IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 22/12/2016

Case Number: 49152/2014

(1) REPORTABLE: [redacted]/ NO
(2) OF INTEREST TO OTHER JUDGES: [redacted]/NO
(3) REVISED

22/12/2016 DATE

SIGNATURE

NATIVIDADE ORLANDA DE SOUSA **PLAINTIFF**

AND

SUBTROPICO MARKET AGENTS (PTY) LTD **DEFENDANT**

JUDGMENT

MOLEFE J

[1] The plaintiff instituted an action against the defendant for compensation for injuries sustained in a collision involving a forklift driven by Alfred Gaanamong ("the driver") and the plaintiff, who was a pedestrian at the time. The collision occurred on 7 April 2014 at the Tshwane Fresh Produce Market ("the market").

[2] It is common cause that the Fresh Produce Market is owned, operated and controlled by the City of Tshwane Metropolitan Municipality and that at the time of the collision the driver was acting within the course and scope of his employment with the defendant.

[3] In her particulars of claim the plaintiff claimed that the collision was caused as a result of the negligence of the driver in one, more or all of the following respects:

3.1 he failed to keep a proper lookout;

3.2 he drove the forklift forward while carrying banana crates on the front of the forklift which obscured his vision;

3.3 he failed to take cognizance of the fact that pedestrians frequent the Fresh Produce Market;

3.4 he failed to avoid the collision when by the exercise of proper care, he should have done so;

3.5 he operated the forklift without having the required licence or certification.

[4] The defendant denied that the collision occurred as a result of the driver's negligence, and pleaded that the collision was caused as a result of the negligence of the plaintiff who was negligent in one, more or all of the following respects:

4.1 she failed to keep a proper lookout;

4.2 she failed to avoid the collision by exercising proper care, when she could and should have avoided it.

[5] At the commencement of the trial, the parties agreed to separate the issues of liability (merits) and quantum in terms of Rule 33 (4). The trial proceeded with the issue of merits and the determination of quantum of the plaintiff's claim was postponed *sine die.*

[6] It is trite that the plaintiff bears the *onus* to prove that the driver was negligent and that this caused or contributed to the incident and that the defendant bears the *onus* to establish contributory negligence that contributed to the occurrence[1].

[7] The parties submitted two videos (DVD) recordings of the incident obtained from a static camera(s). The parties agreed that the videos depict "*a true reflection of that part of the incident reflected thereon*".

[8] The video that depicts the forklift striking the plaintiff shows the plaintiff walking in an aisle at the market, an area where pedestrians are entitled to walk. It depicts the plaintiff further walking (at least) seven paces in a straight line in the middle of the aisle, with the forklift approaching from her rear and running her over. Plaintiff's Counsel[2] contends that under circumstances where it is common cause that members of the public are invited to attend the market walking on the aisles, it is certainly a situation of *res ipsa loquitur*, ie a situation where the plaintiff has proved with the video facts from which negligence may readily be inferred. It is then for the defendant to displace a *prima facie* inference.

[9] Defendant's Counsel[3] argued that the *maxim* of *res ipsa loquitur* has no general application to collisions although it may, in a restrictive class of cases, sometimes apply. It was argued on behalf of the defendant that it does not apply in

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[1] See Eversmeyer (Pty) Ltd v Walker 1963 (3) SA 384 (T)
[2] Advocate J O Williams SC
[3] Advocate A Vorster

this case because if it does apply, it boils down to the notion that it is self-evident that the collision was caused by the negligence of the driver of the forklift.

[10] For *res ipsa loquitur* to be brought into play, the occurrence must be sufficiently described to make the findings of negligence self-evident from its very nature. Even then, the inference need not be drawn and further that it may be negative by a contrary explanation by the defendant or by some other means. In my view, the Court in *casu* cannot invoke the *res ipsa loquitur maxim* merely because the video shows the driver colliding with the plaintiff from behind, but should make a finding of negligence on the evidence presented by various witnesses on the disputed facts as it appears from the pleadings. It still has to be decided whether on all of the evidence and the probabilities, the plaintiff has discharged the *onus*.

[11] Two witnesses testified on behalf of the plaintiff; Mr Frank Mashaba and the Plaintiff.

> 11.1 **Mr Frank Mashaba** testified that he is the driver of Mashaba Forklift and Training and that they train people to operate forklifts and are accredited to issue forklift certificates. Mr Mashaba testified that he issued a forklift licence certificate to the driver on 8 April 2014, a day after the incident and the licence certificate is valid for two years. In terms of the General Driving Rules for forklifts, if a driver cannot see in front because of a big load, the driver must drive in reverse.
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> With regard to the issue of the license being issued the day after the incident, defendant's Counsel submitted that an unlicensed driver is not per se negligent because he drives without a valid license.

11.2 **Mrs Natividade de Sousa**, the plaintiff, testified that when the incident occurred she was sixty years old and was familiar with the conditions at the market as she had been frequenting the market as a buyer for eight (8) years. The members of the public have access to the market aisles and she was also aware of the presence of forklifts in the aisles. On 7 April 2014 in the morning, she was walking down the aisle from Lebombo market stall on the other side of the aisle to the defendant's market stall on the other side of the aisle. When she was near the defendant's door, she was hit by a forklift from behind. She sustained injuries from the incident and was hospitalized. She further testified that before crossing from one side of the aisle to the other side, she kept a proper lookout by looking to her left but did not see the forklift approaching. The plaintiff further testified that there was nothing she could have done to avoid the incident.

Under cross-examination, it was put to the plaintiff that she crossed the aisle to the other side into the forklift's lane of travel without keeping a proper lookout, that she crossed in front of a pillar which dissects the aisle into two and that was the reason why the forklift driver failed to see her.

[12] Two witnesses, the forklift driver and Mr Roelf Swanepoel testified on behalf of the defendant.

12.1 **Mr Alfred Gaanamong**, testified that he is a forklift driver in the employ of the defendant with 21 years' experience as a forklift driver. He testified that on 7 April 2014 at approximately 05h30, he was the driver of the forklift and he went to fetch crates of bananas from the ripening facility outside the market building situated approximately 1 kilometer from the market building to

the defendant's stall inside the building. The bananas were packed in a pallet with 50 crates/boxes in a pallet. The one pallet with a load of 50 crates of bananas was packed in front of the forklift. The other crates were in four trailers, with two pallets in each trailer. The load of banana crates in front of the forklift was obstructing his view but he could not drive in reverse because of the trailers at the back.

He drove from outside into the market building by looking intermittently to the right and left. He never saw Ms de Sousa prior to the incident; he just felt the impact of hitting something and heard people screaming. The forklift collided with Ms de Sousa from behind, probably because according to the driver's testimony, she emerged from behind the pillar.

Under cross-examination the driver testified that he loaded the forklift in front for traction to pull the trailers uphill.

12.2 **Mr Roelf Swanepoel** testified that he is a market trader in the employ of the defendant and the driver's manager. Mr Swanepoel testified that on the morning of the 7 April 2014, he was inside his work station busy with computer sales and when he looked up he saw Mrs de Sousa on the other side of the aisle next to a pillar. He saw her crossing from the other side of the aisle behind the pillar but he did not see the forklift approaching. After the incident he unhooked the forklift from the trailers to move it away from the scene of the incident.

Under cross-examination Mr Swanepoel conceded that the market building is a beehive of activities with forklifts and pedestrians and that someone visiting

the market can assume that the driver of a forklift should be able to see him/her. He also confirmed under cross-examination that he did not see Mrs de Sousa crossing from the one side of the aisle to the defendant's stall nor did he see how fast she crossed.

[13] During the inspection in *loco*, it was clear that the market building and the greater precinct is a beehive of activities with forklifts and pedestrians intermingling. From the ripening facility to the market building there is a winding road and a busy intersection. Inside the market buildings, a lot of forklifts with loads in front were observed driving in reverse.

[14] In a civil case, the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless, where the *onus* rests on the plaintiff as in the present case, and where there are mutually destructive versions, the plaintiff can only succeed if she satisfies the Court on a preponderance of probabilities that her version is true and accurate and therefore acceptable and that the version advanced by the defendant is therefore false and falls to be rejected. In deciding whether that evidence is true or not, the Court will weigh up and test the plaintiff's allegations against the general probabilities. (See **National Employer's General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E)**.

[15] In **African Eagle Life Assurance Co Ltd v Cainer**[4], Coetzee J applied the principle set out in **National Employers' General Insurance Association v Gany 1931 AD 187** as follows:

[4] 1980 (2) SA 234 (W) at 237 D-H

> *"Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version".*

[16] The plaintiff *in casu* appeared to be an honest, credible and consistent witness whose testimony can be relied upon. Although she testified that she did not have an accurate recollection of events because of the lapse of time between the incident and her testimony and because of the pain she endured due to the incident, I found her to be reliable and that her version is a true version.

[17] It is an established fact that the forklift was heavily laden in front and the driver conceded that the load obstructed his view. Driving when you cannot see is inherently dangerous. A reasonable driver of a forklift could have foreseen the reasonable possibility that driving a forklift in a market where the public enjoys access, with your view obstructed, may hit a pedestrian, like he did in this case. His version is that he never saw the plaintiff at all before he felt that his forklift struck her. Had the forks of the forklift not been so heavily and highly stacked, he would have seen the plaintiff and not ridden into her. Similarly if he followed the general rules and reversed the forklift, he would also not have struck her since he would have seen her. Mr Swanepoel conceded that a person at the market is entitled to assume that forklift drivers are able to see them.

[18] I therefore find the plaintiff's version to be more probable. I am unable to find any negligence whatsoever that can be attributed to the plaintiff. A finding of

negligence on the driver's part is quite justifiable as he failed to act reasonably. I find that the plaintiff has successfully discharged the *onus* expected of her of proving negligence on a balance of probabilities on the part of the forklift driver.

[19] I do not agree with the argument by the defendant's Counsel that because the driver drove from the ripening facility negotiating a winding road, crossing a busy intersection and maneuvered his way into the market building without an incident, therefore the driver is not negligent in colliding with the plaintiff from behind. There is absolutely no merit on this argument.

Contributory Negligence

[20] It is trite that for the defendant to be successful in achieving an apportionment of damages, the *onus* is on the defendant to prove negligence on the plaintiff's behalf which causally and factually contributed to the collision. In **Kruger v Coetzee 1966 (2) 428 (A)** it was held that the defendant has the *onus* to satisfy the Court that the reasonable person in the position of the plaintiff:

> 20.1 would foresee the reasonable possibility that the conduct would injure another person or property and cause that person patrimonial loss;
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> 20.2 would take reasonable steps to guard against such occurrence; and
>
> 20.3 that the plaintiff failed to take such steps.

[21] I agree with the submission by the plaintiff's counsel that this matter is not akin to that of a pedestrian, who intrudes or traverses onto a road meant for vehicular traffic. On the contrary, the market is a place which invites members of the public to visit the stalls on foot whilst purchasing goods.

[22] Counsel for the defendant argued that an apportionment should be applied as the plaintiff should have looked to her left and seen the approaching forklift. This argument is based on the assumption that when the plaintiff was crossing to the other side of the aisle, the approaching forklift would already be there to be seen. However, the second video (which does not show the actual collision) reveals that the plaintiff whilst crossing to the other aisle where she was hit, could not have seen the approaching forklift because it was not yet on the premises. The first video (which shows the actual impact) shows that where the plaintiff was hit, she was already walking straight down the aisle for at least some seven paces, ie. not crossing. It is clear even from the video that the plaintiff was hit from behind under circumstances where no reasonable person could have foreseen the possibility that she would be run over from behind and be dragged by the forklift.

[23] It cannot be expected of the plaintiff to have anticipated the proverbial invisible forklift approaching from behind and further anticipate that such forklift which she did not see, will not see ahead whilst driving forward because of a very high load obstructing the driver's view. I am therefore unable to find any negligence whatsoever that can be attributed to the plaintiff. The negligence of the forklift driver was the sole cause of the incident and the defendant has failed to prove any contributory negligence on behalf of the plaintiff.

[24] In the premises, I make the following order:

1. The defendant is liable for 100% of the proven or agreed damages;

2. The defendant shall pay the plaintiff's costs of the action insofar as it pertains to liability, such costs to include the costs of Senior Counsel and the costs of the trial from 31 October 2016 to 2 November 2016;

3. The issue of quantum is postponed sine die.

D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Plaintiff	:	**Adv. JO Williams SC**
Instructed by	:	**Dawie De Beer Attorneys**
Counsel on behalf of Defendant	:	**Adv. A Vorster**
Instructed by	:	**Hugo & Ngwenya Attorneys**
Date Heard	:	**31 October 2016, 1 and 2 November 2016**
Date Delivered	:	**22 December 2016**