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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 5539/2014P

In the matter between:

VDN CARRIERS AND LOGISTICS CC

PLAINTIFF

And

GENNAO LOGISTICS CC

FIRST DEFENDANT

MARTIN KHUWA MAHAMBA

SECOND DEFENDANT

And

SUMTAS TRUCKING CC

THIRD PARTY

ORDER

It is ordered as follows:

- 1 Absolution from the instance is granted against the first and second defendants, against the plaintiff and against the Third Party.
- 2 No order as to costs.

JUDGMENT

Mngadi, J

[1] This judgment deals with the liability part of the delictual action for damages arising out of a motor vehicle collision involving three trucks.

[2] The plaintiff is VDN Carriers Logistics CC a close corporation duly registered and incorporated in accordance with the Close Corporations Laws of the Republic of South Africa. The first defendant is Gennao Logistics CC a close corporation registered and incorporated in terms of the Close Corporation Laws of the Republic of South Africa. The second defendant is Martin Khuwa Mahamba an adult male truck driver. The Third Party is Sumtas Trucking CC a close corporation registered and incorporated in terms of the Close Corporation Laws of the Republic of South Africa.

[3] The collision-giving rise to the action took place on 31 August 2013 . The vehicles involved in the incident were the plaintiff's vehicle bearing registration number [...] driven by Regis Rudvidzo (Rudvidzo), the first defendant's vehicle bearing registration number [...], [...] and [...] driven by the second defendant (Mahamba) and Third Party's vehicle bearing registration number [...] driven by Muzi Khumal (Khumalo) .

[4] The plaintiff sues the first and second defendants for the costs of repairs of the damage to its truck in the sum of R421 446.64. The damage was caused when its truck collided with the first defendant's truck driven by the second defendant in the course and scope of his employment with the first defendant. The first and second defendants admit the collision but deny that the second defendant was in any manner negligent. They plead that the third party's truck had overturned and created an obstruction on the roadway. The second defendant to avoid colliding with the overturned truck had to and suddenly changed his lane colliding with the plaintiff's truck. The defendants joined the Third Party' to the action on the basis that the collision was the result of a sudden emergency caused by the Third Party's driver who was negligent, in addition, for having allowed his vehicle to overturn creating an obstruction in the lane that the first defendant's vehicle was travelling in. They plead that the Third Party's driver

in overturning its truck on the roadway caused the collision. Alternatively, they plead that the sole or contributory negligence on the part of the plaintiff's driver caused the collision.

[5] The Third Party pleaded and it denies that the overturned truck caused the collision between the plaintiff's truck and the first defendant's truck. It denied that its driver was in any way negligent in causing its truck to overturn. It alleged that its truck overturned when it went over a load deposited on the roadway by another truck. It pleaded in the alternative sole or contributory negligence on part of the second defendant and the plaintiff's driver and that even if its driver was negligent in overturning its truck that was not the cause of the collision between the plaintiff's truck and first defendant's truck. In addition, the Third Party pleaded that if it is found that its driver was negligent in overturning the truck and that caused the collision between the plaintiff and first defendant's trucks the plaintiff's driver was contributory negligent. The plaintiff denied any negligence on the part of its driver.

The issue for determination is negligence on the part of the plaintiff's driver, on the part of the second defendant and on the part of the Third Party's driver. In addition , if it is found that the Third Party's driver was negligent in overturning the truck, it needs to be determined whether the overturned truck caused the collision between the plaintiff's truck and first defendant's truck. Both the driver of the overturned truck and the second defendant raise the defence of sudden emergency. The plaintiff's driver too in denying contributory negligence on his part raises as an alternative the defence of sudden emergency due to the presence of the overturned truck on the roadway.

[6] The plaintiff in the particulars of claim pleaded that the second defendant was negligent in one or more of the following respects, namely; he failed to keep a proper look out, he failed to keep the motor vehicle he was driving under any or proper control, he drove at an excessive speed under the circumstances, he failed to apply his brakes timeously adequately or at all, he failed to avoid a collision when through the exercise of reasonable care he could and should have done so, he collided into the side of the plaintiff's vehicle , he failed to keep a proper following distance from the vehicles in front of him, he failed to take into

consideration the rights of other road users more specifically the right of the plaintiff, he changed lanes at a time when it was unsafe and inopportune to do so, he failed to avoid a collision when through the exercise of reasonable care he should and could have done so. The defendants and the third party alleged negligence in similar respects.

[7] The collision took place on a clear night in the early hours on 31 August 2013. It took place on the N3 freeway on the northbound lanes. The scene of the collision is on a curve approaching the Loskop off ramp north of Estcourt. The roadway to the north at the area of the collision consisted of two traffic lanes. A white solid line on the right borders the right lane. A solid yellow line borders the left lane on the left and the edge of the surface of the road, which is the emergency lane. The lanes of the freeway to the opposite direction are separated from the lanes to the north by a wide grass median with hedge running along its middle.

The collision took place on a curve to the left. The area outside the roadway on the left descends and it has a metal barrier through the curve. The roadway in approach to the collision is a gentle down slope. The collision area is outside a built up area. There were no streetlights or anything providing artificial lighting. Traffic to the south would not provide lighting to the collision area due to the curve and the wide grass area between the north bound and the southbound lanes. It is common cause that there was no lighting from the overturned truck and that the collision area was dark at the time of the collision. The area on the left of the collision area has grass and some trees or bushes. The road was tarred and dry at the time of the collision.

[10] Each party called one witness. The plaintiff called its driver Regis Munyaradzi Ruzvidzo. The first and second defendants called their driver the second defendant Martin Khuwa Mahamba. The Third Party called its driver Muzi Khumalo. There was no formal sketch plan with scale and key provided. There were no photographs taken at the time of the collision presented except photographs showing damage to the plaintiff's truck. Only one photo was presented depicting the scene some hours after the collision which was close to depicting the scene at the time of the collision or soon thereafter. Unfortunately,

the photo in question (photo 35) was of a particularly poor quality. It was taken when one was standing on the roadway approaching the scene of the collision. At that angle , it distorted distances between objects. It was taken when it was dark and without the use of a flashlight. It resulted not showing objects depicted in the photo. The overturned truck with its wheels on the air and lying on its back is hardly visible on the photo. It is a matter of speculation as to whether the overturned truck is facing north or south. The set of wheels of the overturned truck are hardly decipherable from the photo and neither can one tell whether the trailer is still fixed to the horse and whether it was fixed or articulated truck. It can be seen that the truck is on the left hand side of the roadway. It is difficult to make out from the photo whether the overturned truck is partially on the left lane, on the emergency lane, or off the roadway. In fact from the photo one can't make out the emergency lane. The overturned truck is partly above the level of the roadway. It appeared to have ripped through the metal barrier when it overturned. The photo shows what could be pieces of the metal barrier pulled over the emergency and left lanes.

[11] The photo does not show the solid yellow line. It does not show the line separating the left and the right lane. If approaching traffic could see the collision area as depicted in photo 35 it would have been a confusing scene. The person who took photo 35 did not testify nor was a person who observed when photo 35 was taken . In my view, photo 35 did not clarify the situation. Because of its poor quality and the absence of the evidence of the person who took the photograph, it may not be used in preference to the evidence of the witnesses.

[12] The three witnesses are not in a position to give clear evidence on what they observed after the collision. They were involved in the collision as drivers and they would not readily admit fault on their part. It was at night and dark. They were shaken by the accident and they sustained injuries, which were serious in the case of Mahamba and Khumalo . ' Ruzvidzo pointed out a completely wrong area as the area of the collision. They were concerned about receiving medical attention and they were grateful for having escaped with their lives. As an example, a person carried on a stretcher to an ambulance is unlikely whilst so carried to take note of the position of vehicles involved in the collision .

[13] The three drivers testified that they approached the collision area driving at a normal speed. The normal speed is a speed of about 80 km per hour. Each truck was loaded and it was from Durban to Johannesburg. It was around 02h00. In the case of Khumalo a little earlier than that. They had their headlights on at drive level of intensity. They had their attention on the road and each one was in control of his truck. There was little or no traffic.

[14] Ruzvidzo testified that he was driving a fixed box loaded 14-ton truck. He was driving on the left slow lane. He passed a person who was on the left side of the road waving a material to indicate that there was a danger. He then noticed that there was an overturned truck obstructing his lane of travel. It was on a curve to his left. He applied brakes reducing speed of the truck. The distance was too short and he could not avoid colliding with the overturned truck by stopping his truck. He then swerved to his right to the right lane. At that instance, a truck hit him on the left hand side of his truck. His truck veered off the road to the grass area between the lanes to the north and the lanes to the south where it came to a stop. He did not see the truck that collided with his truck before the collision. He did not see the overturned truck whilst a distance from it because it was in a curve and it was dark. In my view, it is not clear why Ruzvidzo did not see the first defendant's truck before it collided with his truck. It must have been travelling near his truck. It is difficult to speculate that it tried to pass Ruzvidzo on his left because it collided with Ruzvidzo 's truck from the left. It is likely that Ruzvidzo was not travelling on the slow lane, he was travelling on the right lane and the truck that collided with his truck was on the left lane. It is clear that Ruzvidzo after seeing the overturned truck, he concentrated in reducing speed of his truck. He testified that when he swerved to his right next to the overturned truck his truck was driving quite slowly having drastically reduced speed to about 10 km per hour. It is possible that the first defendant's truck caught up with Ruzvidzo as he was reducing speed. Rudvidzo did not indicate, hoot or put on emergency lights on his truck. He did not take note of traffic close to his truck. He claims that he did not have an opportunity to do so. On the other hand, Mahamba's unchallenged evidence is that he too had drastically reduced the speed of his truck when he swerved to his right.

[15] Mahamba testified that he was driving a 22 meter double trailer articulated loaded truck. He was driving on the left slow lane. Although the full beam of his headlights could pick up an object 500 metres away, he noticed a short distance about 30m ahead that there was an overturned truck blocking his lane of travel. He reduced the speed of his truck. It was on a curve to his left. He did not see any emergency triangle on the road and he did not see any person waving a material to indicate the danger ahead. He realised when he was next to the overturned truck that he would not be able to avoid colliding head on with the overturned truck. His truck with its left side glancingly collided with the overturned truck. He swerved to the right lane and lost control of his truck. His truck collided with the plaintiff's truck. It went off the road to the grass area between the south bound and the northbound lanes. He was trapped in the cab. He testified before he swerved to his right he did not check for traffic on the right. He did not see the plaintiff's truck. He thinks the plaintiff's truck was in the process of overtaking his truck. He too did not indicate, hoot or put on emergency lights. Mahamba too claims that he had no opportunity to take any other **measures except** to apply brakes and swerve to the right . It is not clear whether first defendant's truck actually collided with the overturned truck or not. However, the presence of the overturned truck on the roadway could cause Mahamba to be distracted. He was in charge of a big truck. He might not have been certain of what was lying ahead . It makes sense for him to concentrate in bringing his truck under control. It might not have left him with anytime when he realised that despite his attempt he would not be able to avoid colliding head on with the overturned truck. In a split decision, he swerved to his right , which caused a collision with the plaintiff's truck. Further, it is clear to me that due to the layout of the roadway and the prevailing circumstances both Rudvidzo and Mahamba were not able on their approach at a safe distance to determine the exact position on the roadway of the 'overturned truck.

[16] Khumalo testified that he was the driver of the overturned truck. The truck was an articulated single trailer 12-metre truck. It was loaded with a container fastened with metal bolts to the trailer. He approached the area of the collision at a normal speed and with his headlights on. He was negotiating a gentle curve to

his left. He then noticed a white bag of about 1mx1m standing in the middle of his lane of travel. He was travelling on the left hand lane. The bag was standing a waist high on the road. There was traffic on the right lane. He applied brakes and tried to avoid colliding with the bag. The distance was too short. He could not bring the truck to a stop. He collided with the bag. The collision with the bag caused the truck to overturn. The truck landed on the left hand side of the road. It completely overturned b lying on its back with both the wheels of the trailer and the horse facing up but the trailer with the container on it remained attached to the truck. He crawled out of the cab farther away to avoid being injured in case the truck caught fire. A passing motorist called an ambulance for him. The ambulance people stretched him from where he had crawled to the ambulance parked on the road, and took him to hospital. He testified that he did not ask any person to warn traffic of the danger posed by the overturned truck. He could not take any measures to warn traffic of the danger because he was severely injured. He did not see any passing traffic passing the collision area before he was taken to hospital. The overturned truck had no lights on it after it overturned. The collision area was not lit, it was dark. The overturned truck did not obstruct traffic lanes.

[17] In my view, after the truck overturned Khumalo was not in a position to take particular notice of whether the overturned truck posed any danger to approaching traffic or not. He crawled out of the overturned truck and he remained in that spot until a stretcher took him to the ambulance. There was no light and the collision area was dark. Khumalo testified that if he were in a position to do so, he would have warned approaching traffic of the danger posed by the overturned truck. In my view, If the overturned truck was in a ditch away from the roadway there would have been no need to warn approaching traffic of the danger posed by the overturned truck. Both Ruzvidzo and Mahamba saw the overturned truck as constituting a danger to traffic moving on the roadway. Rudvidzo testified of an attempt made by an unknown person to warn the traffic of the danger ahead.

[18] There was no evidence of what distance was required to stop safely each of the trucks in view of the layout and surface of the roadway. There was also no

evidence how far a driver keeping a proper look out would have seen the obstruction caused by the overturned truck. The three drivers generally agree that, as it was dark at night and in a curve. What appeared to be an obstruction in the curve did not give an approaching truck driver enough time to stop the truck and avoid colliding with the obstruction. During the trial, the plaintiff forcefully contended that the overturned truck did not actually block the roadway. In my view, of significance is whether the position of the overturned truck from the view of approaching traffic it called for evasive action or not. It is clear from the undisputed evidence of Ruzvidzo and Mahamba that from their view it did call for evasive action.

[19] Photos consistently with the evidence of Ruzvidzo and Mahamba show that the plaintiff's truck was damaged mainly on the left hand side of the cab. The quotes for repairs of the damage show that first defendant's truck was damaged mainly on its right side. This is consistent with Mahamba swerving to the right. Mahamba's undisputed evidence is that he swerved to the right to avoid colliding head on with the overturned truck, which would have resulted in him being killed or severely injured. He claims that he had no time to look out for traffic on the right. If he had no other alternative, it is of no significance that he did not look out for traffic on the right before he swerved to the right. I reject Mahamba's evidence that the collision between his truck and the overturned truck caused the overturned truck to move away to the left of the roadway in any significant manner. The size of the overturned truck and the concentration of damage on Mahamba's truck disproves the theory. I am also of the view that there is no evidence that the overturned truck was moved before photo 35 was taken. The plaintiff too in the sketch plan tendered in terms of Rule 36(10) placed the overturned truck partly on the left hand lane of the roadway.

[20] Mahamba's evidence may seriously be criticised in a number of areas. Standing alone, it may justify an inference that Mahamba had an opportunity to see the overturned object at a reasonable distance to take a timely evasive action if he had kept a proper look out and driving at a reasonable speed. Therefore, in view of the prevailing circumstances, it may be contended, he misjudged unreasonably the position of the overturned object on the roadway,

that he exaggerated the effect of the collision with the overturned object on his truck. However, Mahamba's evidence may not be looked at in isolation. It finds support in the evidence of Ruzvidzo and to that of Khumalo to a certain extent. Their evidence is to the effect that in the prevailing circumstances an object at the area of the collision as the overturned truck appeared to be blocking the roadway from the moment it could be observed, it did not give a truck driver keeping a proper look out and driving at a reasonable speed to take timeous evasive action. In my view, the particularly poor depiction in photo 35 does not counter this evidence.

[21] Ruzvidzo claims that he was travelling on the left hand lane. Next to the overturned truck, he swerved to the right. Ruzvidzo's evidence that he was travelling on the left slow lane, in my view, is inconsistent with the evidence of Mahamba and it is not in accord with the probabilities. However, although his evidence does not make sense, it does not show any fault on his part in the collision between the plaintiff's truck and the first defendant's truck. I also find it significant that Ruzvidzo testified that the collision between the plaintiff's truck and the first defendant's truck took place at a point that is adjacent to or along the overturned truck as he was in the process of manoeuvring his truck from the left lane to the right lane. This indicates, in my view, that both Ruzvidzo and Mahamba although they were close to the overturned truck they were of the view that it blocked the left lane. In addition, they both independent of each other realised at that point that applying brakes was not going to help; they had to move to the right.

[22] It has been held that it is irrational to meticulously examine reactions of drivers in a placid atmosphere of the court in the light of after acquired knowledge . Likewise, reliance on estimated speed and estimated distances made by persons in moving vehicles involved in the collision at night during the occurrence of the event poses risk of stigmatising a person as guilty of negligence when in fact he did all that could be expected of him under the particular circumstances. See *Cooper v Amstrong* 1939 OPD 140 at 148; *South African Railways v Symington* 1935 AD 37 at 44-5; *Lambechts v African Guarantee & Indemnity Co Ltd* 1955 (3) SA 459 (A) at 465F.

[23] It is trite that the onus to prove on the balance of probabilities rests on the plaintiff throughout to prove negligence on the part of the defendant. Once plaintiff proves an occurrence-giving rise to an inference of negligence on the part of the defendant, the latter must produce evidence to the contrary; he must tell the remainder of the story or take risk that judgment be given against him. In other words, the defendant has a tactical onus of furnishing an explanation of his conduct which either excludes negligence on his part.

[24] The presence of an obstruction on the roadway, a bag in the case of Khumalo, the overturned truck in the case of Ruzvidzo and Mahamba, called for evasive measures on their part. In the case of Khumalo the evasive measure was to reduce speed, when that did not completely work out, to collide with the bag. The evasive measures resulted in the truck overturning and landing where it posed a danger to other road users. In the circumstances, it cannot be said that the evasive measures employed to deal with the situation were unreasonable. In the case of Mahamba, his evasive actions constituted trying to bring the truck to stop and when that did not succeed, to swerve to the right. One cannot say the evasive measures were unreasonable. Likewise, Ruzvidzo reduced speed and swerved to his right. In my view, it made sense to try to move away from the area of the overturned truck. It turned out that in the case of Mahamba although the evasive action succeeded in avoiding colliding with the overturned truck it resulted in a collision with the plaintiff's truck. It is of no significance that Mahamba did not look out for the plaintiff's truck since it is not shown that he had an opportunity to look out for such traffic and that if he had seen that traffic he would not have swerved to his right.

[25] The presence of the overturned truck in the freeway roadway at night when it was dark at a curve with no warning of its presence caused the collision between the plaintiff's truck and the first defendant's truck. Nevertheless, as explained above, there was no negligence on the part of Khumalo. He was caught in an emergency. It is common cause that the white sugar bag was deposited on the roadway by another truck which passed before Khumalo . Negligence is conduct, which falls short of a conduct of a reasonable person in the circumstances. The realities faced by the person at the relevant time are

taken into account in judging his conduct, an armchair approach is avoided. The judgement arrived at must be based on the totality of the evidence, speculation must be discounted. The party alleging negligence bears an onus of proof to be discharged on the balance of probabilities. See *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E. In my view , no negligence has been proved on the part of any of the three drivers. They were faced with certain situations, which were not of their creation. They dealt with those situations to the best of their abilities , which I am unable on the evidence to find that they were unreasonable .

[26] In the result, it is ordered as follows:

Case Number	:	5539/2014P
For the Plaintiff	:	G. Ender
Instructed by	:	Hooker Attorney c/o Leslie Smith & Company Pietermaritzburg
For the first and second defendants	:	B . Osborne
Instructed by	:	Botha & Olivier Pietermaritzburg
For the Third Party	:	E. Van Jaarsveld
Instructed by	:	Whalley & Van Der Lith Inc. Randburg

Heard on : 23-26 November 2020

Judgment delivered on : 18 February 2021