Republic of South Africa

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

**Case Number 7489/2007**

In the matter of:

**DJ BOSMAN TRANSPORT (PTY) LTD** Plaintiff

Versus

**BLOMDAL VERVOER (PTY) LTD** Defendant

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**Judgment: 28 February 2012**

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**MIA AJ:**

[1] On the evening of 2 December 2006, a collision occurred on the N12, outside of Kimberley, involving two truck and trailer combinations. The plaintiff's vehicle with the registration number RSY 228 GP, was driven by Mr. W.O. Mocke (Mocke) and the defendant's vehicle with registration number TGH 347 GP, was driven by Mr. Johannes Smile (Smile). The vehicles were

driven by the respective drivers acting within the course and scope of their employment. The plaintiff's driver died as a result of the collision with the defendant's truck. Both vehicles sustained damage as a result of the collision. The plaintiff claimed damages for the loss it suffered which it averred was due to the defendant's driver's negligence. The defendant counterclaimed for damages it sustained as a result of the collision.

[2] The parties agreed that the quantum and merits be separated. Accordingly the matter proceeded on the merits. The issue of quantum was postponed *sine die*. The only issue to be determined was the cause of the collision and whether there was contributory negligence. The plaintiff premised it's case on the principle *res ipsa loquitur* submitting that the plaintiff's driver was travelling in a southerly direction on the N12 when the defendant's driver turned south onto the N12 when it was not safe to do so. The plaintiff's vehicle collided with the rear left side of the defendant's truck.

[3] The plaintiff alleged in paragraph 6 of it's particulars of claim that the defendant's driver was negligent in that:

a) He entered the lane in which the Plaintiff's vehicle was travelling without due regard for other road users thereof, and particularly without regard for the Plaintiff's vehicle;

b) He failed to avoid the collision when by the exercise of reasonable care he could and should have done so.

[4] The defendant denies that its driver was negligent and in paragraph 6.3 of it's plea alleges that:

a) In the event that it is found that the defendant's employee was

negligent that such negligence was not the cause of the collision.

b) in the event that it is found that the defendant's employee was negligent and contributed to the collision, the defendant alleged that the plaintiffs employee was negligent in that:

i) he failed to keep a proper lookout; and or

ii) he failed to apply his brakes timeously or at all; and or

iii) he drove his vehicle at an excessive speed under the prevailing circumstances; and or

iv) he failed to avoid the collision when by reasonable care he could have done so.

[5] It is useful to describe the layout of the scene. The collision occurred on a straight stretch of the N12. The N12 is a national road with a single carriageway that runs in a southerly and another that runs in a northerly direction. The road is bordered by an emergency lane on either side of each carriageway. Colour photographs were handed in and it was agreed that the pictures correctly depicted the scene of the collision. The photographs indicated that there was a clear view down the N12 travelling from north to south. Smile confirmed this in evidence during cross examination as well. In response to a question in relation to photograph three on page 10 he said " *Daar is geen verspering nie*". There was a diesel depot situated on the right hand side of the N12 when travelling from north to south. From the exit of the diesel depot the road runs straight on either side for more than 1km.

[6] The photographs and oral evidence indicated that there were no lights along the N12 and the diesel depot was partially lit. The speed limit on the N12 is 120 km per hour generally. However the speed limit is 80 km per hour for heavy duty truck and trailer vehicles such as those involved in the

collision. The road markings and traffic signs appeared to be clear from photographs of the scene. There was no indication that the weather affected the vision of either driver. The witnesses also testified that the road surface was dry at the time of the collision. Having regard to the above description, it follows that a driver keeping a proper lookout travelling north to south on the N12 would see vehicles exiting the diesel depot and entering the N12, as there were no obstructions present. Likewise a driver keeping a proper lookout, leaving the diesel depot to enter the N12 would see any vehicles coming along the N12 in either direction.

[7] In the context of the above scene it must be determined whether the defendant's driver was negligent and caused the collision. The plaintiff's driver died in the collision and it was not possible to ascertain what he observed on the road on the night the collision occurred. The plaintiff called three witnesses. Adjutant officer Benjamin Daniel Coetzer testified that he drew the sketch of the collision which was a rough sketch. He did have access to the photographs when he drew the sketch. He also testified that he was not tasked with the reconstruction of the collision and could not give evidence on how the collision occurred. Adjutant officer Andre Mark Mcanda testified that he was called out at 23h00 to take photographs of the scene of the collision. He arrived on the scene 10 minutes after the call. He ventured an opinion about the point of impact but changed his initial view under cross examination. No reliance could be placed on his view with regard to the point of impact as he had not been qualified as an expert by the plaintiff and it was clear that he had not had sufficient opportunity to consider the matter properly in relation to reconstruction of the collision. His evidence only holds value with regard to the photographs he took on the night in question and what can be observed therein. The evidence of officer Wilhelm Franciscus Germishuys

did not take the plaintiff's case further other than that a further statement was taken from Smile. In view of the uncertainty regarding his evidence and the commissioning of the statement there is not much probative value therein.

[8] The plaintiff called Professor Thomas Prins Dreyer, a retired lecturer in Applied Mathematics and an author in the field of Applied Mathematics. Professor Dreyer dealt with reconstructions for more than thirty years and has testified in the High Court, the Magistrates Court and in Arbitration Forum matters. Professor Dreyer visited the scene where the collision occurred prior to the matter commencing and made various observations after spending half an hour at the scene. He testified that he noted that all the trucks without exception exited the depot and entered the N12 at an angle of approximately 45 degree to the right. This he testified was borne out by the marks made by the trucks on the gravel road. He further observed that vehicles entering the N12 at this angle of 45 degrees, would not have a clear view of vehicles coming down the N12 from the left travelling in a southerly direction. He concluded that if the defendant's driver entered the N12 at a 45 degree angle then he would not have observed the plaintiff's driver coming along the N12. It must be borne in mind that the time Professor Dreyer made the observation was different to the time and lighting on the night of the collision.

[9] The above observation must be considered along with the joint minute submitted after Professor Dreyer testified. At the Court's instance, Professor Dreyer and Mr. Lionel Gordon, the defendant's expert, were directed to compare the expert evidence of each party and to consider the points of agreement. The following is an extract from the joint minute signed by Professor Dreyer and Mr. Lionel Gordon, marked exhibit "D":

"1. *"The experts agree that the Point of Impact (POI) lies somewhere between the road centreline and the eastern emergency lane yellow line. Dreyer is of the opinion that the Blomdal truck was about 30 meters into the N12 when it was struck, due to the deposit of coal at the start of the solid centre line to the South thereof, whereas Gordon is of the opinion that the POI was closer to the emergency lane and further south down the road due to the type of damage to the rear of the Blomdal trailer, resulting from this trailer having straightened in the southerly direction.*

2. *It is agreed that it is difficult to determine exactly the POI, and thus the orientation of the vehicles at this point, as the vehicles would have moved after impact, and the approach speed of either vehicle[s] is not known precisely, and cannot be determined as the distance between the two vehicles at rest is not known.*

3. *It is agreed that given enough time and distance, and if the Blomdal truck was visible by the Bosman truck driver, he should have been able to avoid the accident had he kept a proper look out and braked early enough. It is agreed that the faster the Blomdal truck had moved into the intersection the less time the Bosman driver would have had to react and stop.*

4. *It is agreed that it is uncertain which vehicle had caused the skid marks as described by the Police reports and these are not shown on the photographs.*

5. *It is agreed that based on the observed damage to the vehicles, and the rest position of the Bosman vehicle (horse and trailer), that the Bosman horse hit the Blomdal rear trailer on its left rear end at a slight angle anti-clockwise from due south ( direction south-east)."*

[10] The defendant called the following experts Mr. Lionel Gordon, Mr. Manfred Klose and Mr. Daniel Burger. Mr Gordon's evidence is covered in the joint minute. Mr Klose's evidence covered an explanation of vehicle monitoring devices to which the plaintiff tended no contrary expert evidence.

The evidence of Mr Burger regarding the Google map was not very helpful due to the margin of error the evidence indicated was applicable to Google maps. The defendant also called the driver of the Blomdal vehicle, Smile, who testified that he had been driving for seven years when the collision occurred. On the night of the collision, he stopped at the Diesel Stop to fill up on diesel and he received a free cool drink. He then proceeded to the exit and observed a vehicle (bakkie) pass by. He stopped at the exit and then proceeded slightly to the left into the exit and then turned right into the N12. He testified that he always entered a road by first turning slightly to the left which enabled him to see oncoming traffic approaching from the left and then he turned right into the road. He adopted this method of entry into a road since he commenced driving, seven years before the date of the collision.

[11] Smile testified that he entered the N12 in the same manner on the night of the collision. After he had executed the turn to the right he drank his cool drink. Whilst drinking his cool drink he felt a knock from behind and applied his brakes. Thus the vehicle must have been moving when he applied his brakes. Upon alighting he discovered that the Bosman vehicle had collided with the back of his truck and trailer. Smile's evidence is with regard to his conduct on the night in question. He was unable to indicate how the Bosman vehicle approached except what he observed after the collision.

[12] In *Abdo NO v Senator Insurance Co Ltd and another* 1983 (4) SA 721 (EC) at 725F–726A reference is made to the unreported decision of *Putzier v Union and South West Africa Insurance Co Ltd* 1973 ECD (unreported), where the Court observed that:

> "It seems to me however that unless the opinion of the experts is either

uncontroverted or incontrovertible, one should look first at the evidence of the eye witnesses, if any. If such eye witnesses are unacceptable then naturally the Court is bound to decide, if possible, which of the opinions of the various experts is preferable and to found its judgment on such opinion.

[13] The full bench in the Eastern Cape in *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (EC) at 436H–437B adopted the following approach:

> "Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training..... An expert's view of what might probably have occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eyewitness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the Court to his view (cf.*Mapota v Santam Versekeringsmaatskappy Bpk* 1977 (4) SA 515 (A) at 527–8 and *Madumise v Motorvoertuigassuransiefonds* 1983 (4) SA 207 (O) at 209)."

[14] In light of the principles crystallised in the aforementioned decisions, direct eyewitness evidence is preferable to expert evidence . As the driver of the Bosman vehicle died in the collision, it is not possible to ascertain what he saw on the night of the collision and what action he took to avoid the collision. The defendant's driver testified about his conduct generally and his conduct on the night of the collision. His evidence was that he did not see the Bosman vehicle approach when he entered the N12 and he was parked in the emergency lane when he head a noise, a thud. He got out to investigate and discovered that the Bosman vehicle collided with the Blomdal vehicle. He was

seated in the cabin in front of the vehicle, drinking his cool drink and did not observe the collision. Although he was present his evidence did not explain what happened the moment the collision occurred. Consequently there is no direct evidence with regard to the point of impact, hence the joint minute of the experts must thus inform the decision with regard to the point of impact. Professor Dreyer's observation about how other truck drivers entered the N12 cannot be preferred above Smile's explanation of the method he used to enter the N12. I accept Smile's evidence regarding the manner he entered the N12. He had a clear view of traffic approaching from his left. He also conceded during cross examination, that the view was unobstructed.

[15] The duties of drivers on public roads is recorded in case law and legislation. There is a common law duty on drivers of vehicles to act reasonably in all circumstances. It is also required of a driver that he will have regard for other road users generally but there are preferred actions in prescribed circumstances. In relation to the present matter it is a basic rule to drive with care when driving at night.( *Kruger v Santam Versekeringsmaatskappy* 1983(4) SA 445 (O)). Both drivers involved in the collision were required to keep a proper lookout at all times and to avoid colliding with other vehicles. This duty to keep a proper lookout is described in *Rondalia Assurance Corporation of SA Ltd v Page and others* 1975 (1) SA 708 (A) as meaning more than looking straight ahead. It includes an awareness of what is happening in one's immediate vicinity. The driver should observe the whole road from side to side and the pavements on the side of the road as well. There is an established duty that the driver travelling on a main thoroughfare should have regard to traffic coming from a side street or intersection. He is however entitled to expect that the driver entering the main road will proceed with caution and enter the road only when it is safe to do so and not act recklessly. (*Martindale v Wolfaardt* 1940 AD 235).

[16] Smile was entering the main road and there was an obligation to proceed with great caution whilst keeping a lookout and to proceed at a pace that he could stop within a few feet if a vehicle, hidden by some obstruction appeared unexpectedly. (*Marine & Trade Insurance Co Ltd v Biyasi 1981 (1) SA 918 (A)*; *Grobbelaar v Federated Employers Insurance Co Ltd 1974 (2)SA 225 (A); Rondalia Assurance Corporation of SA Ltd v Page 1975 (1)SA 708(A).* From Smile's evidence regarding the manner he entered the N12 he had a clear view and ought to have seen oncoming vehicles. Indeed he mentions the bakkie that passed before he entered the N12.

[17] The evidence must be viewed in totality to form a picture of how the collision occurred. The evidence of Smile, was that he did not see the collision happening and was unable shed light on the point of impact. Thus the evidence of the experts must inform the determination of the point of impact. In this regard the joint minute indicates the experts views. The experts agreed that the point of impact was somewhere between the road centre line and the Eastern emergency lane. There is a difference of opinion as to whether it was closer to the road centre line or closer to the emergency lane. Professor Dreyer conceded during cross examination that the coal lying at the centre solid line could have landed there as a result of displacement by the force upon impact when the Bosman vehicle collided with the Blomdal vehicle. In light of this concession, Mr Gordon's opinion that, the point of impact was closer to the emergency lane as the Blomdal vehicle had straightened out in a southerly direction and the damage was sustained on the rear left side of the Blomdal vehicle, is tenable and more probable. It is important to note however that both experts agreed that the point of impact occurred on the left lane travelling in a southerly direction.

[18] Having regard to Smile's evidence that he entered the road in the particular manner he described, he ought to have seen the Bosman vehicle further up the N12, if he kept a proper look out, as the view was clear for a considerable distance to his left. I find it difficult to reconcile Smile's evidence that he exercised such care upon entering the N12 with his decision to leave the parking in the Diesel stop to drink his cool drink in the emergency lane on the side of the N12. Even if the front cabin stopped in the emergency lane, the experts agree that the point of impact was in the left lane. The only conclusion to be drawn from this is that the rear end of the Blomdal vehicle was still in the left lane. There is no road lighting the N12 and it was dark. The portion of the Blomdal vehicle protruding thus posed a danger to road users. In *Santam Versekerings Maatskappy Bpk* [1987] 2 All SA 443 A, Smallberger JA, described circumstances which would be regarded as negligence on the part of a driver as follows:

> "Waar 'n voertuig op 'n ope pad op die ryoppervlakte stilhou, d w s op daardie deel van die padoppervlakte waaroor ander verkeer gewoonweg beweeg, en sodoende 'n hindernis veroorsaak, kan dit, afhangende van die omstandighede, 'n gevaar vir ander padgebruikers skep. ...Waar daar egter so stilgehou word, onder meer, om 'n draai, of net onderkant die kruin van 'n heuwel, **of in die nag, of in omstandighede van belemmerde of swak uitsig, sou dit waarskynlik (weereens afhangende van die omstandighede) wesenlike gevaar vir ander padgebruikers inhou, en sou 'n *diligens paterfamilias* sodanige gevaar voorsien en daarteen waak. Versuim om in so 'n geval redelike stappe te doen om daarteen te waak sou op nalatigheid neerkom.** (Vgl *Grobbelaar v Federated Employers Insurance Co Ltd en* 'n *Ander* 1974 (2) SA 225 (A); *Nkuta v Santam Assuransie Maatskappy Bpk*1975 (4) SA 848 (A)." (my emphasis)

[19] Even though the front cabin of the Blomdal vehicle stopped in the emergency lane, the rear end of the vehicle was not in the emergency lane and out of the path of other road users. As a driver Smile was under a duty to ensure that he entered the N12 with due regard for other road users and to exercise such care when doing so, so as to avoid a collision with other road users. (*Rondalia Assurance Corporation of SA Ltd v Page and others* 1975 (1) SA 708 (A); *Martindale v Woolfaardt* 1940 AD 235). Smile testified that he had just executed the turn and was drinking a cool drink at the time the collision occurred. If his attention was divided between driving, observing the road and drinking his cool drink, he probably did not observe the Bosman vehicle when he entered the N12 until he had already entered. Even though he moved into the emergency lane this did not prevent the rear end of the Blomdal vehicle from causing an obstruction in the N12, in the path of the Bosman vehicle. It appears that Smile was in the emergency lane and situated so that the rear end of the Blomdal vehicle protruded into the N12 which caused an obstruction in the road and posed a danger to other road users. The Blomdal vehicle was still on as Smile could apply his brakes. There is no evidence that his hazard lights were on to alert traffic that he was on the side of the road. In doing so he did not act as the reasonable man would have under the circumstances. I am satisfied that the plaintiff has proved that Smile was negligent in that he did not keep a proper lookout when he turned onto the N12 and failed to avoid a collision when by the exercise of reasonable care he could have done so.

[20] Having determined that the driver of the Blomdal vehicle was negligent and caused the collision, I turn to the defendant's plea that the Bosman driver contributed to the cause of the collision in that he failed to keep a proper look out, failed to brake timeously and failed to avoid the collision when he had the

opportunity to do so. The rear and side of the Blomdal vehicle had reflector strips along the vehicle assisting to identify it in the dark. According to the plaintiff's expert, Professor Dreyer, the driver of the Bosman vehicle ought also to have observed the lights of the Blomdal combination whilst it exited the diesel depot. The C track indicates Mocke was not travelling at an excessive speed. He was driving at 70 km per hour. He reduced his speed and braked to bring the vehicle to a halt. Smile is unable to say that Mocke did not keep a proper lookout or that he failed to brake timeously. On his version he was not even aware of the Bosman vehicle. The collision with the left side of the Blomdal vehicle suggests that Mocke swerved to the left in order to avoid the collision. The driver of a vehicle in a main thoroughfare, although he is entitled to assume that the driver of a vehicle approaching from a side road will act reasonably, cannot ignore that other vehicle and must keep it under observation at all times.

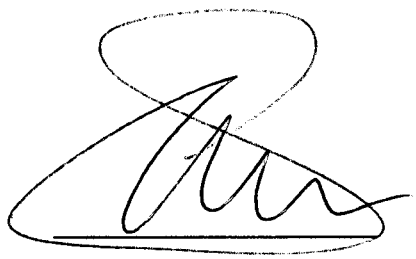
[21] Having regard to the evidence before me, Mocke drove for seven hours without a break. Without evidence to the contrary, it in an inevitable conclusion that he was fatigued. Even if he observed the Blomdal vehicle he may have failed to appreciate the danger it posed in entering the N12 when it did. If he kept a proper lookout for other vehicles he would have seen the Blomdal vehicle and could have taken action to avoid the collision timeously. It seems that he realised at a late stage that the Blomdal vehicle posed a danger and probably due to fatigue did not break timeously to avoid the collision.

[22] Having regard to the above I am satisfied that the plaintiff has proved that the driver of the Blomdal vehicle caused the collision and shares a

greater portion of the responsibility for the collision. Further that the Bosman driver failed to take steps to avoid the collision when timeous action could have prevented the collision. Consequently I attribute seventy percent of the negligence to the defendant's driver and thirty percent of the negligence to the plaintiff's driver. The plaintiff has succeeded substantially in proving its case and it follows that costs should follow the cause.

[23] In view of the above I make the following finding:

1. That the collision that occurred on 2 December 2006 between the truck trailer vehicle with registration, RSY 228 GP, driven by Mr. W.P. Mocke and the truck trailer with registration, TGH 347GP, driven by Mr J Smile was caused by the negligence of the drivers of the respective vehicles.
2. I apportion negligence to the plaintiff and defendant at 30%:70% respectively.
3. Plaintiff is entitled to costs of suit.



**MIA AJ**