REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 40832/2012

DATE: 13/8/2014

In the matter between:

WESTMEAD TRUCK STOP CC **PLAINTIFF**

AND

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

....

IMPERIAL LOGISTICS REFRIGERATED SERVICES (PTY) LTD **FIRST DEFENDANT**

AFRICA MBATHA **SECOND DEFENDANT**

CORAM: BAQWA J

DATE HEARD: 12 AUGUST 2014

DATE DELIVERED: 13 AUGUST 2014

JUDGMENT

BAQWA J

Summary

Delict- Negligence- what constitutes- motor vehicle accident- night driving and collision with unobserved obstructions- defendant's driver- compelled to stop on a freeway due to automatic engine damage avoidance mechanism of his truck kicking into operation forcing him to stop on a slow lane- defendant's driver who had a reflective chevron on his trailer putting on hazard lights and putting up a triangle at the rear of his vehicle.

Second defendant was the driver of a freight-liner truck on the N3 free-way in the vicinity of Harrismith when the automatic engine damage avoidance mechanism kicked in and stalled the vehicle and brought it to a stand still on the north-bound slow lane. Not long thereafter a Volvo truck driven by plaintiff's driver collided with the freight-liner. Plaintiff's driver was killed in the collision. In an action for damages by the owner of the Volvo truck there was a separation regarding determination of merits and quantum in terms of Rule 33(4). The matter proceeded regarding determination of merits and the issue of contributory negligence.

Held *that the second defendant who was the driver of the freight liner had taken all the reasonable steps a reasonable driver could have taken under the circumstances and that he had ensured the visibility of his stationary vehicle.*

Held *that the driver of plaintiff's vehicle was the sole cause of the collision and that plaintiff was one hundred per cent (100%) liable to compensate the first defendant.*

Annotations

Case law

Johannes v South West Transport (Pty) Ltd 1994(1) SA 200 NM at 204 E-F.

Kruger v Coetzee 1966(2) SA 428(A) at 430 E

Dintoe Johannes Sebate v Road Accident Fund case Northwest High Court, Mafikeng case no 62/2009 delivered on 8 December 2011

Willness v Cape Provincial Administration 1992(1) SA 310 (E) at 3115F.

Nkula v Santana Assuransie Maatskappy Bpk 1975(4) SA 848(A)

Seemane v AA Mutual 1975(4) SA 954 A

Manderson v Century Insurance supra 1951(1) SA 533(A)

Santam v Beyleveld supra; Mthetwa v Shield Ins 1980(2) SA 954(A) 956-7

Introduction

[1] This is an action in which the plaintiff seeks damages suffered as a result of a collision of a Volvo truck owned by it and bearing registration letters N[…] and a truck and trailer with registration letters W[…] and P[…] the property of the first defendant and which was being driven by the second defendant acting within the course and scope of his employment.

[2] The said collision occurred on 9 November 2011 on the N3 freeway in the vicinity of Harrismith in the Free State Province. Plaintiff avers that the collision was caused solely as a result of the negligence of the second defendant in that he failed to keep a proper lookout or alternatively failed to take the rights of other vehicles into consideration. Plaintiff further alleges that second defendant parked his vehicle in a dangerous position on the road thereby causing a thereby causing a dangerous unlit obstruction or alternatively failed to take sufficient steps to warn other road users or more specifically the driver of plaintiff's vehicle of its presence on the road surface.

[3] The issue that I have to decide is the question of negligence which led to or caused the accident which would then establish which party is liable for damages caused.

[4] At the beginning of the trial the parties agreed that the issue of liability be separated from the determination of quantum. I have accordingly ordered the separation of those issues in terms of Rule 33(4) of the Uniform Rules of Court.

[5] The first defendant has filed a counterclaim in which it alleges negligence on the part of the driver of the plaintiff's vehicle.

[6] First defendant alleges that the driver of plaintiff's truck was negligent in one or more of the following respects, namely that he failed to observe the first defendant's truck and trailer as a result of which he collided with it alternatively that he failed to heed warning signs put up by the driver of first defendant's vehicle to warn other road users of the road of the presence of the stationary truck and trailer.

The evidence

[7] Four witnesses were called by both parties that is, two by the plaintiff and two by the defendant.

[8] The first witness called by plaintiff was warrant officer Nel and the second one was Constable Thapelo Mothupi. Both these witnesses are policemen stationed at Harrismith police station. They were patrolling the N3 National Road in and around the Harrismith area. Summarised, their evidence is to the effect that they received a radio message regarding an accident that had occurred involving two trucks on the N3. They proceeded to the scene where they found the Volvo truck lying on the grass on the left hand side of the Freight Liner truck which was still stationary on the slow lane of the north bound traffic with its left wheels at or near the yellow line.

[9] The Volvo truck had been smashed in on impact on the front right side with the driver trapped inside whilst the Freight Liner had been damaged on the left rear of the trailer. Neither of them had seen a yellow triangle to the rear of the Freight Liner. Neither of them could recall seeing flickering hazards lights of the Freight Liner.

[10] Testimony for the defendants was given by two witnesses, Christoffel Devries and Nkosiphantsi Africa Mbatha, the second defendant. Devries is a qualified motor mechanic who repairs trucks in and around Harrismith. On the day in question, he was called out to attend to a broken down truck, namely, second defendant's vehicle. He arrived at the scene of the break down and observed the second defendant's vehicle on the left lane of the northbound traffic. The vehicle had its hazard lights on. The road was busy with traffic on both the northbound and southbound lanes. For that reason he had to proceed about four hundred metres past second defendant's vehicle to a point where he could negotiate a u turn and cross-over to second defendant's side of the road. As he passed defendant's vehicle he switched on the orange emergency lights on his vehicle.

[11] As he waited for traffic to pass so he could make the u turn manoeuvre, he heard a loud bang. He observed the tail lights of the Volvo truck flicker and then go off. The deafening sound was the sound of the collision between the Volvo and Freight Liner trucks of the plaintiff and the first defendant.

[12] Second defendant, Mbatha also testified about how his vehicle's engine suddenly cut out as he was driving northbound towards a truck stop where he intended resting for the night. He attempted to restart the truck which had come to a stop on the left lane with its left wheels close to the yellow line. He was still hoping the truck would restart when he noticed a sign on the dashboard indicating engine trouble. What had happened was that the engine damage avoidance mechanism had kicked in which not only stalled the vehicle but made it difficult to manoeuvre. He put on his hazard lights. No sooner had he done so when he observed a policeman near his driver's window who enquired about his reason for stopping. He explained what happened and the policeman advised that he should place a hazard triangle behind the now stationary vehicle.

[13] Mbatha testified that he alighted, selected a triangle from two which were in the vehicle and placed it plus minus 20 metres behind his vehicle. His vehicle was also fitted with a reflective chevron at the rear of the trailer which was lit up by his vehicle lights. He thereafter climbed back into the cabin of his vehicle to await the arrival of a mechanic who had been summoned by his company. No sooner had he done so when he heard a loud bang. He alighted and observed that a Volvo truck had collided with the rear end of his trailer the impact of which dislocated it from the 'horse' section of the horse and trailer combination. The Volvo truck came to a stop on the grass on the left hand side of the Freight Liner.

Application of law to the facts

[14] *''When determining whether conduct was negligent or not, in particular in relation to a vehicle running into an unlighted vehicle on the road during the hours of darkness, a great number of factors entered into consideration, amongst them being the visibility of the obstruction, its colour, the background against which it stands, possible light from other sources, variations of light and shade, weather conditions and the presence or otherwise of other road users, whether vehicular or pedestrian.''* This is the dictum of Justice Frank in the case of **Johannes v South West Transport (Pty) Ltd 1994(1) SA 200 NM at 204 E-F.**

[15] The unchallenged evidence of De Vries was that when he arrived at the scene, second defendant's vehicle had its hazard lights on. Second defendant was unequivocal that he placed a triangle at the rear of his vehicle to warn other road users of its presence. It was also not disputed that the trailer had a brightly coloured chevron at the rear which covered the width of the vehicle.

[16] Mr Vorster, for the plaintiff, has submitted that second defendant had contributed to the collision by failing to stand outside his vehicle to warn other motorists of the presence of his vehicle. He further submits that second defendant did not place a triangle at the rear of his vehicle because none was observed by the policemen who came to the scene and by De Vries.

[17] It is common cause that the portion of the road where the accident occurred was the N3 freeway, a tarred road with four lanes, two for the southbound and two for the northbound traffic. The road surface was flat and straight and became a decline about 400 metres ahead of the accident scene. Other than darkness of the night, there was no object to obstruct the vision of drivers travelling in both directions. This is also confirmed by the evidence of De Vries who was able to observe the second defendant's truck from across the road.

[18] As to the failure of second defendant to stand outside his vehicle, Mbatha testified that he did not have a torch but that he had placed a triangle at the rear after the policeman had advised him to do so. There is no reason to believe that Mbatha would have ignored the admonition of the policeman. In addition, the trailer was fitted with a chevron and Mbatha had his hazard lights on, a fact which is confirmed by De Vries. It would thus appear that Mbatha had taken all the steps that could be taken by a reasonable driver to warn other motorists.

Mr Vorster has submitted that in fact, second defendant never put up a triangle behind his vehicle. He submits that if there was a triangle, the policemen and De Vries would have seen it after the accident. Accepting for a moment that there was a triangle put up by the second defendant and considering a fact which is common cause, namely that the plaintiff's driver travelled on the slow lane immediately before the collision, what is the likelihood of the triangle remaining visible on the road surface ? In my view, common sense and logic indicates that the triangle would either have been

swept away or crushed being on the path of a heavy moving vehicle. It is therefore not surprising that the three witnesses did not see one after the accident. I may also hasten to add at this point that I found second defendant to be an honest witness who did not exaggerate the facts surrounding the accident and who withstood a thorough cross examination.

[19] The test to be applied in order to weigh second defendant's conduct is referred to in the case of **Kruger v Coetzee 1966(2) SA 428(A) at 430 E** where the following was stated:

'' Each case in which it is said that a motorist is negligent must be decided on its own facts. Negligence can only be attributed by examining the facts of each case. Moreover, one does not draw inferences of negligence on a piecemeal approach. One must consider the totality of the facts and then decide whether the driver has exercised the standard of conduct which the law requires. The standard of care so required is that which a reasonable man would exercise in the circumstances and that degree of care will vary according to the circumstances. In all the cases the question is whether the driver should reasonably in all the circumstances have foreseen the possibility of a collision.''

[20] The issues of foreseeability and collision with an obstruction at night were canvassed in an unreported decision of Gutta J: **Dintoe Johannes Sebate v Road Accident Fund Northwest High Court, Mafikeng case no 62/2009 delivered on 8 December 2011** in which he states:

''31. The plaintiff had the onus to prove that the plaintiff's stationary vehicle was foreseeable by a reasonable driver.

*32. The test for negligence in collision with objects at night was applied in **Willness v Cape Provincial Administration 1992(1) SA 310 (E) at 3115F**. Held that there was no duty on the driver to travel at such a speed as would have enabled her to stop within the range of her vision.*

*33. In **Johannes v South West Transport (Pty) Ltd 1994(1) SA 200(Nm)**, the Court held that a stationary vehicle obstructing the traffic lane of a driver on a freeway was not foreseeable. Also a broken down bus and tractor on a rural road were found to be unforeseeable obstructions.*

See Nkula v Santana Assuransie Maatskappy Bpk 1975(4) SA 848(A)

34. In most cases the Courts have applied the foreseeability test and indeed refused to hold that a motorist who collided with an inconspicuous obstruction after dark, should have foreseen the possibility of encountering the obstruction in the circumstances in which the collision occurred:

34.4. While driving in an urban area and the obstruction was a pedal cycle without reflections or lights.

See Seemane v AA Mutual 1975(4) SA 954 A

35. The negligence of a driver who collides with an unlit obstruction at night is judged using the reasonable foreseeability and preventability test, that is, if an obstacle is foreseeable by a reasonable driver, he is required to prevent a collision.

See Manderson v Century Insurance supra 1951(1) SA 533(A)

36. A collision at night with an unlighted obstruction does not justify the inference that the insured driver was not keeping a proper lookout unless it is established that the obstruction was capable of being timeously seen by one keeping a proper lookout.

See Santam v Beyleveld supra; Mthetwa v Shield Ins 1980(2) SA 954(A) 956-7

37. Hence the next question for consideration is whether the plaintiff's vehicle was foreseeable by the insured driver and was capable of being timeously seen by the insured driver."

[21] **In casu**, I am of the view that the facts of this case can be distinguished from the cases referred to in the **Sebate** decision in that they refer to an unlit obstruction at night.

[22] With the triangle, the chevron, hazard lights and the presence of a vehicle with its orange emergency lights in the vicinity, second defendant's vehicle could hardly be referred to as an inconspicuous obstruction in the dark. **A fortiori** with the combined lights the considerable northbound traffic passing the stationary vehicle the vehicle must have been visible for all to see.

[23] It thus remains an unexplained enigma as to why the plaintiff's driver failed to see the vehicle until, as appears from De Vries's evidence, the very last moment. Unfortunately the plaintiff's driver is not available to unravel the enigma having succumbed to his injuries and died as a result of the accident.

[24] Mr Geyser appearing for the defendants submits that where an obstruction is visible, the person colliding with it is solely to blame for the collision. He submits further that the second defendant took sufficient steps to make other road users aware of the danger ahead. This is supported by the uncontradicted evidence of the witness De Vries regarding the other numerous vehicles which drove past second defendant's vehicle that fateful night. Contrary to the submissions by Mr Vorster, for the plaintiff, De Vries's evidence does not suggest that those vehicles only managed to pass second defendant's stationary vehicle because they drove only on the right hand lane. I can therefore not draw that inference from evidence before me.

[25] There is no evidence as to what avoiding action plaintiff's driver took to prevent the accident. He could have slowed down or even stopped on noticing the clearly visible obstruction, alternatively he could have swerved to the right to join the traffic on the right hand lane to pass the stationary vehicle. He did

neither. According to De Vries he appears to have applied brakes a split second before the collision. It is also common cause that he swerved to the left thereby colliding the front right portion of his Volvo truck with the left rear of the trailer of second defendant. Even though I have no direct evidence of the speed at which he was travelling, common sense suggests that it must have been at some considerable speed because the impact, according to De Vries, sliced off a portion of the front of plaintiff's vehicle. Second defendant also testifies that the impact dislocated the trailer, laden with meat from the horse and trailer combination.

[26] On the basis of the above I find that plaintiff's driver ought to have reasonably foreseen that in the event of an emergency such as he found himself in, he would not be able to bring his vehicle to a stand still or manoeuvre the truck into a safe and swift swerve so as to avert harming other road users. He ought to have reduced speed given the warning signs I have referred to above.

[27] Mr Vorster has argued strenuously for a finding of contributory negligence on the part of second defendant. I am not persuaded that the plaintiff has made out a case for contributory negligence. The second defendant took the steps that a reasonable driver ought to have taken in the circumstances. Demonstrably these steps were effective in that all the other vehicles safely passed his stationary vehicle. There is no evidence or palpable reason as to why plaintiff's driver acted differently.

[28] Accordingly, I have come to the conclusion that had he kept a proper lookout, he would have seen the vehicle ahead and avoided the collision. The defendants have discharged the onus of proving not only that the plaintiff's driver was negligent but that such negligence was indeed the sole cause of the collision.

[29] **The order**

In the result, I order that:

(1) Plaintiff is one hundred percent (100%) liable due to the negligence of plaintiff's driver.
(2) Plaintiff is ordered to pay defendant's costs on a party and party scale.

_____

S.A.M BAQWA

(JUDGE OF THE HIGH COURT)

Counsel for the plaintiff:	Adv S.P.M Vorster
Instructed by:	Blakes Maphanga INC
Counsel for the defendant:	Adv W.W Geyser
Instructed by:	Dyason Attorneys