Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 4102/2008

In the matter between:

TONY'S TRUCK CENTRE (PTY) LIMITED **Plaintiff**

and

WAYNE MONRAY HENDRICKS **Respondent**

JUDGMENT DELIVERED: 6 DECEMBER 2010

BINNS-WARD, J:

[1] This case concerns a claim by the plaintiff for compensation in damages in respect of the loss allegedly suffered by it as a consequence of the collision of a vehicle driven by the defendant with one of its tow vehicles. The collision happened on the N2 national road between Bot River and Caledon in the early hours of the morning of 7 March 2006.

[2] Mr Prinsloo, a driver in the employ of the plaintiff, gave evidence that he had been summoned to assist at the scene of an incident on the night of 6 March 2006. Apparently what had happened was that a heavily loaded horse and trailer, which had been under tow, had broken loose from the tow vehicle while being towed up a rising gradient in the direction of the Caledon. The horse and trailer had run backwards down the slope and lodged themselves off the side of the road. Assistance was required from the specialised vehicle under Prinsloo's control to winch the stranded vehicle back into the road.

[3] Prinsloo stated that as he approached the scene of the aforementioned incident along the N2, driving towards Caledon from the direction of Bot River, he could see the place of the breakdown from some considerable distance because of the lights of the attending traffic enforcement officials. He said this was indeed what he customarily looked out for whenever he was summoned to an incident after dark. He testified that while he and his colleague were doing their work his attention was drawn to a fast approaching vehicle coming along the road from the direction of Bot River. This vehicle collided with his vehicle and then crossed the opposite side of the road and crashed into the barrier rails at the side of the road. He went across the road to ascertain whether anyone in the other vehicle had been injured.

[4] Prinsloo said that the only person in the other vehicle was the driver. He stated that when he reached the vehicle the driver was bent over the steering wheel with his head towards the windscreen. As he looked into the vehicle this person flopped backwards against the seat. Prinsloo said there was a strong

smell of alcohol detectable. The driver of the other vehicle was confused and incoherent. Prinsloo assisted him to get out of the vehicle and lie on the ground to await the arrival of an ambulance. The driver of the other vehicle was injured and in the course of assisting him Prinsloo's shirt was drenched with the driver's blood.

[5] Prinsloo stated that he was not qualified as an expert to say whether the driver of the other vehicle was intoxicated or not, but he gained the impression that this was the case, not only because of the smell of alcohol that pervaded the other driver's presence, but also because of the other driver's behaviour in cursing and carrying on inappropriately. Prinsloo conceded under cross-examination that such behaviour might also have been ascribable to the driver injuries.

[6] Prinsloo testified that the scene of the area in which the collision occurred had been well lit up. He referred in this regard to the lights on the attending traffic police vehicles and six bright spotlights mounted on his own vehicle for the purpose of illuminating the area in which he and his colleague, the late Charles Nel, had to work in order to winch the horse and trailer out of troubke and back into the road.

[7] Prinsloo was shown a sketch plan of the scene of the collision drawn by Cst. Brand of the Caledon police station. This sketch plan was put in by the plaintiff's counsel as Exh. A. He did not agree that the sketch plan entirely accurately depicted the scene, but he recognised the vehicles indicated thereon

as being A, the vehicle driven by the defendant, B, his own vehicle and C the vehicle that was subject of the salvage operation. He confirmed that his vehicle was to some extent blocking the side of the road intended for use by the vehicles travelling in an easterly direction towards Caledon. He said he could think of no good reason why the defendant should not have timeously seen the obstruction in the road. He stated that other vehicles using the road at the time had had no difficulty in slowing down, or stopping, so as to safely negotiate the hazard occasioned by the salvage operation. Prinsloo did, however, state that there were no cones or warning triangles in the road.

[8] The plaintiff also called a traffic policeman who had charge of the scene. This was Mr Mzukize Khonza. Mr Khonza stated that he had been on duty on the afternoon of 6 March 2006 wwhen, at about 17h00, he received a report of a broken down vehicle on the N2. He proceeded to the scene to manage traffic. He was assisted by a colleague. The tow truck summoned to the scene lost its tow connection to the vehicle and it was necessary to summon a specialised vehicle to salvage the situation. The specialised vehicle was the one brought to the spot by Mr Prinsloo in the early hours of the morning.

[9] Khonza stated that he was managing traffic approaching from the Bot River direction. Because the two traffic lanes for vehicles heading east towards Caledon were blocked, a stop-start system was set up. Traffic in both directions was therefore compelled, to the exclusion of traffic travelling in the opposite direction to use in turns the single lane intended for traffic travelling westward towards Bot River. Khonza stated that traffic control cones had been placed in

the roadway to guide traffic. He also described how his official vehicle had been parked in the road facing towards Bot River with its headlights and blue roof light flashing. In addition he described how the area was lit up by a spotlight on Prinsloo's vehicle.

[10] He described how two vehicles had approached from the direction of Bot River. One of them had stopped, but the other had accelerated past him, with a sound of changing gears and increased engine revolutions. This vehicle, being that of the defendant had then collided with the salvage vehicle and thereafter veered across the road into the barrier rail. Khonza stated that while he was directing traffic he had been wearing reflective clothing more particularly a reflective jacket and reflective gloves. He had held up his hand to signal stop, but the driver of the defendant's vehicle had disregarded this instruction.

[11] Mr Khonza described that he had run over to the defendant's vehicle and found the defendant, who was known to him, sprawled across the front passenger compartment, seated in the driver's seat but with his upper body leaning across to the front passenger side. He heard the defendant groaning and detected that he was injured, with blood on his face. He summoned the police and an ambulance.

[12] The next witness to testify was Cst. Brand. He had attended at the scene after the collision. He accompanied the defendant in an ambulance to hospital and arranged to have the defendant's blood drawn for testing for alcohol content. The witness stated that he detected the smell of alcohol on the defendant,

although he could not be sure whether this came from the defendant, or the contents of his vehicle. Brand stated that the defendant was very confused.

[13] Under cross-examination, Brand confirmed that there had been traffic cones in the road and that the traffic police vehicle's lights had been on. He testified that one had a clear visibility of the place where the collision occurred for some considerable distance before reaching it if proceeding in an easterly direction from Boontjieskraal which is on the Bot River side of where the collision occurred.

[14] The plaintiff's counsel sought to introduce a certificate in terms of s 212 of the Criminal Procedure Act in respect of the results of the defendant's blood alcohol level. I indicated that the certificate would be admitted only provisionally subject to counsel being able to persuade me on what basis it could formally be admitted in evidence. Mr Topliss a forensic analyst from the forensic chemistry laboratory of the national Department of Health was called to confirm the content of the certificate. An analysis of the defendant's blood showed the concentration of alochol therein to be .23 grams per 100 millilitres. That is an amount considerably in excess of the statutory limit of .05 grams per hundred millilitres and supportive of the correctness of the observation of Mr Prinsloo that the defendant was noticeably under the influence of alcohol at the time of the collision. The defendant did nto challenge the evidence of Mr Topliss.

[15] Mr Geoffrey Rimmer, an insurance assessor with about 25 years experience gave evidence as to the costs of repairing the plaintiff's vehicle. It

emerged from Mr Rimmer's evidence that the plaintiff was the insured, which gives rise as a matter of probability to the fact that the plaintiff was either the owner or the bearer of the risk of damage to the vehicle into which the defendant collided on the night in question. Rimmer testified that considerable effort had been invested in repairing the vehicle as economically as possible. The cost of repair, inclusive of VAT, was R238 290,30. Ms *Barthus*, who appeared for the plaintiff, conceded that it was probable that the plaintiff was VAT registered and that the VAT component of the repair costs would have been offset by the plaintiff. Thus the relevant amount of compensation is the VAT exclusive amount of R209 026,58.

[16] The defendant gave evidence. He said that he and three friends had shared two litre bottle of whisky before lunch on the day before the collision. They had stopped drinking at about 13h00 and he had thereafter slept for some time before setting off from Bot River to Caledon. He had travelled 17km without incident before the collision. As he approached the scene of the collision, he had noticed red, blue and yellow lights in the road ahead. He slowed down apprehending that there must be something happening. He also noticed a person in the road using a torch to direct traffic. Very shortly after he passed this person, who must have been Traffic Officer Khonza, he collided with something, which accepts must have been the plaintiff's vehicle. He thereafter remembers nothing until he came to in hospital. The defendant stated that there were no warning traffic cones or triangles or any other warning signs in the road before the point of collision.

[17] In my judgment it is apparent that the situation of danger constituted by the salvage operation being conducted in the roadway was obvious to motorists approaching from the direction of Bot River. It is apparent from the evidence of all the witnesses on the scene, including the defendant himself, that there were lights of various colours visible on the scene from some distance. Any approaching motorist would have been advised to slow down and approach with caution. The defendant stated that the lights had confused him. Accepting this to be so, especially having regard to the fact that he was probably affected by a high blood alcohol concentration, he should have slowed down further or even stopped. While one had no precise idea of the defendant's speed at the time of impact, it is safe to say having regard to the nature of the damage caused that he must have been proceeding at some speed at the time of the collision. Even if one accepts the defendant's own estimate that he was proceeding at between 40 and 60 kph, that was too fast in the circumstances, in which, by his own account he was confused and not able to discern the situation in the road ahead of him.

[18] The defendant did not succeed in discharging the onus of proving any degree of contributory negligence by the plaintiff or its servants. If there was any degree of negligence on the part of the traffic police by not putting out sufficient warnings, as suggested by the defendant, and as to which I make no finding, any such causal negligence would be irrelevant as between the plaintiff and the defendant.

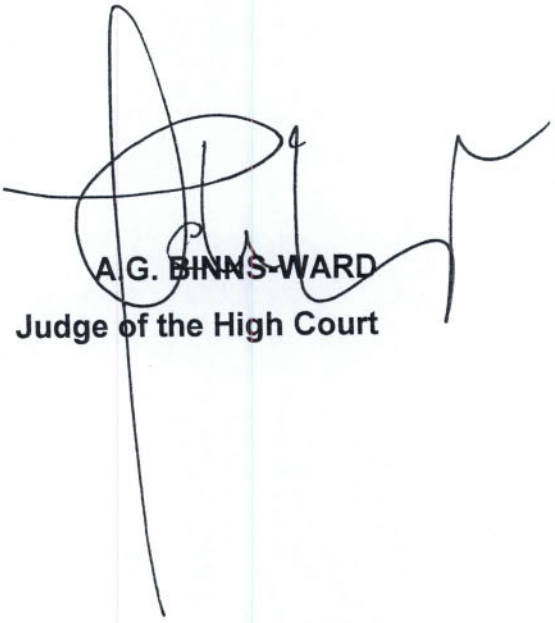
[19] The plaintiff is therefore entitled to compensation from the defendant in the sum of R209 026,58 and judgment will be entered accordingly.

[20] The trial in this matter took place over three days. The first day was wasted through the non-appearance of the defendant. If this was as a failure of the defendant's erstwhile attorney to inform him that the trial would commence on the date for which it was set down, the defendant must pursue any claim he may have for incurring the liability to pay the plaintiff's costs of that day from that source. The trial was not completed on the second day as a result of the absence of Mr Rimmer, who had not been subpoenaed and was reportedly not willing to come to court voluntarily. The plaintiff also apparently considered, misdirectedly, that it could, without the consent of the defendant, introduce the s 212 of the Criminal Procedure Act certificate by Mr Topliss merely by handing it in from the bar. In the circumstances I consider it reasonable that the defendant be rendered liable only for the costs of two of the three days given over to the trial.

[21] The following order will issue:

1. Judgment is granted in plaintiff's favour against the defendant in the sum of R209 026,58, together with interest thereon *a tempore morae* from date of judgment to date of payment.

2. The defendant is ordered to pay the plaintiff's costs of suit as between party and party, save that such costs shall include only two day's trial costs.



A.G. BINNS-WARD
Judge of the High Court