Republic of South Africa

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

Case No: 9964/2008

Before: The Hon Mr Justice Binns-Ward

In the matter between:

GRINDROD SA (PTY) LTD t/a AUTOCARRIERS Plaintiff

and

RENWOOD CARRIERS CC Defendant

JUDGMENT DELIVERED: 13 SEPTEMBER 2012

BINNS-WARD J:

[1] Just before daybreak on 6 September 2006 a collision between two large transport vehicles occurred on the N1 national road at a place about 27 kilometres west of Laingsburg. One of the vehicles involved was a Mercedes Benz motor carrier, owned by the plaintiff; the other, which was being driven by an employee of the defendant, was a MAN truck. The only persons known to have been present at the time were the drivers of the respective vehicles. In this action the plaintiff sues the defendant for compensation in damages for the patrimonial loss it alleges that it

sustained in consequence of the damage occasioned to its vehicle and its cargo in the collision.

[2] At the commencement of the trial, in accordance with an agreement to that effect reached between the parties, a ruling was made in terms of uniform rule 33(4) directing that the issue of the defendant's alleged liability be tried and determined separately from and before the other issues in the action. It was also noted at the commencement that the third party proceedings by the defendant against two other parties would not be proceeded with.

[3] The plaintiff alleges that the defendant is liable because the sole cause of the collision was the negligence of the defendant's employee, who is alleged (in para. 6 of the plaintiff's particulars of claim) (i) to have driven on the incorrect side of the road; (ii) to have failed to keep a proper look out; (iii) to have failed to apply his brakes timeously, adequately or at all; (iv) to have failed to avoid the collision when by the exercise of reasonable care, he could and should have done so and (v) to have driven too fast in the circumstances. The defendant denied the allegations of negligence against the driver of its vehicle. It did not deny the allegation that its driver had driven on the incorrect side of the road. But being on the incorrect side of the road does not necessarily equate to negligence, which no doubt explains why it is more customary for a plaintiff relying on such a fact to plead that the other driver had driven on the incorrect side of the road 'when it was dangerous and unreasonable to have done so', or words to that effect. The plaintiff's relevant allegation falls to be understood as to imply the customary amplification.

[4] Tragically, the driver of the MAN truck died in the incident. In the result there is only one person left alive to give a direct account of the event; he is Mr. Henry Newman, who was the driver of the plaintiff's vehicle. Mr Newman testified at the trial. The only other witnesses were two motor vehicle collision reconstruction experts. The first of these, Mr. Stanley Bezuidenhout, was called by the plaintiff, and the other, Mr. Renier Balt, gave evidence for the defendant.

[5] Certain salient facts were not in dispute. Thus it was not in contention that the plaintiff's vehicle was being driven on the northbound route in a roughly easterly direction towards Laingsburg, and the other vehicle on the southbound route in the opposite direction. The roadway at the place of the collision consists of just two lanes, one carriageway thus being provided for each direction of traffic. These lanes are demarcated by a broken white line on the tarmac surface roughly in the centre of the road. There are emergency lanes on both sides of the road. These are divided by from the adjacent carriageway lanes in the usual manner by unbroken yellow lines.

[6] There is a very gradual curvature in the road in the area in which the collision occurred. The road also inclines gradually for traffic heading towards Laingsburg, and correspondingly slopes downwards for traffic coming from the opposite direction. These characteristics, as indeed confirmed by the observation of Mr. Bezuidenhout, who attended at the scene later on the day of the collision, did not impede the vision of a driver approaching the area of impact of the presence of oncoming traffic. In other words, from the area of impact there was an unimpeded view along the road in both directions. It is thus no surprise that the centre line in the area of impact is a

broken line permitting of overtaking in both directions, and not a solid line as would be expected were visibility of approaching traffic ahead restricted.

[7] The 'activity timetable' monitoring device fitted to the plaintiff's vehicle indicated that the collision happened at 6:10 a.m. As the collision occurred when it was still dark enough to require headlights, each of the drivers should have been able to see the approaching lights of the other's vehicle for some time before they reached the point of impact. The plaintiff's counsel sought to argue at the conclusion of the trial that the evidence did not establish what view Mr Newman would have had of approaching traffic as he approached the area of impact. The issue was material in the context of the claim by the driver of the plaintiff's vehicle not to have been conscious of approaching lights until momentarily before the impact. If the plaintiff had sought to explain Newman's failure to see the oncoming vehicle until momentarily before the impact, an aspect of the evidence to be described and discussed presently, I would have expected it to have adduced evidence establishing that the character of the roadway impeded his ability to see approaching traffic. As it was the submission by the plaintiff's counsel went against the weight of the evidence, at least to the extent that the point was material. It might not have been established exactly how far from before the area of impact Mr Henry's forward vision was unimpeded, but all the indications are that he should have been able to see the approaching vehicle for some seconds at least.

[8] It is also not disputed that the collision occurred on the northbound side of the road, that is on what would have been the 'correct' side of the road at the time for the vehicle being driven by Mr. Newman. Various photographs taken at the scene by a

traffic officer who had attended there while the vehicles were still in the positions in which they had come to rest after the collision and during the clear-up operation, as well as photographs taken by Mr. Bezuidenhout, who arrived there during the afternoon, were put in evidence. From certain of these photographs it could be established that a set of skid marks was evident starting from a point approximately 50m[1] east of the area of impact and tracking from there to the area of impact. A scale drawing prepared by Mr. Bezuidenhout depicts these skid marks up to the place where the MAN truck and its two combination trailers came to rest after the collision.

[9] It is not disputed that these skid marks had been caused by the effect of the driver of the MAN truck having braked harshly just before and up to the moment of impact. It is evident from the photographs and the drawing that the skid marks commenced well inside the southbound (or westerly) lane of the road, in other words from within the correct side of the road for the driver of the MAN truck.[2] The skid marks track in a straight line on a diagonal course from the southbound lane across the northbound lane to the area of impact. It is common cause between the two experts that the driver of the MAN truck must have applied his brakes before the vehicle reached the place on the road at which the skid marks commenced. They explained that there is a momentary interval before the application of the brakes and the engagement of their effect. Obviously it would only be once the resultant traction

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[1] Mr Bezuidenhout testified that the skid marks were approximately 50m in length. They are measured at 42,2m on the scale drawing incorporated in the report which was included in a bundle of documents included in the court file and referred to during the course of his evidence. It is not clear from the drawing whether the indicated distance was measured to the back or to the front of the MAN truck and trailer combination (indicated on the drawing as 'Vehicle B').

[2] As to the weight and importance to be attached to such evidence, compare the remarks of Schreiner JA in *Coetzee v Van Rensburg* 1954 (4) SA 616 (A) at 618D: '*Bearing in mind how difficult it is for even honest witnesses to estimate speeds, distances and relative positions with reasonable accuracy, courts rightly attach great importance to track-marks and similar substantially unchallengeable evidence.*'

between the tyres and the road surface built up sufficient friction that the skid marks could be caused. Indeed, as I understood the experts, the tyre marks left on the tarmac would have been the effect of the brakes on the MAN truck having locked the wheels.

[10] Mr. Bezuidenhout was of the opinion that it had been the effect of the braking action that caused the MAN truck to veer in the manner described from its lane into the oncoming lane. Mr. Balt, on the other hand, was of the opinion that the course taken by the MAN truck was the result of the driver having turned it to its right and braked. The disagreement on this point does not seem to matter. On either approach it is evident that at that the time the driver of the MAN truck commenced to brake harshly, as if in an emergency, his vehicle was in the southbound (i.e. 'correct') lane, and that the braking action must have occurred when the vehicle was further back towards Laingsburg than where the skid marks commenced on the road surface.

[11] Both experts excluded excessive speed as a factor that could be implicated in the causation of the collision. The monitoring device on the plaintiff's vehicle showed that it had reached a maximum speed of 90 kph during the 57,7 km journey it had undertaken that morning up to the time of the collision, with an average speed over that distance of 79kph.

[12] There was some dispute between the two experts as to the precise point on the road where the vehicles came into collision. Nothing turns on this. It is common cause that it must have been somewhere to the northern side of the lane for traffic travelling towards Laingsburg. The difference of opinion pertained to a matter of a few metres in a linear direction along the yellow line, and not so much as to the fact that the point of collision must have been close to the yellow line. It was common

cause that the nature of the collision involved a degree of initial angular contact between the horses or cabs of the two vehicles and that the severe jack-knifing of the horse of the MAN truck evident in some of photographs had been caused as a consequence of the collision and was not the result of braking. The resultant displacement damage to the horse of the MAN truck would appear from the photographic evidence to have been more severe than to the horse of the plaintiff's vehicle.

[13] On the basis of a tyre mark running across the southern lane of the road directly opposite the position in which the rear trailer attached to the plaintiff's vehicle had come to rest after the collision, Mr Balt opined that the driver of the plaintiff's vehicle had been travelling on the incorrect side of the road before the impact and had been turning quite sharply back towards its correct side of the road. Mr Bezuidenhout took issue with that opinion. It is common cause that by the time the photographs showing the tyre mark in question were taken the scene had become contaminated as a consequence of the cleaning up operations. In the circumstances I am unable to find that Mr Balt's opinion in this respect is well-founded. It is nevertheless clear that the plaintiff's vehicle had moved to its left so that it was partly or nearly entirely off the trafficway of its correct lane at the moment of impact. When it might have commenced the leftward turn necessary to have brought it to that position is not evident.

[14] In the result the evidence of the expert witnesses was of little assistance beyond confirming on which side of the road the collision occurred and excluding

excessive speed as having played a causative role in the collision. The plaintiff's counsel in effect conceded as much in argument.

[15] The evidence of the driver of the plaintiff's vehicle also shed little light on how the collision occurred. He testified that as he drove along in his correct lane he suddenly became aware of lights in front of him. This happened so momentarily before the collision that he had been unable to react in any manner at all before the impact occurred. The impression given by Mr Henry's evidence was that the interval between his perception of the approaching lights and his apprehension of the occurrence of the collision from the sound and feel of the impact was no more than an instant. He lost consciousness upon impact and came to some time later to find himself trapped in the cab of his truck. Henry was uncertain and inconsistent as to where in relation to the vehicle driven by him the approaching lights were when he saw them. Some of his answers suggested that he saw the lights approaching into his lane, while at other times during his evidence he gave the court to understand that the approaching lights were already in his lane when he saw them. The only matter on which he was consistent in this respect was that he became conscious of them only momentarily before impact.

[16] Upon a consideration of the evidence the only ground of alleged causal negligence that was cogently arguable at the end of the trial was that the driver of the defendant's vehicle had been driving on his incorrect side of the road at the time of the collision. The plaintiff's counsel argued that once it had been proven that the collision had occurred on the side of the road on which the plaintiff's vehicle had been entitled to drive, it behoved the defendant to establish that the driver of the MAN

truck had not been negligent. The plaintiff's counsel found support for his argument in the following statement in Isaacs and Leveson *The Law of Collisions in South Africa*, Seventh Edition (by HB Klopper) at §9.4.1:

> If there is irrefutable proof of a collision on the incorrect side of the road, such collision constitutes *prima facie* negligence on the part of the driver who was found to be on his incorrect side of the road at the time of the collision. Once the plaintiff has established that the collision did in fact occur on his side of the road, the defendant has to explain his presence on the defendant's incorrect side of the road. If the explanation is insufficient to dispel the inference of negligence arising from his presence on the incorrect side of the road, the defendant will be held negligent.

Counsel submitted that the judgments in cases like *Marais v Caledonian Insurance Co Ltd* 1967 (4) SA 199 (E) and *Ntsala v Mutual & Federal Insurance Co Ltd* 1996 (2) SA SA 184 (T) supported the statement quoted from Isaacs and Leveson.

[17] With respect, I consider that the statement relied on by counsel puts the matter too bluntly; it comes down in the result to an incorrectly articulated application of *res ipsa loquitur*. The statement cannot apply if at the end of the plaintiff's case there is evidence which might be incompatible with an inference that the defendant was probably on the incorrect side of the road because he had driven negligently – take the pool of oil on the road surface example postulated in *Stacey v Kent* 1995 (3) SA 344 (E) at 358B-C, for example. The correct approach is to recognise that the onus of proving causal negligence burdens the plaintiff. It is not a shifting onus. Thus, if upon a consideration of all the evidence the court is not satisfied that the alleged causal negligence has been established on a balance of probabilities, the onus has not been discharged and the claim cannot succeed. The defendant bears no onus to prove an absence of negligence on its part. The fact that the defendant's vehicle was on its incorrect side of the road when the collision occurred does not in itself establish

negligence on the part of the defendant. It is a fact from which an inference of negligence may be drawn. Whether the inference justifies a conclusion that negligence on the part of the defendant has been established depends on the contextual significance of the fact upon a consideration of the evidence as a whole; cf *Govan v Skidmore* 1952 (1) SA 732 (N) at 733H-734G. A conclusion drawn on the basis of inference in civil proceedings is supportable if it is that which is most consistent with the probabilities if regard is had to all the proven facts; cf. e.g. *Macleod v Rens* 1997 (3) SA 1039 (E), at 1049A-B.

[18] Thus it is readily conceivable that there may be cases in which, even without an explanation from the defendant, the facts apparent on the evidence, whatever its provenance, detract from the sustainability of a finding that the mere presence of a motor vehicle on the incorrect side of the road at the time of its collision with a vehicle on the correct side of the road is sufficient to establish negligence on the part of the driver of the first mentioned vehicle as the most probable cause of the occurrence. In my respectful judgment the position was accurately expressed by Kroon J in *Stacey v Kent* supra, at 352, to the effect that the mere fact of a particular occurrence due to a thing or means within the exclusive control of the defendant in circumstances which warrant an inference of negligence does not give rise to a presumption of negligence. The enquiry is whether the allegations of causal negligence made by the plaintiff have been established on the balance of probabilities upon a consideration of all the evidence. Even in a case in which the expression *res ipsa loquitur* in its true sense is not applicable, the evidence at the end of the plaintiff's case might be such as to give rise to what King J described as a 'tactical onus' on the defendant to furnish an explanation of his conduct (see *Goode v SA*

Mutual Fire & General Insurance Co Ltd 1979 (4) SA 301 (W) at 306C). But that position does not obtain in my view when at the end of the plaintiff's case the proven facts allow for more than one inference as to the cause of the collision to be drawn, none of them more probable than the others, and the defendant's driver is deceased and not available to be called. In any event the court does not in any case adopt the piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a prima facie case; and then (b), deciding whether this has been rebutted by the defendant's explanation; see *Sardi and Others v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A), at 780H and *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 573H-574H and 575 *fin* – 576F.

[19] Mr Newman's evidence concerning the occurrence of the collision was singularly uninformative. In essence it came down to this: He was driving in his lane when he became aware of lights in front of him momentarily before the impact. He did not have time to take any measures to avoid the collision. He was not conscious of steering his vehicle to the left, or braking before the impact. He said nothing to suggest that he had heard any sounds such as the screeching effects of the approaching vehicle's locked brakes, or any hooting. The area of impact, which was towards the left hand side of the northern lane, and the position in which the plaintiff's vehicle came to rest suggest that Newman must have been turning towards his left at the time of impact. Where he commenced that turn and from which place on the trafficable surface of the road it is not possible to say. Having regard to the length of the skid marks left by the MAN truck, and the fact that both expert witnesses expressed the opinion that the MAN truck had been travelling at a lower speed than the plaintiff's vehicle at the time of impact (there were no physical signs on the

roadway or verges consistent with any braking effects of the plaintiff's vehicle), and accepting that the common view of the experts is also that the MAN truck's brakes would have taken effect some moments before the brakes locked, and furthermore that the taking effect of the braking system would have been preceded by a period of time to allow for driver perception and reaction time, and for the interval between the application of the brakes by the MAN truck driver and the consequent mechanisms that would put the brakes into effect, it seems to me that a period of at least four or five seconds must have intervened between the time that the driver of the MAN truck must have seen something ahead of him in the direction from which Newman was coming and the occurrence of the impact.

[20] Newman's professed inability in the circumstances to cast more light on the occurrence is puzzling to say the least. I would have expected him to have been able to have a clear view of the MAN truck moving from its lane into his, and to have been conscious that it was braking heavily while it did so. The probabilities are that the driver of the MAN must have been confronted with the sudden prospect of a collision with something in front of him in his lane. Why else would he have applied brakes harshly while travelling in his lane? And yet Newman, who - approaching in the opposite direction - should have been able to see whatever it was that was confronting the MAN driver, saw nothing; and not even the MAN truck itself until the very last second. At the very least, these factors detract quite materially from the reliability of Newman's evidence. Indeed I am constrained to hold that the quality of Newman's evidence was unsatisfactory. I do not accept that its unsatisfactory quality was in any way attributable, as the plaintiff's counsel sought to argue, to the witness's

background or limited education; it is more plausibly attributable to a degree of inattention or a withholding of full disclosure.

[21] The evidence does not give rise to a *res ipsa loquitur* situation in my assessment. In *Groenewald v Conradie, Groenewald en Andere v Auto Protection Insurance Co.* Ltd 1965 (1) SA 184 (A) it was emphasised that the use of the expression *res ipsa loquitur* is strictly speaking appropriate only when it is necessary in deciding a case to look only at the particular occurrence without the assistance of any other explanatory evidence. The expression properly applies only if the occurrence by itself, and considered in its own light, appears to tell the whole story; otherwise the limited meaning of the expression would be perverted. One might put it thus: *res ipsa loquitur dummodo una solaque sit.*[3] Acknowledging this much confirms the correctness of the observation by Jones J in *Berriman v Road Accident Fund* (unreported), repeated in *Road Accident Fund v Mehlomakhulu* 2009 (5) SA 390 (E), at 396C, that 'For the *res ipsa loquitur* maxim to apply the only known facts relating to negligence must be the occurrence of the collision…'.

[22] In the current case there is more evidential material before court than the mere occurrence of the collision on Mr Henry's correct side of the road. The evidence also establishes, objectively, that the driver of the MAN truck had been travelling in his own lane until seconds before the collision, and that he was still in his lane when he applied brakes harshly as if in an emergency situation. As mentioned, it is probable

[3] *Groenewald* at 187F, which I would translate loosely as '*an occurrence speaks for itself when it, and it alone, is the only evidence*' . In *Groenewald*, a matter concerning a collision on the defendant's incorrect side of the road, the Appellate Division found that the expression *res ipsa loquitur* did not apply on a consideration of all the evidence. The Appellate Division found that the trial court should have found that causal negligence of the defendant driver had been established on a proper evaluation of the effect of the evidence of the driver of the plaintiff's vehicle. The driver of the defendant's vehicle had been unable to describe the occurrence of the collision because of the effect of amnesia occasioned by the injuries he had sustained in the collision.

that something must have happened or been perceived by the driver of the MAN truck to induce him to act as in an emergency. It is sufficient that I am able to find this as a matter of probability, reasoning inferentially from the fact and character of the established braking action; it is not necessary that I must know exactly the character of the precipitating factor. In the context of the indication that there probably was a precipitating factor I am unable to find on the evidence that the driver of the MAN truck probably acted unreasonably. Whatever the position might be as to skidding (cf. *Stacey v Kent* supra, at 358-362) - as to which I express no view, emergency breaking while driving in his own lane does not afford *prima facie* evidence of negligence on the part of the driver applying brakes.

[23] Had the driver survived the collision, I would have expected him to give evidence, and if the defendant had failed to call him it would have run the risk of an adverse inference being drawn; cf. *Galante v Dickinson* 1950 (2) SA 460 (A). However, the court is unable to draw an adverse inference against the defendant in the context of its inability to call the driver by reason of his having been killed in the collision; cf. e.g. *Elgin Fireclays Limited v Webb* 1947 (4) SA 744 (A), at 750, and *Leeuw v First National Bank Ltd* 2010 (3) SA 410 (SCA), at para. 20. (I should perhaps add that I do not think that anything falls to be made in the circumstances of the failure of the defendant to have expressly pleaded sudden emergency or inevitable accident or any such similar defence. In this regard I agree, with respect, with the remarks made by Kroon J in the analogous circumstances of *Stacey v Kent*.[4] Indeed

[4] Supra, at351J-352B. The defendant in *Stacey* had survived the collision, but, due to retrograde amnesia as a consequence of the injuries sustained in it, was unable to testify as to what had happened in its occurrence.

the plaintiff's counsel did not even raise the issue in argument, advisedly, in my view.)

[24] The unreliability and, on any approach, uninformative character of Newman's evidence means that upon a consideration of all the evidence the court does not know enough to be able to find on a balance of probabilities that the driver of the MAN truck was causally at fault in the collision. The nature of the actions of the MAN truck driver are equally consistent with his having acted appropriately, or merely in error of judgment in a sudden emergency. In the peculiar circumstances of the current case the plaintiff cannot succeed merely because the collision occurred on its side of the road, and despite the unsatisfactory quality of the evidence of the driver of the plaintiff's vehicle.

[25] In the result the plaintiff has failed to discharge the onus that burdened it to prove causal negligence in the respects alleged in its particulars of claim. The defendant is entitled to be absolved from the instance. On that basis the action is dismissed with costs, including the qualifying costs of Mr Balt.

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