

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 58756/2013

Date:

7/12/2016

DELETE WHICHEVER IS NOT APPLICABLE

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

7/12/16
DATE

Pretorius
SIGNATURE

In the matter between:

UNIVERSAL CRANE HIRE CC

PLAINTIFF

And

MEC FOR THE GAUTENG DEPARTMENT OF ROADS AND
TRANSPORT

DEFENDANT

JUDGMENT

PRETORIUS J.

- (1) The plaintiff instituted a claim against the defendant for the payment of damages in an amount of R1 531 564.04, based on delict. The claim was instituted on 1 November 2013 and the defendant pleaded on 9 September 2014.
- (2) The plaintiff amended the particulars of claim on 3 August 2015. The defendant did not plead to the amended particulars of claim. It was agreed by the plaintiff and defendant that the plea filed on behalf of the defendant on the original particulars of claim would be regarded as the plea to the amended claim.
- (3) The parties agreed that the court only has to decide the question of negligence and that quantum would be heard, if necessary, at a later date in terms of Rule 33(4) of the Uniform Rules of Court.
- (4) The allegations in the particulars of claim setting out the negligence of the defendant which the plaintiff relies on are:

*"6. ...Due to poor and unsafe condition of the road; road surface; **poor visibility due to long grass and no warning signs or barriers at the said location**, the vehicle was involved in a motor vehicle accident wherein the vehicle was rolled over and coming to a standstill in a trench/water channel/gully adjacent to the road.*

7. The motor vehicle accident and resultant damage to the

Plaintiff's vehicle was caused solely as a result of:

7.1 unrepaired damage to and/or poor maintenance of the road;

7.2 absence of an emergency lane and uneven and small adjoining un-tarred area;

7.3 erosion of side slopes;

7.4 invisibility of a deep and dangerous trench/water channel/gully;

7.5 the lack of warning signs and barriers preventing road users to drive into the trench/water channel/gully." (Court emphasis)

The plaintiff's claim is thus based on delict, contending that the defendant had a "*duty of care*" in the circumstances. The defendant is clearly wrong in its argument that the plaintiff did not allege that the lack of road barriers and the tall grass contributed to the accident.

- (5) It was further alleged that the defendant had a legal duty to maintain the road, the road surface and to ensure that it was safe for public use. The plaintiff alleged that the defendant failed and/or neglected to maintain the road, and the road surface and to warn road users of potential dangers like the existence of the trench/ditch/water channel next to the road; failed to erect road traffic signs or barriers where it should have been done due to the existing dangers on the road at the time and failed to provide an emergency lane for vehicles to pull off the

road safely on an incline in an emergency.

BACKGROUND:

- (6) On 14 April 2011 at approximately 11h00 on the M57 between Nellmapius- and Olifantsfontein roads Mr Skhosana, who was in the employ of the plaintiff, was driving the crane of the plaintiff. He was driving from south to north and had proceeded 3½ kilometres on the road, after having left the site where he had previously worked, when the engine of the crane cut out. He applied the foot brake and the crane came to a standstill on the road.
- (7) His evidence was that, as the crane was blocking the road from south to north, he used the handbrake to reverse slowly and carefully by pulling up the handbrake and letting it go repeatedly to move the crane to the side of the road. This he did gradually, using his side mirrors to keep a proper lookout to the rear. He realised he could not see the back wheel of the crane properly and opened the window and stuck his head out of the window on the left hand side to have a proper clear view of the wheel. He had, according to him, to use the handbrake, as the footbrake would lose pressure due to the engine not turning over. He could, in the circumstances, properly control the movement of the crane by using the handbrake whilst reversing to the left hand side of the road. He was able to steer the crane as the oil in the engine was still hot, enabling the steering. The crane came to a complete

standstill next to the road in a level position. As he wanted to open the door to exit from the cabin of the crane the crane toppled over onto the left hand side and he could not open the door and was stuck in the cabin of the crane.

- (8) Charles, who was also employed by the plaintiff, was driving behind him and had parked on the opposite side of the road, but was not with him when the crane toppled over. Charles arrived and kicked out the front window of the cab to enable him to get out. Mr Skhosana, the driver, then saw that the crane had toppled over into a ditch at the side of the road with the back wheels in the ditch and the crane lying on its left side.
- (9) Mr Skhosana impressed the court as an honest witness, who made concessions when necessary. The court is well aware that he is a single witness, but can find no improbabilities or inconsistencies in his evidence. His evidence as to the conditions and how the crane had toppled over on the left hand side is confirmed by the various photos taken on the day of the accident. I find that his evidence is, on a balance of probabilities, the truth.
- (10) The photographs of the scene, which were not disputed, depict the crane lying on its left hand side next to the road. It is clear from the photographs that there was approximately one metre of gravel next to

the edge of the tar road and tall grass at the edge of the gravel portion, as confirmed by the witness, Mr Leibach, the tow truck driver. The estimate was that the grass was at least 1.70 metres high next to the road. According to Mr Skhosana the revolving lights and the hazard lights of the crane were switched on. Mr Skhosana explained that he had come to a standstill on the edge of the ditch, which was obscured by the tall grass to such an extent that he did not see the ditch. There were no warning traffic signs or any indication that there was a ditch next to the road.

- (11) Mr Skhosana's explanation as to why he did not leave the crane on the road where it had come to a standstill originally, with triangular warning signs was that the crane was standing on an incline close to a blind rise and it would have been dangerous to leave the crane on the road. This explanation is accepted by the court.
- (12) At the inspection *in loco* it could be seen that it would have been dangerous to leave the crane on the left hand side of the road and would have caused an obstruction for traffic travelling from south to north, thereby endangering other road users.
- (13) Both the tow truck driver, Mr Leibach, and Mr Vallance, a member of the plaintiff, confirmed that they were at the scene of the accident within a short time after the accident had taken place, although Mr

Skhosana had already been taken to hospital. They both confirmed Mr Skhosana's evidence in respect of the tall grass which had obscured the ditch from Mr Skhosana. It is clear from the evidence of Mr Leibach, as illustrated by the photos, that there was only 1 metre between the edge of the tar to where the tall grass was growing and the space was not wide enough to park the crane on the side of the road. Mr Leibach confirmed that any driver of any type of vehicle, including the crane would not have been able to observe the ditch, due to the tall grass growing at and near the edge of the ditch. Mr Leibach is an independent witness who gave his evidence in an honest and open manner.

- (14) The court attended an inspection *in loco*. The recordal of the findings were, by agreement, admitted to court and I found it to be in accordance with my observations.
- (15) During the inspection *in loco* it was clear that the road had substantially been altered since 11 April 2011. A barrier was erected on the eastern side of the road where there is a culvert to prevent vehicles from leaving the road.
- (16) An emergency lane was added on the western side of the road, from south to north, after the road had been built up and levelled to enable slow moving traffic to pass on the left hand side of the road and not to

create an obstruction when a vehicle has problems and has to pull off the road. The tall grass has been cut. There were four red and white warning signs erected to indicate the ditch on both the eastern and western sides of the road, warning traffic travelling from south to north and north to south of danger should a vehicle leave the road at that point.

- (17) The defendant failed to lead any evidence to explain why these safety measures had been implemented after April 2011, when the accident had occurred. No reason was forthcoming for there being no such safety measures previously. It is clear from the defendant's actions, post April 2011, that the conditions at the time were regarded as dangerous, hence the remedial actions taken by the defendant after April 2011.

- (18) Mr Vallance was severely criticised by the defendant's counsel for submitting a report to the police in regards to the accident which was at variance with how the accident had actually happened. Mr Vallance's evidence was honest. He immediately conceded that his report to the police as to how the accident had happened was incorrect. His explanation was that he had made this report without consulting with Mr Skhosana, as Mr Skhosana was still on sick leave. He conceded that the accident could not have occurred as he had set out in the police report, but explained that he had made wrong

assumptions as to how the accident had occurred. His explanation was that the accident had to be reported within 48 hours to the insurers. He, therefor, made a statement to the police to obtain a reference number, before consulting with Mr Skhosana.

(19) A bundle of photographs illustrated the scene on the day of the accident, whilst the crane was still lying on its side in the ditch. The defendant chose not to lead any evidence, although the evidence of the defendant's expert was canvassed with the witnesses. These questions could not take the case any further as it was not evidence before the court.

(20) It is clear from the photos and the findings during the inspection *in loco* that the crane's engine had cut out whilst on an incline in the middle of the single lane travelling from south to north. It was thus causing a hazard to all traffic and the reason for Mr Skhosana moving the crane out of the way must be accepted. The crane posed a danger to traffic not only travelling from south to north, but also to traffic travelling from north to south whilst standing on the road.

THE LAW:

(21) In the particulars of claim it is set out:

"The Defendant has a legal duty to maintain the road and the

road surface and to ensure that the road and road surface was safe for public use. Furthermore the Defendant has the legal duty to inform public users of any dangerous situation relating to the road."

(22) This paragraph was admitted by the defendant in the plea. The legal duty that existed has been admitted and the plaintiff alleges that the defendant had breached the "*duty of care*" in the present matter in a negligent manner.

(23) The five well-known requirements to establish delictual liability have been set out in **RL Judd v Nelson Mandela Bay Municipality**¹, by Alkema J:

"...(a) the commission or omission of an act (actus reus), (b) which is unlawful or wrongful (wrongfulness), (c) committed negligently or with a particular intent (culpa or fault), (d) which results in or causes the harm (causation) and (e) the suffering of injury, loss or damage (harm)..."

(24) In **Minister of Safety and Security v Van Duivenboden**², Nugent JA held:

"...A negligent omission is unlawful only if it occurs in

¹ SAFLII Case No. CA149/2010 (Eastern Cape, Port Elizabeth High Court) at paragraph 8

² 2002(6) SA 431 SCA at paragraph 12

circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in Kruger v Coetzee, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.” (Court emphasis)

(25) It is thus clear that the test is whether a reasonable person in the particular circumstances would have foreseen the harm and would have acted to avert it. This test is applicable to the facts of the present matter.

(26) In *Lee v Minister of Correctional Service*³ the Constitutional Court held:

“In [Minister van Polisie v] Ewels it was held that our law had reached the stage of development where an omission is regarded as unlawful conduct when the circumstances of

³ 2013(2) SA 144 (CC)

the case are of such a nature that the legal convictions of the community demand that the omission should be considered wrongful. This open-ended general criterion has since evolved into the general criterion for establishing wrongfulness in all cases, not only omission cases.” (Court emphasis)

- (27) In **Law of Delict**⁴, the learned authors come to the following conclusion:

“The boni mores or general reasonableness criterion is, therefore, a juridical yard-stick that gives expression to the prevailing convictions of the community regarding right and wrong. It is a criterion which enables the court continuously to adapt the law to reflect the changing values and needs of the community.”

- (28) Should the court find that the defendant had a legal duty, as set out in the particulars of claim, and admitted by the defendant in the plea, and the defendant failed to testify to prove justification or that it is unreasonable to expect the defendant to have foreseen the consequences of their omission or that it is not *contra bonos*, then the defendant should be held liable for the economic loss of the plaintiff.

⁴ Neethling, Potgieter and Visser, 7th Edition at page 40

- (29) In **Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority [2006] 1 ALL SA 6⁵**, Harms JA held:

*"When dealing with the negligent causation of pure economic loss it is well to remember that the act or omission is not prima facie wrongful ("unlawful" is the synonym and is less of a euphemism) and that more is needed. Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered (and not the converse as Goldstone J once implied unless it is a case of prima facie wrongfulness, such as where the loss was due to damage caused to the person or property of the plaintiff). In other words, **conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant.** It is then that it can be said that the legal convictions of society regard the conduct as wrongful, something akin to and perhaps derived from the modern Dutch test "in strijd . . . met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt" (contrary to what is acceptable in social relations according to unwritten law)." (Court emphasis)*

- (30) The case most relevant in regards to the facts in this matter is

⁵ 2006[1] All SA 6 at paragraph 13

Matshoge v Premier of North West Province and Others⁶ where Kgoele J stated at paragraph 31:

"A person who uses a road for the general public purpose is entitled to expect (that he) could use it with safety."

- (31) The same principle should apply in the present instance as Kgoele J stated in paragraph 53⁷:

"It is trite law that the defendant, in the face of its negligence bore the burden of adducing evidence in rebuttal of the inference that such wrongful and negligent omission caused the loss."

- (32) In the present instance the defendant failed to supply any evidence to enable the court to consider an acceptable explanation from the defendant as to how the crane could have landed in the ditch. The defendant chose not to call any witnesses, although the defendant's expert was present at court. This court has to decide on the available evidence placed before the court by the plaintiff, whether the defendant acted as can be expected from a reasonable person in the position of the defendant at the time of the accident and should have acted to avert it. The defendant relied in the heads of argument on the experts' reports, none of which were presented as evidence. Therefore no reliance can be placed on any of the experts' reports. No reliance

⁶ (279/12) [2014] ZANWHC 54 (12 December 2014), SAFLII
⁷ *Supra*

can be placed on the initial particulars of claim, as it has been amended.

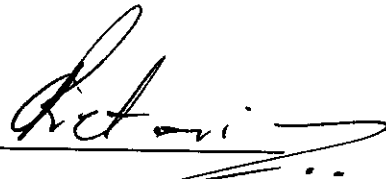
(33) The amended particulars of claim is the matter this court has to deal with. It is even more important in this case for the defendant to have lead evidence, as after the accident in 2011 the defendant saw fit to change the road by erecting a barrier on the opposite side of the road, erecting warning signals at the place of the accident, warning traffic travelling in both directions to be careful and last, but not least by building an emergency lane from south to north to enable traffic to safely come to a stop at the side of the road. These changes were not explained by the defendant. The inference that the court draws is that the defendant realised the danger existing at the place of the accident and effected remedial action, unfortunately too late for the plaintiff. The defendant should have foreseen that the tall grass, obscuring a deep ditch at the side of the road, without any warning signals, could cause harm and should have averted it, as it did after the accident occurred.

(34) The only reasonable inference I can draw is that the hidden ditch obscured by tall grass caused Mr Skhosana not to see it, although he even went so far as to open the window and to lean out to make sure the back wheels of the crane were safe. I find in the circumstances where there was a trench of approximately 2 metre, obscured by the

long grass, without any warning signals, that no contributory negligence can be found on the part of the plaintiff. In the result I find that the defendant was 100% negligent and therefor liable for the proven damages of the plaintiff.

(35) In the circumstances the following order is made:

1. The defendant is liable for 100% of the damages to be proved by the plaintiff;
2. The defendant to pay the costs of the trial, including the costs of senior counsel.



Judge C. Pretorius

Case number : 58756/2013

Matter heard on : 17 to 21 November 2016

For the Plaintiff : Adv AJH Bosman SC

Instructed by : Jordaan & Smit Attorneys

For the Respondent : Adv Mohlabedi SC

Instructed by : State Attorney

Date of Judgment :