

REPUBLIC OF SOUTH AFRICA



HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A3088/2017  
CASE NO IN COURT ABOVE: 23023/2015

- |    |                              |     |
|----|------------------------------|-----|
| 1. | REPORTABLE:                  | NO  |
| 2. | OF INTEREST TO OTHER JUDGES: | NO  |
| 3. | REVISED:                     | YES |

*Y.G. Barrie.*  
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SIGNATURE

DATE: 31 October 2017

In the matter between:

VICKY ALLISON JANKS	Appellant (Plaintiff in court above)
And	
SHAD DEVELOPMENTS	Respondent (Defendant in court above)

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JUDGMENT

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Barrie AJ:

1. The matter before the court is an appeal against a judgment (“the judgment”) handed down on 15 July 2016 by the honourable magistrate D L Persence (“the magistrate”), a magistrate of the magisterial district of Johannesburg North, sitting at Randburg. The judgment related to a civil action that the appellant, Mrs Vicky Allison Janks, instituted against the respondent for damages arising from a motor vehicle collision that occurred on 9 April 2015 on 12<sup>th</sup> Avenue, Rivonia, Sandton, Johannesburg, some 400 metres from a point where 12<sup>th</sup> Avenue intersects with Wessels Road.
2. The collision took place at or shortly after dusk on the day in question. It was between the appellant’s motor vehicle, a 2010 Audi A1 sedan motorcar (“the Audi” or “the appellant’s Audi”) and a so-called TLB. The appellant’s Audi was apparently damaged beyond repair. The TLB was not damaged in the collision at all.
3. The term TLB is an abbreviation for “Trailer-Loader-Backhoe”. A TLB, which is sometimes also simply referred to as a Loader Backhoe, is a substantial item of earthmoving equipment used for loading and digging purposes in earthmoving and construction applications. A TLB comprises a four-wheeled tractor vehicle with a cab for the operator thereof, with its loader and backhoe, which are distinct pieces of machinery, respectively at the front and back of the tractor vehicle.

4. The TLB was at the time of the collision driven by the respondent's employee, Mr Nganga Johannes Sigudla ("Mr Sigudla"). He was acting in the course and scope of his employment with the respondent, Shad Developments, which is described in the pleadings as a trading firm.
5. The appellant in terms of her particulars of claim alleged that it was negligent driving on the part of the respondent's driver, i.e. Mr Sigudla, that caused the collision.
6. The trial proceeded before the magistrate on the "merits" only, i.e. in respect of the question whether and to what extent the respondent could be held liable for damages in respect of the damage that had occurred to the appellant's Audi in the collision.
7. Although the respondent had in its plea raised that it was the appellant's negligence that caused the collision, it became apparent early in the proceedings before the magistrate that the appellant had not been the driver of the appellant's Audi at the time of the collision. The Audi was at the time driven by the appellant's daughter, Miss Candice Mari Janks ("Miss Janks").
8. As the appellant was not the driver of the Audi and as the respondent had not taken steps to join Miss Janks as a party to the proceedings in accordance with the provisions of the Apportionment of Damages Act, 34 of 1956, the appellant's case that stood to be adjudicated before the magistrate

was what is colloquially known among practising trial lawyers as a “one percenter” – if the magistrate were to find that negligent conduct on the part of Mr Sigudla was a contributory cause of the collision, the appellant would be home and dry and would be entitled fully to recover damages in respect of the damage caused to the Audi in the collision. In the event that was not the outcome that arose before the magistrate. She found that Miss Janks was 100% to blame for the collision, i.e., in effect, that no conduct on the part of Mr Sigudla that could be regarded as negligent contributed to the collision.

9. One witness was called on behalf of the appellant to testify before the magistrate – the driver of the appellant’s Audi at the time of the collision, Miss Janks. The respondent reciprocated by calling the driver of the TLB, Mr Sigudla.

10. Miss Janks testified to the effect that:

10.1 The collision occurred at a time when it was already dark, between 19h00 and 19h30. There was, however, street lighting in 12th Avenue where the collision occurred. The weather conditions were non-contributory – it was clear and the road surface was dry.

- 10.2 12th Avenue at the place where the collision occurred is a straight road with a "*long dip in the middle*" - the road descends downhill up to a point and then ascends again.
- 10.3 She was proceeding home from "*Pilates class*" (apparently a form of physical exercise participated in by persons inclined to do so, usually in a group). She had turned into 12th Avenue at Wessels Road, which is at a point approximately 400 metres away from the scene of the collision. After turning into 12th Avenue she noticed a BMW motor vehicle a couple of hundred metres in front of her. She caught up with the BMW motor vehicle because its driver had to slow down for the TLB in front.
- 10.4 She could not remember how far away she was from the TLB when she first noticed it. However, she noticed it while she was still a considerable distance away from it, possibly approximately 300 metres away. She recalls seeing its backhoe, referring to it as the "*big craning thing*". The TLB's hazard lights were on. She, however, also noticed bright white lights at the top of the vehicle, conveying that all she could actually recall was the flashing lights.
- 10.5 The BMW then overtook the TLB. She waited for the BMW to complete the overtaking manoeuvre and to return to the left hand lane. She then checked that there was no oncoming traffic and, after

indicating her intention to do so by activating the Audi's indicator, proceeded to overtake the TLB.

- 10.6 While she was in the process of overtaking the TLB, the TLB started to turn towards the right, into her path of travel, with no warning or indication, into an unmarked, unlit yard. In these circumstances, the Audi collided with the TLB. The impact on the Audi was on its front side to the left. As a result the Audi left the road towards the right-hand side, landing up facing in the opposite direction of the direction in which she had originally driven.
- 10.7 She did not think that the TLB was going to deviate from its path, whether to turn left or right - she had a clear line of sight down the dip, all the way down and up again on the other side and there were no roads that it could be turning into.
- 10.8 Immediately before the driver of the TLB executed the right-hand turning manoeuvre, when the BMW in front of her and she, driving the Audi, was travelling behind it, the whole procession was travelling at possibly 50 km per hour. After the BMW had overtaken the TLB, she, in following suit, accelerated though.
- 10.9 Although she could not actually recall much of the details of the accident, insofar as it was put to her that the driver of the TLB would

testify that he brought the vehicle to a standstill immediately before the collision, indicated that he intended to turn to the right, waited for oncoming traffic to pass, with a motor vehicle that had been brought to a halt immediately behind him and then, when he started to execute his right-hand turn, collided with the Audi that was in the process of overtaking both vehicles at the same time, i.e. the vehicle behind the TLB as well as the TLB, it is not what happened – she would never have executed such a manoeuvre because it was unsafe. The TLB's driver's version was, accordingly, an untruth. If she thought that the driver of the TLB was going to turn, she would not have overtaken.

11. Mr Sigudla testified to the following effect:

11.1 He was the driver of the TLB on the 9<sup>th</sup> of April in his capacity as an employee of the respondent. He had been a TLB operator for some 20 years and had been in the employ of the respondent for 12. He was executing work with the TLB at a construction site at 124, 12th Avenue.

11.2 12th Avenue at the juncture where the collision occurred is a tarred road. It was dry at the time of the collision, which occurred at 18h00, when it was beginning to become dark. The painted centre line of

12th Avenue at the point where the collision occurred was a barrier line.

11.3 He was executing work with the TLB that he referred to as "cleaning", possibly site clearing. After doing so he wanted to go and park the TLB inside building site overnight. To do so he had to enter the 12th Avenue roadway. He switched on the TLB's lights before doing so and then, after entering the roadway, activated the TLB's right indicator to show that he was about to turn. There was a car behind him and there was also an oncoming car. He waited for the oncoming car to pass, with the TLB stationary. The driver of the motorcar behind him had brought the vehicle to a standstill behind the TLB, waiting for him to turn.

11.4 After the oncoming car had driven past, he started to turn to the right. There was then a car that overtook on the right. It hit the TLB, at "*the loading part*" thereof. The lady driver of the vehicle that collided with the loader of the TLB had overtaken the car behind him and tried to overtake him as well, passing over the barrier line, while he was in the process of turning.

11.5 He had turned into the roadway of 12<sup>th</sup> Avenue very shortly before the point where he brought the vehicle to a standstill. His intention was to drive from the point where he was working by taking the road,



and then to enter the construction site itself to park the TLB overnight. He had to execute the right-hand turn to do so.

11.6 He had switched the lights of the TLB on before entering the road; he did not have the hazard light feature on, but the warning lights on the top of the TLB. He had activated the TLB's indicator to indicate his intention to turn right – he checked all the lights of the TLB even after the collision had occurred, at which time the right-hand indicator was still on.

11.7 He was positive that he had brought the TLB to a halt before executing the right-hand turn – there was a vehicle approaching from the front and he had to wait for it to pass; if there had been no oncoming vehicle, there would have been no need for him to bring the vehicle to a stationary position.

11.8 After the collision the driver of the vehicle that had been stationary immediately behind the TLB drove to the left-hand side of the road, stopped for a while and after seeing the lady coming out of the car that had been involved in the collision, drove off.

11.9 Immediately before the collision and executing the right-hand turn, he was looking at the car coming from the opposite direction, but also noticing the car immediately behind him in the rear view mirror.

He did not see any further vehicle approaching from the rear. He only became aware of such a vehicle when it collided with the TLB's loader, which was when he had started executing the right-hand turn and the vehicle that collided with the TLB's loader was in the process of overtaking the stationary car behind the TLB as well as the TLB.

- 11.10 He kept a proper lookout – he was concentrating on the oncoming car in front of him, on the opposite side, while also noticing that the motorcar immediately behind him had come to a standstill behind him.

12. The magistrate in terms of the reasons for her judgment:

- 12.1 recorded a comprehensive account of the evidence that she had heard from each of the two witnesses that had testified before her;
- 12.2 noted that the onus of proof was on the appellant to prove the requisites for establishing liability on the part of the respondent;
- 12.3 referred, among others, to the well-known passage in **National Employers General Insurance Company Ltd v Jagers 1984 (4) SA 437 (E)**, at 440B-441A, that serves as guidance to assessors of fact regarding how to address mutually destructive contradictory versions of facts serving before them; and

- 12.4 concluded that the versions put before her by respectively Miss Janks and Mr Sigudla were, indeed, mutually destructive – i.e. acceptance of the one would necessarily involve rejection of the other.
13. The magistrate was not impressed with Mr Janks' performance as a witness and concluded that the evidence of Mr Sigudla was to be preferred above hers. The necessary implication of that finding was that the merits of the appellant's case had to be decided on the basis of the evidence of Mr Sigudla, which is what the magistrate then proceeded to do.
14. As is clear from what I have set out already, the versions of Miss Janks and Mr Sigudla regarding how the collision occurred are indeed irreconcilable and mutually destructive, as the magistrate concluded.
15. For purposes of this judgment on appeal, it is not necessary to assess whether the magistrate's criticism of Miss Janks as a witness was justified, whether fully or partially – on an assessment of all the evidence that served before the magistrate, no probabilities that favour acceptance of Miss Janks' version of events above that of Mr Sigudla's arise and there is no demonstrable basis upon which it can be found that the magistrate should have rejected Mr Sigudla's version and rather have accepted the version attested to by Miss Janks. The question before this court is, accordingly, whether liability arises for the respondent on the basis of the facts attested to

by Mr Sigudla, i.e. whether a reasonable operator of a vehicle of the nature of the TLB should, in the circumstances that he described, have foreseen and taken precaution against the type of overtaking manoeuvre executed by Miss Janks, so as to have avoided the collision that occurred.

16. On Mr Sigudla's version, he had to enter the roadway of 12th Avenue to enable him to turn into the entrance of the construction site at 124 12th Avenue for purposes of parking the TLB there for the night. He took all precautions necessary to enable him to do so in the circumstances that pertained, at dusk. He switched on the vehicle's lights and the flashing lights at the top of the vehicle's cab to warn approaching road users of an otherwise than what can normally be expected vehicle in the road ahead of them. He entered the left-hand lane of 12th Avenue, i.e. the lane carrying traffic into the direction in which he had to proceed to be able to turn right into the entrance of the construction site without incident, activated the TLB's right-hand indicator to indicate his intention to turn right so as to leave the roadway again. He had, however, to wait for an oncoming vehicle to pass and in so doing, had to bring the TLB to a stationary position, still in the left-hand lane, with the right hand indicator on. While waiting for the oncoming vehicle to pass, he in his rear-view mirror on the right noticed the vehicle behind him that had also been brought to a halt by its driver. From Mr Sigudla's perspective, quite evidently, that was because of such driver's appreciating that the stationary TLB in the road immediately ahead of him

was going to turn to the right shortly. In those circumstances, after the oncoming vehicle had passed, Mr Sigudla started to execute his turning manoeuvre towards the right, evidently without satisfying himself again or further that any other vehicles that had approached from the rear had followed the example of the driver of the stationary vehicle immediately behind the TLB.

17. Similarly to the magistrate, I conclude that Mr Sigudla cannot have been expected to guard against Miss Janks' unreasonable conduct that occurred simultaneously with his starting to execute his turning manoeuvre, i.e. driving up to a situation in the road ahead of her that clearly demanded that utmost care and attention be applied and then, without stopping, crossing over to the right-hand side of the road with the intention to overtake both stationary vehicles ahead of her in one manoeuvre. Mr Sigudla had, prior to executing his right turn, satisfied himself that the driver of the vehicle immediately behind him had seen and heeded the clear indications he had given of his intention to execute a right turn to cross the lane carrying traffic in the opposite direction, so as to leave the road towards the right. The indications, to which the driver of the vehicle behind him had responded appropriately, were the TLB's right hand indicator that Mr Sigudla had activated, and the fact that he had brought the TLB to a standstill (See **Bata Shoe Co Ltd (South Africa) v Moss 1977(4) SA 16 (W)** at 22A – B; **Brown v Santam Insurance Co Ltd & another 1979(4) SA 370 (W)** at 374A) In these

circumstances, when Mr Sigudla started executing his right-hand turn after he had allowed the oncoming vehicle to pass, he was entitled to assume that the drivers of other vehicles potentially approaching from behind would act with the care and attention that the situation demanded and would act similarly than the driver of the stationary vehicle immediately behind him.

18. In my view, Mr Sigudla's conduct matched up to what could be expected of a reasonable operator/driver of a TLB in the circumstances that pertained when the collision at issue occurred in 12th Avenue, Rivonia on 9<sup>th</sup> April 2015.

19. In the premises, the appellant's appeal should be dismissed, with costs.



**F G BARRIE AJ**  
**Acting Judge of the High Court,**  
**Gauteng Local Division,**  
**Johannesburg.**

I agree.



**I OPPERMAN J**  
**Judge of the High Court,**  
**Gauteng Local Division,**  
**Johannesburg.**

**APPEARANCES:**

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**ATTORNEYS FOR APPELLANT: BOTHA & SUTHERLAND**

**COUNSEL FOR RESPONDENT: R POTTAS**

**ATTORNEYS FOR RESPONDENT: SCHOLTZ & SCHOLTZ**

**DATE OF HEARING: 31 OCTOBER 2017**

**DATE OF JUDGMENT: 31 OCTOBER 2017**