

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

24/3/16

DATE

[Signature]

SIGNATURE

24/3/2016

Case Number: A700/14

In the matter between:

JOHANNES VAN DER WALT
T/A J VAN DER WALT FARMING

APPELLANT

and

NGULULU BULK CARRIERS (PTY) LTD

RESPONDENT

Coram: A.A LOUW J, FABRICIUS J et HUGHES J

JUDGMENT

HUGHES J

[1] The respondent had instituted an action for damages against the appellant and Mr Mandavha Solomon Mashile (Mashile). Incidentally, Mashile died before the summons could be served upon him. The damages claim arose as a result of a collision on 6 December 2011, between the respondent's truck with two side tippers then and there being driven by Mr Makolokolo John Zwane (Zwane) and the appellant's tractor with a trailer, being driven by Mashile.

[2] This is an appeal against the judgment of the court *a quo* where the court granted judgment on the merits in favour of the respondent in this appeal. The entire appeal revolves around the issue of negligence either of the appellant's driver, Mashile or the respondent driver, Zwane, who at the time of the collision both drove the vehicles of the appellant and the respondent respectively, in the course and scope of their employment

[3] The truck had a load of 34.5 tons of lime whilst the tractor had a trailer which was loaded with manure.

[4] The presiding officer in the court *a quo*, Moseamo AJ, found that Mashile, the tractor driver was negligent in causing the collision and that no negligence could be attributed to Zwane, the driver of the truck.

[5] The details of the collision are briefly as follows: the collision took place at around 14h50 on the N11 between Groblersdal and Middelburg, in the Province of Limpopo. Both drivers were driving in the direction of Middelburg. Initially, the tractor was traveling on the gravel portion on the side of the national road, whilst the truck was traveling on the road, in the same direction. A sign post appeared in the path of travel of Mashile and he swerved to the right and drove his vehicle onto the road into the path of travel of Zwane.

[6] In an attempt to avoid colliding with the tractor Zwane swerved to the left as the tractor was proceeding to the right of the truck. Zwane managed to avoid colliding with the tractor and instead collided with the left rear of the trailer and the

sign post. Zwane lost control of the truck and the two side tippers which landed on its side across the entire national road. The tractor became detached from the trailer losing its load of manure.

[7] Immediately after the collision the respondent conducted an investigation. During the course of this investigation statements were obtained from both drivers. This was fortunate as a version of Mashile's account of how the collision transpired was admitted into evidence during the testimony of the investigator, Mr Quintin Louw.

[8] According to Mashile, he was driving very slowly as he was 1km away from the main farm entrance. As he drove on the gravel surface he noticed a sign post in his path of travel. In order to avoid the sign post he steered the tractor with the trailer to the right. In doing so his right side tyres of the tractor and trailer were on the tar surface of the "travelling lane", whilst the other side was on the gravel. He states that with the height of the load on the trailer he was unable to observe traffic approaching from the rear as it obstructed his view: *"As I steered to the right I suddenly felt hard impact to the tractor rear... I noticed that the truck ...was still approaching the tractor so I subsequently steered the tractor to the right across the road..."* [That in italics extracted from Mashile's statement].

[9] On the other hand the account given by Zwane, is that he was traveling at 85km when he observed the tractor in front of him. It was driving on the gravel surface on the left side of the road. He testified that when he was 2 km away from the tractor he noticed that the tractor was travelling with two wheels on the road and the other two wheels were still on the gravel, this is when he reduced his speed and moved the truck to straddle the centre line. As he drove on, he decided to overtake the tractor, so he accelerated to pass the tractor. When he was about 20 metres from the tractor it swerved to the right, he then applied his brakes as it seemed as though the tractor was proceeding to the right hand side of the road. He realised that he was going to collide with the tractor, so he swerved to the left and attempted to pass between the trailer and the sign post. In doing so, the driver's side of the truck collided with the left rear of the trailer, thereafter the truck collided with the sign post. The truck and the two side tippers fell on its side on the entire width of the road.

[10] In this case the court *a quo* found that Mashile was negligent in that he did not keep a proper look out, did not have regard for other road users especially Zwane and he drove the tractor from one side of the road into the path of travel of Zwane. The court *a quo* further found that Zwane swerved to the left to avoid colliding into the tractor which had entered into his path of travel and that he had taken all the necessary precautions as he could not pass the tractor on the right, as he thought that Mashile was intending to turn to the right, and his only option was to swerve to the left. Lastly, that the two versions before the court were not mutually destructive. That the version of Mashile in fact supported or corroborates Zwane's version as to how the collision occurred.

[11] It is trite that an appeal court is reluctant to disturb the findings of the trial court on questions of fact. This is so, as the trial court, with regards a question of fact was in a better position to observe the witnesses as they testified and was at a better advantage having being steeped in the trial proceedings. Where there has been no misdirection on the facts by the trial court it is presumed that its decision is correct and the appeal court will only upset that decision if it is convinced that it is wrong.

[12] From the judgment, in analysing whether Mashile was negligent in the circumstances, the court *a quo* took cognisance of the fact that Mashile steered right into the path of travel of Zwane, that Mashile was driving slowly and did not *"look out for vehicles that were already on that lane of travel that he encroached on to"* and that Zwane swerved *"left in order to avoid colliding with the tractor and instead collided with the left hand corner"* of the trailer attached to the tractor. [pg. 453 para [17] of the record]

[13] The court *a quo* in the light of all the evidence before it, in respect of the negligence of Mashile, concluded that *"...it was required of the second defendant (Mashile) to exercise extra caution in moving on to a national road from the side of the road. The second defendant should have foreseen that they (sic) 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 onto a busy national road might cause danger to other road users and acted cautiously". [pg.453 para [19]]

[14] In my view no material misdirection on the facts is evident in reaching the conclusion reached in respect of Mashile's negligence. This is apparent to me if one has regards to his version outlined in his statement provided to Mr Louw. On his own version, he did not look out at all before entering into the path of travel of Zwane. He also did not even warn vehicles following him of his intent to swerve to the right. He moved his slow going tractor and trailer onto the road and in the path of travel of other vehicles and in conducting this manoeuvre he was reckless, endangering those vehicles following the tractor with its trailer. See *Beswick v Crews* 1965 (2) SA 690 (A) at 701A-B.

[15] Can any negligence be attributed to Zwane? His evidence is that he saw Mashile, in the tractor, traveling ahead of him on the gravel path; he was traveling at 80km; he observes the tractor swerve onto the road, he reduces speed and when the tractor continues to travel partially on the gravel and the road he attempts to overtake it however it continues to proceed towards the right, into his path, so rather than collide with the tractor he swerves to the left instead.

[16] It was argued on behalf of the appellant that Zwane did not act as is expected of a reasonable extra heavy duty truck driver in the prevailing circumstances and he did not exhibit the required skill. Further, that this was a case of *res ipsa loquitur*, in that it was a rear end collision and thus Zwane was negligent.

[17] In my view the court *a quo* was correct in concluding that the manoeuvre adopted by Mashile was such that it was not what a reasonable driver in Zwane's position would have expected of the tractor to execute. It was the manoeuvre executed by the tractor that no reasonable driver would have expected that was the catalyst of this collision. Zwane cannot be faulted to guard against that which a reasonable driver in his position would not have expected.

[18] The *dictum* by Schreiner JA in *Moor v Minister of Post and Telegraphs* 1949 (1) SA 815 (A) at 826 comes to mind :

'...recognises the obligation to watch a vehicle that one has seen, not only after it has begun to show signs of dangerous driving, but "in case the owner of the other car should be careless and reckless"... Speaking very generally one expects and is entitled to expect reasonableness rather than unreasonableness, legality rather than illegality from other users of the highway...What one is entitled to expect depends on common experience and not on a fiction that others will always accord us our just rights and will always guard our persons and property from harm.'

[19] I cannot find fault with the conclusion that, "...a reasonable driver in Mr Zwane's position could not have foreseen that a slow moving tractor that was traveling on the side of the road would swerve or turn right in to his lane of travel" as he was entitled to assume that the tractor would continue in the manner it had been traveling all along. [pg.455]

[20] The appellant took issue with the speed that Zwane was travelling, that Zwane failed to swerve to the right timeously and allow a reasonable berth when overtaking and he did not hoot. In my mind, it was rightly concluded that this criticism was not fair in the circumstances which Zwane was faced with, as the swerve manoeuvre adopted by Mashile was not what one would expect of a reasonable driver. In the circumstances Zwane acted appropriately by reducing his speed to assess the next move that the tractor would execute and when he saw it continued to move right whilst he attempted to overtake it, which was not a move expected in the circumstances, Zwane was correct in moving left to avoid a collision.

[21] The reliance on the rear end collision maximum of *res ipsa loquitur*, in my view, is not applicable in the circumstances of this collision. The court *a quo* was correct in concluding so. From the facts it is clear that the tractor had not been driving in the path of travel of the truck but instead entered the path of travel of the truck at an inopportune time. This is not a rear end collision scenario.

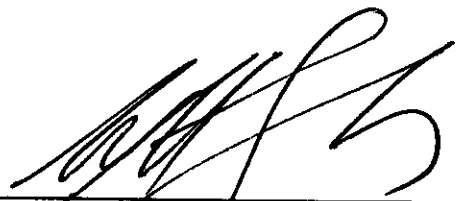
[22] In conclusion, after an analysis of the versions of Mashile and Zwane, it is crystal clear that the versions corroborate each other and are not irreconcilable as

argued by the appellant. The rejection by the court a quo that this was not a case with two mutually destructive versions was correct.

[23] For the reasons set out above the appeal must fail as there is no merit in the appeal.

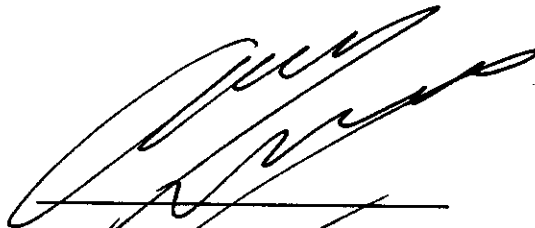
[24] Consequently the following order is made:

[24.1] The appeal is dismissed with costs.



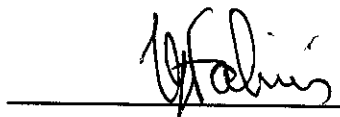
W. Hughes
Judge of the High Court Gauteng
Division Pretoria

I Agree



A. A. Louw
Judge of the High Court Gauteng Division
Pretoria

I Agree



H.J. Fabricius
Judge of the High Court Gauteng Division
Pretoria

APPEARANCES:

For the Appellant: Adv. G B Botha (SC)

Instructed by: Sonja Weideman Attorneys c/o GP Venter Attorneys

For Respondent: Adv. Venter

Instructed by: Whalley van der Lith C/o van Stade van der Ende Attorneys

Date of hearing: 16 March 2016

Date of judgment: _____