


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/11725

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO
(3)	REVISED. <del>NOT YET</del>
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	07/08/2015
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In the matter between:

**LAEVELD CITRUS (PTY) LTD**

Plaintiff

and

**TRANSNET LIMITED**

Defendant

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**J U D G M E N T**

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**MALEKA AJ**

**A.     *Introduction***

1.     At the conclusion of argument, yesterday, I reserved judgment to consider both the written and oral submissions made on behalf of the parties. I have now done so, and I indebted to counsel for their diligence and industry in producing useful heads of argument, within the limited

time available to them, after conclusion of the evidence. After all, the heads of argument made the more difficult of pondering and delivering judgment, less difficult.

2. What gave rise to the dispute before me is a collision which occurred on 10 April 2010 at Ladana Level Crossing between a train and its locomotives owned or operated by or on behalf of the defendant and a truck together with its two trailers owned by the plaintiff. I should indicate, in passing, that there was an issue on the pleadings regarding the plaintiff's ownership of the truck. That has since been resolved by a written admission made on behalf of the defendant at the commencement of the proceedings. In the light of that admission, I say nothing more regarding that historic dispute.
3. It is common cause that the collision occurred at night, approximately 20:00. At that time the plaintiff's truck was driven by Mr Miyelane Raymon Mlambu ("Mr Mlambu"). He was not employed by the plaintiff at the time, but by Dynamic Transport.
4. Arising from the collision, the plaintiff instituted the present action in which it seeks to recover the sum of R649 713.97 as damages suffered by it as a result of the destruction or damage of various components of the truck. I shall, in a moment describe the plaintiff's cause of action.

The defendant disputes liability. Instead, it contends that the sole cause of the collision is Mr Mlambo. In the alternative, the defendant pleaded that Mr Mlambo's conduct contributed to the occurrence of the collision, in that his contributory negligence must be attributed to the plaintiff.

**B. *The issues***

5. In the particulars of claim, the plaintiff asserted that the collision was caused by the exclusive negligence of the driver of the defendant's train. The grounds of negligence attributed to the train driver have been pleaded as follows –

*"5. The collision aforesaid was caused solely as a result of the negligence of the driver of the train he having been negligence in one or more or all of the following respects:*

*5.1 he drove the train without lights notwithstanding the fact that at the time of the incident it was already night time and dark;*

*5.2 he drove the train without ensuring that the lights of the train were in working order;*

5.3 *he travelled at a speed that was excessive in the circumstances;*

5.4 *he failed to give any or any adequate warning of the approach of the train to the Level Crossing;*

5.5 *he failed to apply the brakes of the train timeously or at all;*

5.6 *he failed to avoid a collision when by the exercise of reasonable care he could and should have done so;*

6. *In addition to the negligence of the driver of the train as set out in paragraph 5 above, he defendant, too, was negligent in that*

6.1 *it failed to provide booms to prevent access to the Level Crossing prior to the approach of the train;*

6.2 *it failed to provide any or any adequate warnings of the approach of trains to users of the Level Crossing;*

6.3 *it failed to provide alternatively to properly maintain, whistle boards requiring the driver of a train to sound its whistle when approaching the Level Crossing;*

6.4 *it failed to ensure that the locomotive was in good and efficient order in particular that its lights were working, prior to allowing the train to be operated on that railway line."*

6. I should mention that Mr Pye, who appeared on behalf of the plaintiff, disavowed reliance on the ground of negligence described in paragraph 5.2 of the particulars of claim. He made it clear that the plaintiff did not have any evidence that indicated that the light of the train was not in a working order, at the time the collision occurred.

7. In its plea the defendant denies that the collision was caused by the exclusive negligence of its train driver. It pleaded, in the main, that the collision was caused by the sole negligence of Mr Mlambo. The

particulars of the negligence upon which the defendant relies are set out in the plea as follows –

*“5.3.1 He failed to heed a level-crossing warning sign;*

*5.3.2 He failed to stop at the Level Crossing;*

*5.3.3 He failed to adhere to the robot at the level-crossing instructing him not to cross the railway line;*

*5.3.4 He failed to pay due regard to an approaching train; and*

*5.3.5 He drove at high speed under the circumstances; and*

*5.3.6 He generally failed to avoid the collision when, with the exercise of good and/or reasonable care, he could and should have done so.”*

8. I have already adverted to the plea of contributory negligence relied upon by the defendant, in the alternative. It is set out in the plea as follows –

*"5.5 Alternatively, in the event that the honourable court finds that the defendant was negligent (which is denied by the defendant) the defendant avers that such negligence was not the cause of the collision.*

*5.6 Further alternatively, in the event that the honourable court finds that the defendant was negligent (which is still denied by the defendant) the defendant avers that such negligence was not sole cause of the collision, but that the collision was caused by the contributory negligence of the driver of the motor vehicle of the plaintiff who was negligent in one or more of the respects pleaded at sub paragraph 5.3 above."*

9. The parties agreed to separate the issues between them. They made application in terms of the relevant provisions of Rule 33(4) of the Uniform Rules of Court that the question of liability should be considered at this stage, separate from the question of damages asserted by the plaintiff. I considered the application for separation of issues and granted it, for I was satisfied that the separated issues have clearly been defined, and that it is convenient to consider them separately from the question of damages asserted by the plaintiff.<sup>1</sup> Thus, the overarching

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<sup>1</sup> See - *ABSA Bank Limited v Bernert* 2011 (3) SA 74 (SCA), paras 21 and 22;

issue that I have been called upon to decide is the question of negligence and/or contributory negligence as are pleaded by the parties in the pleadings to which I have referred.

10. I will also deal with the question of costs, as both parties pressed for an order as to costs against each other, in this round of litigation.

**C. *The evidence***

11. Before I deal with the evidence presented on behalf of the parties, it is necessary that I describe the Level Crossing where the collision occurred. I do so based on evidence of photographs that was presented as Exhibit "A" during evidence as well as the description of the scene of the collision by various witnesses, which, by and large, is common cause. It is the following:

- 11.1. Single railway track (comprising two railway lines) intersects with the tarred road at the Level Crossing.

- 11.2. Access to the Level Crossing is controlled on either side by the following:



- 11.2.1. a speed-hump erected approximately 18 meters before the intersection. That speed-hump is approximately 1.5 meters wide and 200 to 250 meters high. Yellow and white lines are painted on top of the speed-hump to make its presence visible to motorists;
  - 11.2.2. there is a stop-line marked on the road surface which is approximately 3 meters before the intersection;
  - 11.2.3. next to the stop-line, there is a pole on which a stop sign is erected, right at the top. Below the stop sign there are mounted two traffic lights. And then, below the traffic sign there is a Level Crossing sign also erected on the same pole.
- 11.3. Railway line travels from Polokwane to Makhado. Approximately 400 meters before the intersection, there is a whistle-blow sign erected next to the railway line and its presence requires a train driver to blow a whistle or horn, at least for three seconds to warn pedestrians and motorists of the on-coming train, as it approaches the intersection.

- 11.4. Approximately 125 meters before the intersection there is a second whistle-blow sign. Again, its presence requires a train driver to blow the whistle continuously until his or her train safely passes the intersection.
- 11.5. It is common cause that there is no boom-gate on either side of the intersection which controls access to the railway crossing.
12. It is also common cause that the traffic lights mounted below the stop sign were not in a working order on the date of the accident. Both witnesses of the plaintiff and the defendant confirmed that the purpose of the traffic lights in their working condition, is to warn motorists who approach the intersection of a train that approaches the intersection. To give that warning, the traffic lights would flash until the train has gone passed the intersection.
13. I now turn to consider the evidence led on behalf of the parties. I deal with the evidence of the plaintiff, and thereafter with that of the defendant.
14. The plaintiff presented evidence of four witnesses, namely:

- 14.1. Mrs Gwendoline Louise Bradbury ("Mrs Bradbury") who is its manager and arrived on the scene after the collision had occurred.
- 14.2. Prof Jan Diederick van der Merwe who was present when the collision occurred, and was the driver of the motor vehicle which was approaching the intersection, from the opposite side of the plaintiff's truck.
- 14.3. Mrs Catharina Cornelius van der Merwe, the wife of Prof van der Merwe, who was the passenger seated next to her husband when the collision occurred.
- 14.4. Mr Mlambo himself, who as I have already indicated, was the driver of the plaintiff's truck at the relevant time.
15. It is not necessary to excavate the whole of the evidence presented by the above witnesses, for the purposes of my judgment. That evidence boils down to this.
16. When he approached the intersection on the night in question, Mr Mlambo stopped next to the stop sign. He looked on either side of

the intersection and saw nothing. He then proceeded to cross the intersection. The cab of the truck crossed safely, he suddenly heard a hooter and when he looked, he realized that the train was approaching. A moment thereafter the train hit the first trailer, which was full of cement. He and his co-driver (referred to in the evidence as "Jan") were hurled out of the cab. He was injured in the collision, but was later taken to hospital. His co-driver succumbed to the fatal injuries he suffered as a result of the accident.

17. Mr Mlambo was adamant that the headlight of the train was not on before the collision. According to him, the headlight was switched when the train was too close to the trailer, approximately 15 meters away from it. Mr Mlambo accepted, during cross-examination that he heard the sound of the hooter blown from the train. After all, that is the sound that alerted him to the approaching train. He indicated, though that a hooter was blown when he was already in the process of crossing the intersection.
18. Prof van der Merwe indicated that he saw the truck when it was crossing the intersection as he was approaching from the opposite end of it. He indicated that his car was on the hump when the collision occurred. At that point in time he had already cast his eyes on either side of the intersection and had not observed the approaching train. He was adamant, during cross-examination, that the headlight of the train was

not switched on, when it was approaching the intersection. His evidence was corroborated by Mrs van der Merwe. She too indicated that the headlight of the train was not on, as it approached the intersection.

19. Both Prof van der Merwe and his wife confirmed that the cab of the trailer had already safely crossed the intersection when the collision occurred; that the train hit the first trailer and proceeded some distance after the intersection; and that there was a cloud caused by cement dust after the collision.
20. Prof van der Merwe indicated that after the collision, he and other motorists who arrived at the scene searched for the injured and assisted them. After about 15 or 20 minutes, he and his family departed from the scene.
21. What is also clear from the evidence of Prof van der Merwe and his wife is that both of them heard the sound blown from the train before the accident occurred. According to them, the sound was blown when the train was 50 meters away from the intersection where the collision occurred.
22. The defendant tendered evidence of two witnesses, Mr Matodzi Amos Ratshisusu ("Mr Ratshisusu") and Ms Tshidi Mashiane ("Ms Mashiane").

The former was the section manager of Transnet Freight Rail. He was not on duty on the night of the collision but was on standby. He was called to the scene after the collision and completed a report of his observations. The latter was the assistant train driver on board the train when it was involved in the collision.

23. Again, I do not consider it necessary to recount the chapter and verse of the evidence from the defendant's witnesses. Its essential content boils down to the following:

23.1. At approximately 18:03 Ms Mashiane and the train driver reported for duty at Ladana Loco. They went through their normal reporting procedures in order to ensure that they were fit for duty and that their ability to ride the train were not compromised by, amongst others, alcoholic inebriation. They then undertook inspection of the train, which included the testing of the breaking system and the functioning of the headlight of the train.

23.2. Thereafter, Ms Mashiane and the train driver proceeded to Ladana Yard to couple several locomotives to the train. They proceeded to Ladana train station where they loaded goods

onto the locomotives. From there, they set off on their journey to Makhado.

24. Ms Mashiane indicated that the headlight was switched on the moment the train driver began to operate the train, and was still on before and at the time of the collision, and thereafter. She also indicated that approximately 400 meters before the Level Crossing the train driver blew the hooter for three seconds, when the train passed the first whistle-blow sign, and that he blew the hooter again, but this time continuously, after the train passed the second whistle-blow sign, which was approximately 125 meters before the Level Crossing.
25. Critically, Ms Mashiane pointed out that she and the train driver saw the truck before it entered the intersection. At that point in time the train had already passed the first whistle-blow sign and was approaching the second. The truck suddenly proceeded to enter the intersection, notwithstanding the approach of the train. She and the driver remarked about what they considered to be reckless conduct on the part of the truck driver. Then, the train driver blew the hooter continuously in order to warn the truck driver. The truck driver nevertheless proceeded to cross the intersection. The result was that the collision between the train and the truck occurred. Ms Mashiane blames the truck driver for the collision.

26. Furthermore, Ms Mashiane confirmed that the train's speed limit was 60 km per hour. She estimated that the speed of the train before the collision was 50 to 56 km per hour. She confirmed that the train driver did not reduce that speed when both of them saw the truck driver when the latter entered the intersection. I should add that she accepted, during cross-examination, that when the headlight of the train was switched on the train driver would be able to comfortably see for a distance of approximately 400 meters ahead of him.

**D. Evaluation**

27. I now turn to consider whether the collision was caused by the negligence of either the train driver or the truck driver, or both of them. In my evaluation of evidence, I shall adopt the approach endorsed recently by the SCA in *Goliath v MEC for Health, Eastern Cape*<sup>2</sup> which eschews a piecemeal process of reasoning, but involves one inquiry into all the evidence, having regard to the probabilities that emerge from the evidence. It is sufficient for the present purposes to direct attention to the following dictum –

*"In Sardi v Standard and General Insurance Co Ltd 1977 (3) SA 776 at 780C-H, Holmes JA made plain that it is inappropriate to*

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<sup>2</sup> 2015 (2) SA 97 (SCA).



*resort to piecemeal processes of reasoning and to split up the enquiry regarding proof of negligence into two stages. He emphasized that there is only one enquiry, namely whether the plaintiff, having regard to all of the evidence in the case, has discharged the onus of proving, on a balance of probabilities, the negligence averred against the defendant.”<sup>3</sup>*

28. What is clear from the whole of the evidence is that there is a sharp dispute between the parties about the condition of the headlight, before and at the time the collision occurred. Three of the plaintiff’s witnesses claim that it was not on before the collision occurred. Mr Mlambo claims that the headlight was switched on immediately before the collision occurred. One of the defendant’s witnesses, Ms Mashiane disputes the claim that the headlight was not switched on. She was adamant that the headlight was switched on the moment the train entered operation and remained so throughout until and after the collision.
  
29. In my resolution of the dispute on this aspect of the case, I accept that all of the witnesses testified honestly and as best as they could recollect the events which occurred long ago, approximately five years ago. I accordingly reject the contention by Mr Mmusi, who appeared for the defendant that Prof van der Merwe and his wife tailored their evidence

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<sup>3</sup> *Goliath v MEC for Health*, supra, para 11.

to suit the interest of Ms Bradbury because of their knowledge of her. I shall therefore test the conflicting versions of the parties based on the reliability of their evidence, measured against the inherent probabilities.

30. On that approach, I accept, as a starting point, that the lighting function of the train was in a proper working order. That was accepted by Mr Pye, who made it clear that the plaintiff did not have evidence to show that the headlight of the train was not in the proper working order, and thus did not place any reliance on the ground of negligence alleged in paragraph 5.2 of the particulars of claim. Moreover, the evidence of Ms Mashiane about the physical inspection of the train and its functionality, including the headlight, before it was set on the journey to Makhado, was not disputed by the plaintiff.
31. Next, I accept, as did all the witnesses, that after the collision the headlight of the train was on. All of the plaintiff's witnesses did not dispute this piece of evidence. Moreover, the plaintiff was driven to make the concession, through a formal admission of fact placed before me at the close of the defendant's case, that two journalists who arrived at the scene of the collision found that the headlight of the train was on after the collision.

32. In my judgment, the inherent probability supports the defendant's version that the headlight was on before, at the time of and after the collision. The evidence of prior inspection of the train tendered by Ms Mashiane was undisputed. It is improbable that the train would be set in motion, on a long journey by a train driver without its headlight being on. That would imply that the train driver would have travelled some distance before the collision without appreciation of visibility ahead of him, which is unlikely, in my view.
33. Moreover, the train driver and Ms Mashiane saw the truck before the collision occurred, at least before the train reached the second whistle-blow sign. They could only have done so if the visibility ahead of them was improved by the shining headlight of the train. For all of these reasons, I reject the version of Mr Mlambo that the headlight of the train was switched on immediately before the collision occurred.
34. The parties were agreed about the point of impact between the train and the truck. The version of the plaintiff is that the cab of the truck safely crossed the intersection. It is the trailer that immediately followed the cab which was collected by the train in the collision. Ms Mashiane did not dispute that version. Mr Ratshisusu did not observe the collision, and therefore his evidence does not add anything to the issue.

35. Based on the above version, it is more probable that the truck driver entered the intersection when it was safe for him to do so. I therefore accept that he did not see the train approaching when he entered the intersection. His evidence on this score is corroborated by the evidence of Prof van der Merwe and his wife, who also confirmed that they did not see the train at all when their vehicle was approaching the intersection from the opposite end.
36. In my view, it is probable that the truck driver did not see the train when he proceeded to cross the intersection because the train was not in sight yet at that time. This probability is confirmed by the fact that the truck driver had stopped before the stop sign which was approximately 3 meters away from the intersection. His evidence that he looked on either side of the intersection before he proceeded to enter the intersection was not disputed.
37. The probability is also supported by the fact that the truck proceeded to the intersection slowly. It was a heavy vehicle laden with heavy material, approximately 680 bags of cement. I therefore accept that there was no reason for the truck to proceed into the intersection at a fast speed. Moreover, the truck driver explained that the truck has 16 gears and he had to engage the first gear in order to set it on motion to proceed to the intersection. This shows that the process of crossing the intersection was a slow and not rapid maneuver.

38. In my judgment, the conduct of the truck driver was not negligent. He had exercised the requisite caution before he crossed the intersection. I add, in this regard, the fact that the traffic lights which were installed next to the intersection were not flashing at the time. They did not warn the truck driver, or other motorists, that the train was approaching. The fact that the traffic lights did not flash gave the truck driver the comfort that it was safe to cross the intersection.
39. The conduct of the train driver shows, in my view that he was solely responsible for the occurrence of the collision. He should have seen the truck when it was in the process of crossing the intersection. The visibility ahead of the train was unobstructed, and he could see at least 400 meters ahead of him because the headlight of the train was on. The fact that he did not see the truck well in time shows that he did not keep a proper lookout. Had he exercised a proper lookout, he could have seen the truck and taken the necessary steps to avoid the collision.
40. Even if I accept the evidence of Ms Mashiane that she and the train driver saw the truck entering the intersection at the time when the train was approximately 125 meters before the intersection, the train driver did not do anything to avoid the collision. He did not reduce speed at all. Ms Mashiane confirmed that the train driver maintained the same speed of 50 to 56 km per hour. It must be recalled that at that point in time the train was travelling close to the maximum of its speed. The fact that the

train came to a halt approximately 100 to 200 meters after the point of impact shows that the train driver did not take any evasive action to avoid the collision. I am therefore satisfied that the train driver operated that train at an excessive speed in the circumstances, and failed to take evasive action, when circumstances required him to do so.

41. Mr Mmusi contended that the train driver's conduct cannot be criticized because he enjoyed a right of way to enter the intersection, and that he warned the motorists of the approach of the train by blowing the horn, when he crossed the first and second whistle-blow signs. He relied on several judgments of the then Appellate Division which have been usefully discussed and approved in the recent judgment of the SCA in *Jacobs and Another v Transnet Ltd t/a Metrorail and Another*<sup>4</sup>. The import of these judgments is set out in paragraph 8 of the SCA judgment in the following terms –

[8] *A train has the right of way at a level crossing. Reasonable measures have to be put in place to prevent the foreseeable harm from occurring. In Ngubane v South African Transport Services Kumleben JA, after restating the test for negligence as laid down in Kruger v*

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<sup>4</sup> 2015 (1) SA 139 (SCA).

*Coetzee, adopted the following comments from Lawsa and Herschel v Mrupe:*

*"Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm."*

42. In my view, reliance on *the Jacobs judgment*, and similar cases, is misplaced. The train in this case was traveling at an excessive speed. It was traveling at a speed which was close to its maximum speed. The train driver should have foreseen the truck when it was crossing the intersection well before the train reached the intersection, had he kept a proper lookout. Had he done so he would have been able to take the necessary precautions to reduce the speed of the train and thus avoid the collision. He failed to do so.

43. The warning which the train driver gave does not justify his conduct. It was to no avail, because the truck had already entered the intersection at the time when the whistle was blown and heard by the truck driver, as well as Prof van der Merwe and his wife. I emphasize the fact that the traffic lights were not flashing at that time, therefore did not provide any warning to the truck driver about the approach of the train.
44. In my judgment, the collision was caused by the sole negligence on the part of the train driver. In the light of my conclusion, it is not necessary to consider the question of contributory negligence raised by the defendant in its plea. It is also not necessary to consider the contention by Mr Pye that any contributory negligence on the part of the truck driver should not be held against the plaintiff because he was not the employee of the plaintiff but that of Dynamic Transport and that there is no proximity of interest to hold the plaintiff vicariously liable from the conduct of the truck driver.


**E.     *The order***

45. In the light of my findings, the order I make is the following:



45.1. The defendant is liable for the damage to the plaintiff's truck caused by the collision which occurred between that truck and the defendant's train on 10 April 2010 at Ladana Level Crossing.

45.2. The defendant is ordered to pay the costs of the action.



**ISAAC VINCENT MALEKA**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION,**  
**JOHANNESBURG**

Counsel for the Plaintiff: **ADV WARREN PYE**

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**ADV F. KARACHI**

Instructed by: **MKHABELA HUNTLEY ADEKEYE INC**

Date of Hearing: **04 AUGUST 2015**

Date of Judgment: **07 AUGUST 2015**