

REPUBLIC OF SOUTH AFRICA



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

16 / 5 / 2014

CASE NUMBER: 32812 / 2012

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

2014/05/16 [Signature]

In the matter between:

NGULULU BULK CARRIERS (PTY) LTD

PLAINTIFF

AND

JOHANNES VAN DER WALT t/a

JN VAN DER WALT FARMING

FIRST DEFENDANT

MANDAVHA SOLOMON MASHILA

SECOND DEFENDANT

JUDGMENT

MOSEAMO, AJ:

[1] The plaintiff instituted action against both first and second defendants for damages arising out of a motor vehicle collision which occurred on the 06th December 2011. The collision was between Mercedes Benz Across 3344 MP 3 drawing two trailers bearing registration letters and numbers FLL 607 MP and FLL 576 MP respectively (plaintiff's vehicle) and a Massey Ferguson Tractor drawing a trailer with registration letters and numbers BLY 915 L (first defendant's vehicle). The plaintiff's vehicle was driven by Mokolokolo John Zwane (Mr Zwane) while first defendant's vehicle was driven by the second defendant who was an employee of the first defendant. It is common cause that second defendant was driving the first defendant's vehicle during the course and scope of his employment with the first defendant. The parties agreed to separate merits and quantum and therefore the matter proceeded before me on merits only. Two witnesses testified for the plaintiff.

[2] Mr Zwane testified that he was travelling from Groblersdal to Middleburg. According to Mr Zwane when he was 2 km from where the collision took place he saw the first defendant's vehicle travelling with its right wheels on the tar road and left wheels on the gravel road. When he first saw the first defendant's vehicle he reduced his speed by taking his foot off the accelerator. As he approached he switched on his hazards, moved plaintiff's vehicle to the middle of the road where the white line was in the middle, he then accelerated preparing to go past the first defendant's vehicle. When he was about to go past the second defendant turned right. He then applied his brakes, he noticed the front wheel of the first defendant's vehicle turning right and going over the white line. He realised that the second defendant wanted to enter a gate on the right-hand side. He then swerved to the left in order to avoid colliding in to first defendant's vehicle. The second defendant did not give any indication of his intention to turn. Mr Zwane decided to go to the left and in order to go between the first defendant's vehicle and the road sign. He mentioned that he could not stop the plaintiff's vehicle to avoid the collision as it had cargo.

[3] During cross-examination the first defendant's counsel suggested a number of evasive manoeuvre that Mr Zwane could have taken. It was also suggested that Mr Zwane should have been more careful knowing that he is driving a heavy duty vehicle that is not easy to stop. Mr Zwane testified that the evasive manoeuvre he made was to avoid killing the tractor driver. He insisted that he had been careful and that it was the reckless conduct of the second defendant that led to the collision.

Much of the cross-examination was directed at challenging Mr Zwane's recollection of events especially after the collision. First defendant's counsel spend more time questioning him on the scene after the collision: (a) where the tractor ended, (b) where Mr Boot was coming from, (c) where the second defendant was after the collision. I found the evidence of Mr Zwane as a whole to be satisfactory and more credible. He answered questions put to him clearly and consistently.

[4] Mr Louw testified that he is an accident investigator and he was instructed to investigate the accident. He visited first defendant's farm where he interviewed the second defendant. He took a statement from second defendant, had it typed and gave it to second defendant to sign. He confirmed that the statement marked Exhibit A page 30 of the record was the statement of the second defendant.

[5] First defendant testified in his defence and called one witness, Mr Boot.

Mr Boot testified that he was travelling from Groblersdal to Middelburg. He saw a plaintiff's vehicle ahead of him. He was at a reasonable distance from the truck when he saw the plaintiff's vehicle moving to the left. During cross-examination he did not see what the second defendant did. He indicated that he does not know why the plaintiff's vehicle suddenly turned left on a flat road and he did not see what the second defendant did to make the plaintiff's vehicle swerve to the left. He then explained what he observed after the collision. I found Mr Boot to be an honest witness. He answered questions put to him openly and honestly.

[6] Mr Van Der Walt testified that he was the employer of the second defendant who had since died of an unrelated cause. He arrived at the scene after the collision had occurred. He found Mr Boot at the scene and he, Mr Boot, gave him his business card. They did not know each other before the collision. He further testified that the second defendant had no reason to go to the entrance on the right-hand side of the road as that was his neighbour's farm. During cross-examination he admitted that second defendant had no driver's licence but could drive the tractor on the gravel road. He admitted that he could not tell what second defendant did as he was not there. He however indicated that second defendant was not on his way to the farm on his right. He disputed that the second defendant executed a right hand turn. Mr Van der Walt answered questions put to him openly and clearly.

[7] The statement of the second defendant as contained in Exhibit A page 30 of record was admitted into evidence. The statement contains the version of the second defendant as to how the collision happened. According to this statement, second defendant was travelling very slowly along the N11 travelling in the direction of Middelburg on the gravel road. He noticed a road sign on the side of the road and he steered the tractor to the right in order to avoid a road sign. The right hand side wheels of the tractor went on to the tar surface on to the lane of travel of the vehicles going towards Middelburg. He was unable to observe approaching traffic from the rear as the fertilizer was very high and obstructed his view. He suddenly felt a hard impact on the tractor from the rear and he saw the plaintiff's vehicle which was still approaching. He steered the tractor to the right to avoid being hit by the plaintiff's vehicle.

[8] Second defendant's counsel mentioned that the matter is proceeding against the first defendant only as the second defendant is deceased and was never served with summons. The following issues are common cause (a) the second defendant was an employee of the first defendant at the time of the collision; (b) the second defendant was driving the first defendant's vehicle during the course and scope of this employment; (c) Mr Zwane and the second defendant were travelling in the same direction; (d) at the place where the collision took place there was a road sign board which protruded in to the gravel shoulder; (e) prior to the collision the first defendant's vehicle was travelling with its right wheels on the tar road and its left wheels on the gravel road.

[9] The issues in dispute are as follows (a) whether the second defendant was negligent and if so, whether such negligence caused the plaintiff damage; (b) whether the Mr Zwane was negligent and if so, whether such negligence caused the defendant damage alternatively whether the plaintiff's negligence contributed to the collision.

[10] It is trite that in cases where a person claims damages from another person alleging that the latter was negligent then the party alleging must prove the alleged negligence on a balance of probabilities. The defendant is negligent if a reasonable person in his position would have acted differently; and in order to determine whether a reasonable person would have acted differently the court must consider whether the unlawful causing of damage was reasonably foreseeable and preventable. Plaintiff in this case must first prove that the second defendant was

negligent. If the plaintiff cannot prove the negligence of the second defendant, he must fail in his action.

[11] The test for negligence is clearly outlined in the dictum of Holmes JA in *Kruger V Coetzee* 1966 (2) SA 428 (A) 430 where it was stated that for the purposes of liability *culpa* arises if (a) *diligens paterfamilias* in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps.

[12] Counsel for the Plaintiff contends that there is only one version, the plaintiff's version, before court. This contention is rejected on the basis that the statement of the second defendant was admitted in to evidence and same was not objected to. There is also corroboration by Mr Louw who took the statement from the second defendant, I therefore find that both versions were properly placed before this court.

[13] First Defendant's counsel's contention is that there are two mutually destructive versions before this court and that this court should follow the approach in *National Employers General Co Ltd v Jagers* 1984 (4) SA 437 (E), *Stellenbosch Farmers Winery Group Ltd and Another v Martell et cie and others* 2003 (1) SA 11 SCA. In my view the two statements are not mutually destructive at all. The statement of the second defendant supports the plaintiff's version that he, second defendant, turned or swerved to the right on to the lane of travel of the plaintiff's truck. The acceptance of the defendant's version does not necessarily lead to the rejection of plaintiff's version. I therefore reject the submission that the two versions are mutually destructive.

[14] I now turn to the issue of negligence; the first issue is whether the second defendant was negligent and if so, whether his negligence caused damage to the plaintiff.

[15] Counsel for the plaintiff contended that the second defendant was negligent in that he swerved on to a national road, knowing very well that the road is busy without keeping a proper look out.

[16] On the other hand counsel for the first defendant contended that the second defendant could not have been negligent if he did not execute a right hand turn but made a slight move to the right to avoid a road sign board.

[17] The following facts are either proven or cannot be disputed:

- a) The second defendant steered right on to the lane of travel of the plaintiff's vehicle;
- b) The second defendant was driving slowly at the time of the collision;
- c) The second defendant did not look out for vehicles that were already on that lane of travel that he encroached on to;
- d) Mr Zwane swerved left in order to avoid colliding into the first defendant's vehicle and collided into the left hand corner of the first defendant's trailer.

[18] At the hearing of this matter there was no evidence led to suggest that the second defendant moved slightly to the right. In the absence of the evidence as to how much into the road the first defendant's tractor moved, I have no option but to accept the version of the Plaintiff that the second defendant steered to the right and the front wheel of the second defendant's tractor was on the white lane.

[19] In my view it was required of the second defendant to exercise extra caution in moving on to a national road from the side of the road. The second defendant should have foreseen that there may already be vehicles on the road on which he wished to swerve to and therefore exercise caution before swerving or entering or steering on to the road. A reasonable person in his position would have realised that steering a slow moving, cargo carrying tractor on to a busy national road might cause danger to other road users and acted cautiously. The issue of whether the second defendant was turning right or only swerved right, in my view does not make any difference.

In *Pauley v Marine and trade insurance co. LTD 1964 (3) SA 371 WLD* it was stated that :

"The principle that the driver of a vehicle must not turn across the line of the traffic following him unless he does so at an opportune moment, in a reasonable manner, and gives ample warning to such traffic of his intention to do so applies not only in urban areas but also in rural areas, and not only where the driver intends executing a right-hand turn across the whole road but also a turn or swerve within his own correct, i.e left-hand side of the roadway whenever the reasonable foreseeable possibility exists that such a manoeuvre might endanger following traffic."

[20] In my view the plaintiff proved on a balance of probabilities that the second defendant was negligent in that he did not keep a proper look out; he failed to have due regard for other road users, in particular the driver of plaintiff's vehicle; he drove the first defendant's vehicle from the side of the road into the path of the plaintiff's vehicle.

[21] The second issue is whether there was contributory negligence on the part of Mr Zwane and if so, the extent thereof.

[22] It is not in dispute that Mr Zwane swerved to the left in order to avoid colliding in to the tractor's trailer which had entered his lane of travel. The first Defendant contends that Mr Zwane overhastily jumped to the wrong conclusion and that is what led to his subsequent maneuvering to the left.

[23] There is no evidence regarding: (a) The distance between the road sign and the tar road; (b) The distance which the tractor started driving with two wheels on the gravel and two wheels on the tar road; (c) How much in to the road did the second defendant swerve; (d) The foreseeability of the second defendant's right hand swerve; (e) The speed at which the tractor was travelling when it swerved in to the road.

[24] The evidence of Mr Zwane is that he was in the process of overtaking the first defendant's when he saw the first defendant's vehicle swerved to the right. He decelerated and swerved to the left wanting to squeeze the plaintiff's vehicle between the road sign and the first defendant's vehicle. He unfortunately collided in to the left corner of the trailer with his right corner of the horse and trailer. He was travelling at approximately 85km just before collision.

[25] In his statement second defendant admits that he steered the first defendant's vehicle to the right and the right hand side wheels of the tractor and trailer went on to the tar surface on to the travelling lane of vehicles driving towards Middelburg. The statement does not mention how much to the right did the first defendant's tractor move in to the plaintiff's truck 's lane of travel. The second defendant further admitted that he was unable to observe approaching traffic from the rear as the fertilizer was very high and it obstructed his view. He also indicated that he was driving very slow at the time of the accident.

[26] In my view a reasonable driver in Mr Zwane's position could not have foreseen that a slow moving tractor that was travelling on the side of the road would swerve or turn right in to his lane of travel. Mr Zwane was entitled to assume that the slower vehicle being overtaken will continue in its course on the left-hand side of the road. I am further of the view that the evasive manoeuvre taken by Mr Zwane in trying to avoid the collision did not amount to negligence.

[27] The first defendant's other submissions as to the negligence of the Plaintiff: the fact that Mr Zwane could have reduced speed, stopped to avoid colliding in to the rear of the trailer, that he drove too fast. I find that this arguments are without merit in that (a) Mr Zwane testified that he was travelling at approximately 80km per hour as he had lifted his foot off the accelerator upon seeing the tractor combination; while the statement of the second defendant is to the effect that the first defendant's vehicle was travelling very slow; (b) he could not have stopped the truck combination as the cargo it was carrying propelled it forward.

[28] In my view Mr Zwane took the necessary precautions. He insisted that he could not have passed on the right as he thought second defendant was turning into a 'gate' to the right. His only option was to swerve to the left.

[29] In my view *maxim re ipsa loquitur* does not find application in this case. The fact that the first defendant's vehicle was travelling on the side of the road and then swerved into the lane of travel of the plaintiff's vehicle clearly indicates that the collision occurred as a result of the first defendant's vehicle moving into the road.

[30] The first defendant's contends that Mr Zwane should have left enough berth while overtaking the second defendant. There was no evidence led to prove that Mr Zwane did not leave enough berth while overtaking the first defendant's vehicle; also I cannot lose sight of the fact that Mr Zwane was overtaking a vehicle that was travelling on the gravel which entered his lane of travel without any warning. As a result I find that the present case is distinguishable to the case of *Beswick v Crews* 1965 (2) SA 690 (A) as referred to by the first defendant's counsel. In that case the plaintiff was overtaking a slow moving lorry that was travelling within its lane of travel whereas in the present case the first defendant's vehicle turned or swerved right into the lane of travel of the plaintiff's vehicle.

[31] In my view the plaintiff has proved negligence on the part of the second defendant which caused the collision and the collision resulted in the damage suffered by the plaintiff. The plaintiff has proved on a balance of probabilities that the negligence of the second defendant was the sole cause of the collision and is therefore entitled to judgement.

The following order is made:

1. The defendant is liable to pay 100 percent of the plaintiff's proven or agreed damages
2. The defendant is ordered to pay the plaintiff's costs of this action.
3. The determination of quantum is postponed sine die.



P.D MOSEAMO

ACTING JUDGE OF THE HIGH COURT