In the High Court of South Africa

KwaZulu-Natal Division, Pietermaritzburg

Case No : AR 100/2013

In the matter between :

X-Moor Transport CC t/a Crossmoor Transport Appellant

and

Gunther Richter Respondent

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Judgment

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Lopes J

[1] This is an appeal against a decision of D Pillay AJ (as she then was), who granted judgment in favour of the respondent (the plaintiff in the court a quo) against the appellant (the defendant in the court a quo), for the agreed damages caused to the respondent's motor vehicle when the appellant's truck collided with it. The driver of the appellant's truck was originally cited as the second defendant in the action, but because of difficulty in tracing him, the action against him was eventually withdrawn. In this judgment I shall refer to the parties as they were referred to in the court a quo.

[2] On the 15th May 2006 the plaintiff drove onto the M4 southern freeway in order to meet two consulting engineers to discuss the replacement of certain expansion joints on the roadway. When he drove onto the M4 heading southwards the two consulting engineers had already arrived, and had parked their vehicles on the left hand side of the M4 within the emergency lane. Those vehicles had hazard lights on, and the consulting engineers were wearing luminous coloured safety jackets.

[3] The plaintiff parked his Subaru motor vehicle behind the other two, and also within the emergency lane. On the roof of his car he placed a flashing yellow light and he left the Subaru hazard lights on. He then went to speak to the consulting engineers together with a member of his site team. They were all standing within the emergency lane, among the parked cars.

[4] Some three months earlier, the defendant had tendered for a contract with the Pinetown Municipality involving the lifting of heavy steel manhole covers. In anticipation of obtaining the contract the defendant fitted a chassis mounted hydraulic lifting crane immediately behind the cab of one of its truck-tractor horses ('the truck') which was used to pull tanker trailers. The defendant, however, was unsuccessful in securing the contract and the crane was never used and remained on the rear of the truck where it had been installed.

[5] The design of the crane was based upon two stabiliser legs, one on either side of the rear of the truck. Each stabiliser leg was held in place by a covering metal sleeve and a safety catch in the design of a locating pin which was on the end of an L-shaped lever ('the lever'). The lever passed through the covering sleeve and thereafter into the stabiliser leg. The lever entered the covering sleeve through a short length of pipe attached to the outside of the covering sleeve. The lever was held in place by a spring. The end of the pipe was bevelled so that when the lever was in what was described as the 'locked position', the locating pin was in place and the switch pointed downwards. When the stabiliser legs were required to be released in order to stabilise the truck when lifting heavy objects, the lever had to be pulled outwards under the tension of the spring, and turned so that it faced upwards towards the sky. It was then in what was described as the 'unlocked position'.

[6] When the lever was in the unlocked position the locating pin withdrew from the stabiliser leg, which would then slide out of the covering sleeve and be released onto the ground. The bevelled end of the pipe was such that when the lever was in the locked position it was closer to the stabiliser leg, enabling the locating pin to go through the covering sleeve and into the stabiliser leg. When the lever was in the unlocked position the bevel of the pipe ensured that the lever was some centimetres further away from the stabiliser leg and covering sleeve, thus withdrawing the locating pin from the stabiliser leg.

[7] Because the defendant had failed to secure the contract which it sought and the crane was never used, the driver of the truck had no training in using it. On the

morning of the 15th May 2006, the driver of the truck left the defendant's depot and travelled some 23 kilometres to the Indian Ocean terminal at Maydon Wharf, where the tanks on the two trailers being towed by it were filled with caustic soda.

[8] Having completed loading, the driver then left the loading depot bound for Umzimkhulu and proceeded to head up the semi-circular on-ramp onto the M4 freeway. Although there was no evidence as to the exact distance which the truck travelled after loading the caustic soda, it seems clear enough that it was no more than a couple of kilometres at most.

[9] As the truck drove up and onto the M4 freeway, the stabiliser leg on the left rear of the truck started to emerge from the covering sleeve. By the time the driver was proceeding along the slow lane of the M4 travelling southwards, the stabiliser leg had emerged by more than a metre. It was common cause at the trial that the driver of the truck would not have been aware of the stabiliser leg's emergence from its covering sleeve because the rear-view mirrors on the truck were angled in such a way that the driver could only see the axle of the second trailer. The truck then arrived at the point along the M4 where the plaintiff's Subaru was parked.

[10] At that stage the stabiliser leg smashed into the rear of the plaintiff's Subaru, unfortunately with fatal consequences. The driver of the defendant's truck would have had no knowledge of what was to happen until the collision took place. The

plaintiff himself was struck and thrown from the freeway over a barrier and onto the on-ramp.

[11] Two witnesses testified for the plaintiff, the plaintiff himself and Mr Proctor-Parker who gave evidence as a specialist in the reconstruction of accidents. Mr Proctor-Parker did not have access to the truck. He relied on a report prepared by D R Foulds, who was also an accident reconstruction expert. Mr Foulds had visited the scene of the collision on the day following the collision, and two days later he had inspected the truck. (The trailers were detached at the time). Mr Proctor-Parker also relied on photographs which were taken of the truck after the collision.

[12] In the cross-examination of Mr Proctor-Parker, two main defences were raised :

(a) that the spring holding the lever had snapped during the journey of the truck, and vibration had caused it to become lodged in a vertical position facing upwards as evidenced by one of the photographs taken after the collision. Mr Proctor-Parker considered this to be highly improbable. It is important to note that as Mr Foulds did not carry out an inspection of the spring there was no evidence before the court a quo that the spring had in fact broken. There was also no evidence as to how the lever had come to be in the vertical position facing upwards when it was photographed shortly after the collision.

(b) that the plaintiff's motor vehicle had been negligently parked. This suggestion emerged from the plea where contributory negligence was alleged on the part

of the plaintiff, arising out of the parking of the plaintiff's motor vehicle. This defence appears to have been abandoned by the end of the trial in the court a quo, and was not relied upon on appeal.

[13] Two witnesses gave evidence for the defendant. The first was Mr Govender who was in charge of the dispatch and control of the trucks and their drivers at the defendant's depot. He testified that he carried out inspections together with each driver of his truck, prior to the driver leaving to load caustic soda at the Indian Ocean terminal at Maydon Wharf. His evidence was that, together with the driver, he would conduct a visual check on lights, brakes, wheel-nuts, vehicle licences, etc.

[14] Mr Govender stated that he would not specifically have inspected the crane mechanism because it was not being used. It had in fact never been used since it had been purchased. He did, however, suggest that he would have seen if the lever had been in the unlocked position because he would have inspected other items in the vicinity of the lever. He suggested that if the lever had been in the unlocked position when the vehicle left the depot, the stabiliser leg would have come out from the covering sleeve on the 23 kilometre journey to the loading point at Indian Ocean terminal. He denied any suggestion that the driver of the truck would have moved the lever into the unlocked position because they were not allowed to leave their trucks at the Indian Ocean terminal.

[15] In re-examination Mr Govender confirmed that when the lever was locked it would be facing downwards. He also confirmed that the lever was spring-loaded. Thus, on his evidence, it would have to rotate through 180 degrees in order to face upwards and be in the unlocked position.

[16] The defendant's other witness was Mr Balt a forensic traffic reconstruction expert. As with Mr Proctor-Parker, he did not inspect the truck and relied instead on an inspection he had conducted on a similar truck with a similar crane mechanism. Mr Balt was also unable to speculate on whether the spring mechanism had broken.

[17] Mr Balt's evidence was that the lever would be in a horizontal position (i.e. parallel to the ground) when it was in the locked position, and would therefore only rotate 90 degrees, to be facing vertically upwards when it was in the unlocked position.

[18] It appears from the evidence at the trial that Mr Balt provided a diagram of the lever, which diagram formed Exhibit "H" at the trial. However, at the time of the appeal Exhibit "H" was not before us. Apparently it could not be located.

[19] I am not sure that this difference between the two witnesses is material. The evidence of Mr Govender seems more probable, because he actually worked with the truck in question and seemed more familiar with the mechanism.

[20] The question which had to be answered in the court a quo was whether the defendant was in any way negligent, and if so, whether that negligence was the cause of the collision. After considering the evidence which was led at the trial, the learned judge found in favour of the plaintiff basing her decision on the following :

(a) that the pleadings were wide enough to encompass negligence on the part of the defendant and/or the defendant's driver;
(b) the defendant's employees did not check the locking mechanism with the degree of care required to ensure the safety of the crane;
(c) additionally or alternatively, someone tampered with the mechanism at the loading depot at the Indian Ocean terminal; and
(d) the defendant was further negligent in allowing an unqualified employee to drive the truck – it having been the evidence of Mr Govender that the driver of the truck was not qualified to operate the crane mechanism;
(e) the defendant had raised the defence of a sudden emergency which it had failed to establish. In those circumstances the negligence of the defendant's driver is to be found by applying the principle *res ipsa loquitur*.

[22] The experts do not contribute in any significant way to the cause of the stabiliser leg emerging from its covering sleeve. On an examination of all the evidence however :

(a) it is highly improbable that the lever came to rest in the vertically upward position as a result of vibration following the breaking of the spring mechanism;

(b) the far more probable explanation is that the lever was manually placed into the unlocked position, probably by someone at the loading depot at Indian Ocean terminals;

(c) that the lever was moved at that stage is more probable because had it been in the unlocked position when the truck left the defendant's depot, the stabiliser arm would have emerged from the covering sleeve due to vibration on the 23 kilometres journey to the loading depot at Indian Ocean terminal;

(d) that the lever was manually switched to the unlocked position is also more probable because Mr Foulds would undoubtedly have inspected the lever to determine how it functioned. When he did so he would have realised that the spring was not functioning, and would have mentioned that fact. All he concluded in his report was that the cause of the collision was that the safety catch was in the unlocked position allowing the stabiliser leg to slide out of its covering sleeve;

(e) the driver would have had no idea that the stabiliser arm had emerged from its covering sleeve until after the collision. He would have been unable to observe it as he was driving because of the angle of his rear-view mirrors;

(f) given the (albeit hearsay) evidence disclosed in the statement made by Mr Adams, the driver who was following the truck up the on-ramp onto the M4, the stabiliser leg started emerging from the covering sleeve at the top of that on ramp.

[23] Mr *Mullins* SC who appeared with Ms *Linscott* for the defendant submitted that *res ipsa loquitur* was inapplicable in this case. If it was applicable, in the absence of an explanation for the cause of the stabiliser leg coming out of its covering sleeve, the defendant would carry the risk of judgment. However, no onus of excluding negligence arose on the defendant's part. Mr *Mullins* submitted that Mr Foulds, the plaintiff's expert, had had every opportunity to inspect and verify the cause of the failure of the lever, but he did not do so.

[24] Mr *Mullins* further submitted that unless it was proved that Mr Govender would have found the lever in an unlocked position, he cannot be accused of negligence. His failure to inspect the lever prior to it leaving the defendant's depot in order to ascertain whether or not the lever was in the locked position, was irrelevant in the absence of a causal link showing that the lever was in fact in the unlocked position, and that is why the stabiliser arm came out of its covering sleeve.

[25] Mr *Mullins* also submitted that the maxim was inapplicable because the evidence in the court a quo was insufficient to establish the actual cause of the stabiliser leg emerging from its covering sleeve.

[26] In *Steyn NO v Ronald Bobroff & Partners* 2013 (2) SA 311 (SCA) Bosielo JA dealt with the maxim at page 321 B – C as follows :

'That expression [*res ipsa loquitur*] only comes into play if the accident or occurrence would ordinarily not have happened unless there had been negligence. The court is not entitled to infer *res ipsa loquitur* (see for example *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA)…'

[27] In *Steyn* the plaintiff had claimed damages sustained as a result of an attorney's failure to execute his mandate with the required degree of diligence, skill and care. No evidence, however, was led as to what a reasonable attorney in the position of the respondent would have done. In those circumstances no breach of the mandate was established.

[28] In *Mostert* the court had to consider the Council's liability for the damage caused by a burst water main. As the experts were, on the evidence, uncertain as to the reason for the failure of the water main, and as mains occasionally burst for a variety of reasons, not necessarily consistent with negligence on the part of the owner, the plaintiff failed. The court in those circumstances found that the maxim was inapplicable.

[29] Those cases are distinguishable from the present matter. In the present matter the most probable cause of the stabiliser leg emerging from its covering sleeve is because some unknown person had switched the lever to the unlocked position. Although that may not be the only reasonable possibility, it is the most probable explanation.

[30] I am not persuaded that the learned judge in the court a quo erred in finding that the defendant was negligent, and that the negligence of its employees was the cause of the collision.

[31] The defendant was in charge of a dangerous agency. One only has to consider how the stabiliser leg operated to appreciate that in the event of it emerging during the truck's travel, a collision of some kind would be almost inevitable. There were a number of steps which the defendant could have taken in order to ensure that that did not take place. The simplest of those steps would have been for the driver of the truck to have checked that the stabiliser legs and the lever were in their proper place prior to embarking on a journey. It is no excuse to say that at the Indian Ocean terminal the driver of the truck was restricted to his truck and not allowed to emerge therefrom. That the defendant did not make an arrangement to ensure that such a check was made demonstrates that it did not appreciate the possibility of the stabiliser leg emerging. That in itself was negligent. The danger was foreseeable and the likelihood of an incident reasonably preventable.

[32] If the cause of the stabiliser leg sliding out of its covering sleeve is unknown, then this is a matter where *res ipsa loquitur.* Mr *Pillemer* submitted that the maxim was not only applicable in circumstances where something would not normally occur without negligence, but also where an abnormal occurrence takes place. In this regard he relied on the authority of *Stacey v Kent* 1995 (3) SA 344 (ECD). In *Stacey* the respondent's motor vehicle skidded onto its incorrect side of the road and collided with the appellant's vehicle. The respondent was unable to recount what

had happened because of a head injury he sustained in the collision. The court found that in those circumstances, and without an explanation as to what exactly happened, the maxim applied and the respondent was obliged to tell the remainder of the story or run the risk of having judgment given against him on the strength of the inference of his negligence.

[33] Similarly in the present matter, the defendant's truck collided with the plaintiff's vehicle in abnormal circumstances. Negligence of some kind was the most probable cause of the stabiliser leg emerging from its covering sleeve. The defendant did not in any way negate that probability. Indeed the main defence advanced by the defendant appeared to be contributory negligence on the plaintiff's part, which was entirely unwarranted.

[34] The plaintiff bears the onus of establishing negligence, and the defendant had to do no more than adduce evidence to displace an inference of negligence (i.e. to tell the remainder of the story). Mere theories or hypothetical suggestions do not avail the defendant.

(See *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 574 E – 575 H).

[35] I agree with the court a quo that the pleadings are sufficiently wide to incorporate the negligence of the defendant in that its driver failed to secure the stabiliser leg. This covers the negligence of the defendant in failing to instruct its driver to do so, and the failure otherwise to secure the stabiliser leg.

[36] In all the circumstances I would dismiss the appeal and confirm the judgment in the court a quo.

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K Pillay J

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Poyo-Dlwati AJ

Date of hearing : 3rd February 2014

Date of judgment : 24th March 2014

Counsel for the Appellant : S R Mullins with S J Linscott (instructed by (Messrs Naidoo Maharaj Inc)

Counsel for the Respondent : R Pillemer (instructed by Messrs Nichols Attorneys)