

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – GRAHAMSTOWN)**

CASE NO: 649/2010

DATE HEARD: 16-17/03/2010

DATE DELIVERED: 24/3/10

NOT REPORTABLE

In the matter between:

FUYIZIZWE MQELE

FIRST PLAINTIFF

MAWETHU NELSON MQELE

SECOND PLAINTIFF

MZWABANTU NGESI

THIRD PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PLASKET J

[1] In the early hours of 19 June 2006 on the road between Beaufort West and Leeu Gamka a collision occurred between a minibus taxi in which the three plaintiff were passengers and a bus driven by on Mr Jongile Hoboyi.

[2] Although the cause of action arose outside of this court's area of jurisdiction, the defendant has consented to its jurisdiction. At the

commencement of the trial an application was made to separate the issues of the merits from quantum. I granted that application and consequently this judgment concerns only whether the defendant is liable for whatever damages the plaintiffs may have suffered as a result of the accident.

[3] The issue to be decided is whether the accident occurred in the lane in which the taxi was meant to be travelling or in the lane in which the bus was meant to be travelling.

[4] It was the evidence of Mr Mzwabantu Ngesi, one of the plaintiffs and a passenger in the front seat of the taxi, that the bus attempted to overtake a vehicle and, when the driver became aware of the taxi in its path, tried to swerve back to its side of the road. It did so too late and the two vehicles collided. As a result, the taxi rolled. According to Ngesi, of the 15 people in the taxi, 11 were killed. If one looks at the photographs that were handed in, the right front of the bus below the windscreen is damaged but the entire right side of the taxi has been ripped away.

[5] Two policemen testified about the scene of the accident. Constable Edwin Jonas was one of the first people to arrive at the scene of the accident. He testified that the taxi was lying – on its side if one looks at the photographs -- on its correct side of the road inside the shoulder of the road marked by a yellow line. Debris lay on this side of the road. The bus was parked on its side of the road – more or less on the yellow line according to the photographs – a distance of 60 or more metres, according to Jonas, from where he said the collision had probably occurred. He saw no debris on this side of the road.

[6] Sergeant Karel Pieterse, who was called by the defendant, confirmed in cross-examination that all of the debris was on the taxi's side of the road and no debris was on the side of the road in which the bus was meant to travel.

He concluded that there was not indication that the collision had occurred on the side of the road on which the bus was meant to travel.

[7] Jonas had mentioned marks on the road, on the taxis side of the road, in the vicinity of where he believed the collision had occurred. These marks angled towards the oncoming lane but did not cross the centre line of the road. Pieterse was of the view that the point of impact was before these marks as there was debris on the road before them. It would be speculative to say that they had anything to do with the accident but, if they did, they would tend to suggest that, a short distance after the point of impact, the taxi was on its correct side of the road.

[8] Mr Jongile Hoboyi, the driver of the bus, testified that he was driving the bus when he saw the taxi cross over the centre line into his line of travel. He flicked his lights, hooted and slowed down, whereupon the taxi moved to its left – and onto its side of the road – before suddenly crossing the centre line again and colliding with his bus.

[9] When, as in this case, one has two irreconcilable versions, the proper way to determine the facts is to ‘consider the credibility of witnesses in conjunction with the probabilities’ in order to determine where the truth probably lies. See *Plaaitjies and another v Road Accident Fund* 1999 (1) SA 162 (SC), 168; *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E), 440D-441A; *Baring Eiendomme Bpk v Roux* [2001] 1 All SA 399 (SCA), para 7; *Stellenbosch Farmers’ Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SAC), para 5; *Santam Bpk v Biddulph* 2004 (5) SA 586 (SAC), para 5.

[10] I turn now to an evaluation of the evidence. First, the unchallenged evidence of Jonas and Pieterse establishes that the debris caused by the collision was all on the side of the road on which the taxi was meant to travel

and that no debris was found on the side of the road on which the bus was meant to travel. This indication of where the collision probably occurred supports the direct evidence of Ngesi that the bus crossed over the centre line of the road onto the taxi's side of the road and that the collision occurred when the bus was on the wrong side of the road. At the same time the evidence of Jonas and Pieterse, bolstered by the photographs, tends to undermine the evidence of Hoboyi: no objective evidence supports his version that the collision occurred in the lane in which the bus was meant to be travelling.

[11] The credibility of Jonas and Pieterse was not challenged and nor could it be. Their evidence was not disputed on any material issue. Ngesi, who is a simple man with a standard 2 education, impressed me as a witness. His account was clear, consistent and logical. He acquitted himself well under cross-examination and there was no basis upon which to suggest that his evidence was untrue or unreliable.

[12] The same cannot be said for Hoboyi. His version of events was improbable: it strikes me as being unlikely in the extreme that, once he had flicked his lights and hooted, and the taxi had heeded his warning by going back onto its side of the road, it would then almost immediately cross over the centre line again and collide with the bus. That apart, however, he was a poor witness who was often evasive and gave contradictory evidence. His evidence was also at odds in important respects with what was put by his counsel to the plaintiff's witnesses.

[13] In the result, I find that the version of Ngesi as to how the collision occurred is more probable than the version of Hoboyi. This means that the collision occurred when Hoboyi, driving the bus, tried to overtake a vehicle and in so doing moved into the line of travel of the taxi. On these facts Hoboyi was negligent in that in driving the bus, he failed to keep a proper lookout, he

tried to overtake when it was inopportune for him to do so and he failed to have regard, or sufficient regard, for the presence of the taxi on the road.

[14] The following order is made:

- (a) It is declared that defendant is liable for the damages that the plaintiffs may prove in due course arising from the motor vehicle accident that occurred on 19 June 2006.
- (b) The defendant shall pay the plaintiffs' costs including the costs of the photographs and the costs reserved on 12 November 2008.

C. PLASKET

JUDGE OF THE HIGH COURT

APPEARANCES:

For the plaintiffs: Mr N Schoeman instructed by Mpambaniso Attorneys, Queenstown and Dold and Stone, Grahamstown.

For the defendant: Mr M Smith instructed by Joubert Galpin Searle Inc., Port Elizabeth and Wheeldon, Rushmere and Cole, Grahamstown.