its right hand side, ultimately colliding with the appellant's vehicle in its right hand lane.

[51] It is not at all necessary to deal with the remainder of the evidence in the Court *a quo*, as it was common cause that the only issue in dispute is the respondent's defence of sudden emergency and that in turn, depends entirely on an analysis of Nel's evidence, in my view.

[52] Nel was everything but a sterling witness. As a matter of fact, I disliked the over-familiar, jocular tone he adopted, but it seems that he was largely allowed to get away with it by his examiners.

[53] I am also critical of his evidence in a number of respects, although he was not tested, or not seriously tested, on these.

[54] I for one, found his evidence quite incredible, of being confronted, (as if all of a sudden), with a sheet of hail, directly and only after he had crested the hill; as if there was no hail on the road when he was still cresting the hill or even prior to that. It rings fanciful in my view and it smacks of an attempt to justify, being in the fast lane, whilst driving a slow, heavily laden truck, which otherwise, did not belong there.

[55] Even if this version is accepted, (and I have to because it was not challenged), on Nel's version during cross-examination, he, (at the time he

noticed the sheet of while hail), also noticed chaos further down the road. He realized there was a problem ahead. He could not see exactly what it was, but he could see something was very wrong. He saw a number of vehicles on the road, ("*… U sien daar ver voor staan die wêreld vol karre …*"). This, he said, was quite a way ahead, ("*… 'n redelike afstand …*").

[56] This made him realize that he had to stop, ("*Daar is fout, ek moet begint – en ek moet rigting kry. Ek moet nou my tot stilstand kom.*")

[57] Nel conceded that there was nothing prohibiting him from moving over to his left and it turned out that, according to him, he collided with the kombi some 300 meters further on.

[58] If one analyses Nel's evidence closely, it is not difficult to understand why Mr De Koning, on behalf of the appellant, stood firm in his criticism of his evidence and strongly urged upon us to find that Nel was negligent by not pulling off to the left, as he easily could have done, upon cresting the hill and noticing the white sheet of hail and the trouble ahead.

[59] Mr De Koning, however, faced one insurmountable hurdle in the presentation of his case, i.e. the undisputed existence of the kombi and the undeniable fact that the respondent's vehicle collided with it. He, very correctly, conceded that it was not in dispute that the respondent's vehicle collided with the kombi.

[60] Mr De Koning stood his ground, nonetheless and urged upon us to find that had Nel moved over to his left instead of to his right, after cresting the hill, the collision would not have occurred.

[61] This may be so, but that does not mean that Nel was negligent in not doing so. This would be akin to suggesting that if Nel had not undertaken the trip at all, the collision would not have occurred.

[62] Nel's decision to drive in the right hand lane, where he perceived the tracks to be drier and thus safer could have been an error of judgment, (and I do not find that it was, although I also find it questionable), but it cannot be said to be negligent.

[63] There is every indication that had it not been for the kombi, Nel would have brought his truck to a safe standstill, whilst driving in the right hand lane, before he reached the "*trouble*" he had noticed ahead of him.

[64] The undeniable existence of the kombi and its collision with Nel's truck, lead to one conclusion, i.e. Nel, whilst trying to slow down in the existing tracks in the right hand lane, suddenly found himself in a situation of imminent danger, when the kombi overtook him on his left hand side, turned in front of him, lost control and started spinning. This, certainly, was not of Nel's own doing and his reaction, to brake violently, causing the truck to jack-knife and skid across the median into the appellant's truck's line of travel, with the resultant collision, cannot be said to be unreasonable or negligent.

[65] Van der Heever, (as he then was), stated the following:

> "*Where a plaintiff is put in jeopardy by the unexpected and patently wrongful conduct of the defendant, it seems to me irrational meticulously to examine his reactions in the placid atmosphere of the Court in the light of after-acquired knowledge; to hold that, had he but taken such and such a step, the accident would have been avoided, and that consequently he also was negligent. To do so would be to ignore the penal element in actions on delict and to punish a possible error of judgment as severely as, if not more severely than, the most callous disregard of the safety of others.*"[2]

[66] The logic of this approach, with respect, cannot be faulted and if I apply it to the facts *in casu*, I find that I simply may not, in the comfort of my chambers, decide that Nel ought to have done otherwise when he at the time, felt that he could bring his vehicle to a safe standstill, by moving to the right hand lane.

[67] In the premises, I find that the respondent's defence of sudden emergency was correctly upheld by the Court *a qou*, and further that no reason exists to interfere with the judgment and order made there.

In the premises, the order I would make herein in as follows:

1. The appeal is dismissed with costs.

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[2] In *Cooper v Armstrong* 1939 OPD 140 at 148. Quoted with approval in *Ntsala and Others v Mutual & Federal Insurance Co Ltd* 1996 (2) SA 184, at 192F-I.

2. The Registrar of this Court is hereby requested to send a copy of this judgment to the Director-General of the Department of Justice and to the contracted transcribers, LOM Business Solutions (Pty) Ltd.

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L P HALGRYN
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

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D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

_____

R MATHOPO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG