

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4870/2011

In the matter between:-

LNS TRANSPORT CC

Plaintiff

and

LEOPARD LINE HAUL (PTY) LTD t/a
ELITE LINE HAUL

First Defendant

AARON MALESA

Second Defendant

HEARD ON:

18, 19 JUNE 2013

JUDGMENT BY:

KRUGER, J

DELIVERED ON:

27 JUNE 2013

[1] This case concerns a collision between two heavy vehicles, which occurred at 07h00 on 26 July 2011 on the N1 approximately 1,5 kilometres south of Springfontein, Free State Province. Merits and quantum were separated and this trial only concerns the negligence of the respective drivers. Course and scope is not in dispute.

[2] A camera mounted in defendant's vehicle recorded 12 seconds around the collision – eight seconds before and four seconds after. The camera is on all the time and if an incident occurs, it stores this footage. A compact disk,

compatible with Word, containing this recording of the collision was handed in as exhibit 1. The video is common cause between the parties. It is called a drive cam video clip.

[3] Four vehicles feature:

- (i) Plaintiff's vehicle, a truck-tractor, (horse) with a semi-trailer ("LNS").
- (ii) Defendant's vehicle, a truck-tractor with two semi-trailers ("UTI", or "Elite").
- (iii) A stationary vehicle half-off the road in defendant's direction of travel (also a truck-tractor and trailer of Value Logistics ("VALUE").
- (iv) A vehicle travelling in plaintiff's direction of travel, which plaintiff's vehicle was overtaking at the time of the accident, the Time Freight vehicle ("TF").

[4] As to the scene of the collision:

- (i) Plaintiff's vehicle, LNS, was travelling in the direction from Johannesburg to Cape Town direction.
- (ii) Defendant's vehicle, UTI, was travelling from Cape Town direction to Johannesburg direction.
- (iii) On the northern (Johannesburg) side there is a railway bridge, about 250 metres from the point of impact and from the bridge the road inclines downward. There was no evidence of the angle of decline, but it is

common cause that the plaintiff's vehicle was travelling downhill and defendant's uphill.

- (iv) There is only one lane for traffic in either direction.
- (v) There is a metal barrier on both sides of the road.
- (vi) There is a solid white centre line for vehicles travelling from Cape Town to Johannesburg, as defendant's vehicle was doing.
- (vii) There is a broken line for vehicles travelling from Johannesburg to Cape Town, as plaintiff's vehicle was doing.
- (viii) The VALUE vehicle was stationary on the road with its left wheels on the left side of the yellow line and its right wheels protruding onto the lane, blocking about half of that lane. The VALUE vehicle was probably 22 metres long (the maximum length allowed).

[5] As to facts relating to the accident:

- (i) The accident occurred at 07h00 on 26 July 2011.
- (ii) It had been snowing and snow can be seen next to the road and at some places on the road.
- (iii) There was ice on the road. Plaintiff's driver, Mr Ferreira, testified that he felt the ice on the road when he stepped out of his vehicle after the collision.
- (iv) The left front sides of the two truck-tractors hit each other.
- (v) Defendant's rear trailer was on its incorrect side of the road after the collision.

- [6] A member of factors contributed to the collision:
- (i) The ice on the road. Plaintiff's driver, when asked in his evidence in chief what caused the collision, said the ice on the road.
 - (ii) The stationary VALUE vehicle, which the defendant's vehicle was in the process of overtaking when the accident occurred.
 - (iii) The slowing down of the TF vehicle, which caused plaintiff's driver to pass it on the right and attempt to get through the gap between the TF vehicle and the stationary vehicle.
 - (iv) Defendant's vehicle overtaking the VALUE vehicle at the time plaintiff's vehicle was overtaking the TF vehicle, thereby taking up the gap which plaintiff's vehicle needed to pass the TF and VALUE vehicles.
- [7] Two witnesses testified for plaintiff: its driver, Mr G.P. Ferreira and an accident reconstruction specialist, Ms Wilna Badenhorst, as an expert witness.
- [8] Ferreira, the driver of the plaintiff's vehicle, testified he has been driving heavy vehicles since 1978, for 35 years. He slept for six and a half hours at Bloemfontein and left at 05h00 in the direction of Cape Town (Port Elizabeth). He travelled behind the TF vehicle for about 100 kilometres. His vehicle's lights were on. About 30 metres before the top of the railway bridge, Ferreira saw that the TF vehicle reduced speed. Ferreira also slacked down. When Ferreira went

over the top of the bridge, he noticed that the TF vehicle had reduced a great deal of speed and he saw the TF vehicle was going to stop. Ferreira applied brakes. He testified that the ABS brakes skid on ice and he had to apply brakes on and off. His truck began to slide. He realised that he was going to hit the TF vehicle and swerved to the right. He saw the gap between the TF vehicle and the stationary VALUE vehicle and wanted to go through it. Ferreira was adjacent to the TF vehicle when he saw the VALUE vehicle for the first time.

- [9] When he was near the defendant's vehicle, defendant's vehicle was on its right side (incorrect side) of the road and at that point in time the defendant's vehicle wanted to turn back into its correct lane. Ferreira said that if the defendant's vehicle did not turn left, he would have passed it. Ferreira said the point of impact was next to the rear end of the stationary VALUE vehicle.
- [10] Asked what the cause of the collision was, Ferreira said the ice on the road. Ferreira saw defendant's vehicle for the first time when he came out from behind the TF vehicle, which is a high and broad vehicle. Ferreira said he was not aware of any vehicle behind him.
- [11] In cross-examination Ferreira said his normal speed is 80 km/h, but because of the snow and wet road he travelled at 70 km/h. Asked when his vehicle began to skid, Ferreira said when he came to the top of the hill and saw that the TF

vehicle was going to stop. Then, as he put it, he saw there was a problem. Ferreira said if the vehicle skids downhill on ice, its speed increases. He agreed that he should be able to get his vehicle out of a skid and said that defendant's vehicle closed the gap he wanted to get through. He was travelling at 30 km/h when he hit defendant's vehicle.

[12] Ferreira agreed that the TF vehicle used its "retarder", which is a device which reduces speed using the gears. Ferreira testified that his vehicle does not have a retarder; it has a Jacobs, which reduces the engine's capacity. One uses the Jacobs when going down a pass; it then causes the truck to reduce speed. He explained that the Jacobs blocks the rear wheels.

[13] When it was put to Ferreira that he should not have overtaken the TF vehicle, he replied that if your vehicle skids, you do not have control over it. He again said that the ice on the road caused the collision. When it was put to Ferreira that a driver should be able to stop without hitting a vehicle in front of him, Ferreira said, not on ice. He agreed that he could not stop his vehicle safely at that stage. He said it was not because he was not paying attention, but when his truck skidded, he was too near the TF vehicle.

[14] Asked how far his vehicle moved forward after the collision, Ferreira said four metres. He said the front axle of his vehicle broke and caused the gouge in the surface of the road, which can be seen on photo B3.

[15] Plaintiff wanted to call Ms Wilna Badenhorst as an accident reconstruction expert. Mr Dobie, on behalf of defendant, objected saying her evidence was inadmissible, because she did not give reasons for her opinions in her report and was not permitted to answer the ultimate question of liability, which is for the court to decide. After hearing argument I ruled that she could be called.

[16] Ms Badenhorst is an accident reconstruction specialist and has been involved in accident reconstructions since 1996. She has done several courses, also in the USA. Her report was handed in as exhibit "D".

[17] In her evidence in chief she was asked on certain aspects:

(i) Where was defendant's vehicle immediately prior to the collision?

She said it was in plaintiff's lane of travel.

(ii) What was plaintiff's speed at the time of the collision?

She said a speed of 30 km/h fits in with the damage to the vehicles and the fact that plaintiff's 25 ton vehicle was moving downhill.

(iii) The TF truck cabin appeared to be bouncing just prior to the collision, which seems to indicate sharp braking.

She agreed with this statement.

(iv) Plaintiff's driver says he could not see defendant's truck from behind the TF truck.

She said this is possible because the TF vehicle is higher than the VALUE vehicle.

[18] In cross-examination Ms Badenhorst agreed that she never visited the scene, nor did she take any measurements. She said defendant's vehicle would not have moved very far after the accident; it would have swung back. She agreed that the defendant's vehicle was completely in its right hand lane before the collision. As to the up- and down movement of the TF vehicle cabin immediate before the collision, Ms Badenhorst said it was possibly caused by acceleration, but more probably it was due to braking. As to speed, Ms Badenhorst testified that a vehicle travelling at 60 km/h does 16,7 metres per second. Thus a vehicle travelling at 60 km/h would travel 133,6 metres in eight seconds. As to stopping distance, on a wet road, at 80 km/h, plaintiff's vehicle would take 63 meters to stop. On ice it can go up to 110 metres. Ms Badenhorst agreed that from the top of the hill to the point of impact was 250 meters.

[19] Defendant's driver, the second defendant, Mr Malesa, testified through an interpreter. He was driving in the direction to Johannesburg. As he approached the hill he saw the stationary VALUE truck, which he had to pass. He realised there was a problem. He saw the TF truck approaching, about three truck lengths away. He reduced speed drastically when he approached the VALUE truck. He flashed to the TF truck to ask what he should do. The TF truck flashed and reduced speed as if to stop. The TF truck again flashed to Malesa to indicate that he should pass. Malesa proceeded to pass the VALUE vehicle. When

Malesa's vehicle's right wheels were right of the centre line, he saw plaintiff's vehicle overtaking the TF vehicle.

[20] In cross-examination Malesa said he is 53 years old; has been a driver for 20 years. His vehicle had two trailers. It was put to him that about 500 metres before the point of the collision, there is a curve in the road, with which he agreed. Malesa said he was in the middle of the road when he saw plaintiff's vehicle for the first time; he was passing the VALUE vehicle. When Malesa started going to the middle of the road, the TF truck was busy stopping. The TF truck was stopping because it gave Malesa a chance to pass the VALUE truck.

[21] At the point of impact, defendant's truck had passed the rear of the VALUE truck. Malesa refused to agree that at that time of the collision his entire vehicle was in the right hand lane. He agreed that people on the road flash their lights for different reasons.

[22] Manape Morakesi was the driver of the TF vehicle. He was travelling in the direction Johannesburg to Cape Town. After he went over the railway bridge he saw the stationary VALUE vehicle ahead of him, facing the Johannesburg direction. The defendant's UTI truck, which he described as the Elite truck, went to the right, flashed its lights for Morakesi, asking for space to pass the VALUE truck. Morakesi flashed back and reduced speed. He had been travelling at less than 50 km/h before he slowed down. He

gave way so that the Elite truck could pass. The Elite truck was in the middle of the road, so as to pass the VALUE truck. Then Morakesi saw the plaintiff's truck coming from behind at speed. He was afraid that truck might collide with him and swerved to the left.

[23] In cross-examination Morakesi said he did not see the actual collision between the two vehicles. At that time he was confused and surprised by plaintiff's truck passing him. It was put to Morakesi that the defendant's truck was wholly in his lane before the collision and that he braked for defendant's vehicle to avoid defendant's vehicle hitting him. Morakesi denied that defendant's vehicle was wholly in his lane before the collision and that he braked for defendant's vehicle.

[24] I accept that Morakesi was mistaken in his denial that the defendant's truck was wholly in his lane before the collision. The reason is that Morakesi's attention was on plaintiff's truck passing him. I further accept that his avoiding action was because of plaintiff's vehicle passing him, not because of defendant's vehicle coming from the front. His evidence was that he and defendant's driver had flashed their lights and he allowed defendant's vehicle to pass the VALUE truck. No reason was suggested why Morakesi would give false evidence to favour the defendant. Morakesi is an independent witness. Mr Venter, for plaintiff, said that Morakesi made a mistake in his evidence by saying that the front part of his truck had not passed the stationary VALUE

truck at the time of the collision, because on the video clip it is clear that the front of the TF truck was adjacent to the VALUE truck immediately prior to the collision. Morakesi is probably mistaken as to the exact position of his vehicle immediately before the collision. He did say that immediately before the collision his attention was on the plaintiff's truck overtaking him and he had to take avoiding action and swerve left; he did not see the collision.

[25] Morakesi's evidence was clear and satisfactory. He confirms the evidence of defendant's driver that they flashed their lights to allow defendant's truck space to pass the stationary VALUE truck.

[26] Elias Sibizo was the last witness who testified. He was called to show that he was able to stop safely behind the TF truck. He was driving in the same direction as plaintiff's truck, but Ferreira, the driver of plaintiff's truck, was unaware of him. On the morning of the trial, before he testified, he informed his counsel that he had spoken to Ferreira at a Stop/Go about ten kilometres before the scene of the collision and that Ferreira told him that he had been informed that there was a breakdown near the railway bridge and that he should be cautious. Ferreira was recalled and he denied that there was a Stop/Go and he denied speaking to Sibizo. In my view, Sibizo is possibly mistaken and he possibly confused Ferreira with another person he spoke to. I attach no weight to this bit of evidence about Ferreira's alleged

notice of a breakdown. It was not disputed that Sibizo was able to stop safely behind the TF truck.

ANALYSIS OF EVIDENCE

[27] The negligence of Ferreira, plaintiff's driver, appears from his own evidence. He drove behind the TF truck for 100 kilometres. He saw water coming out of the wheels of the TF truck. He could see the snow next to the road. He had 35 years' experience as a heavy vehicle driver. He saw the TF truck in front of him slowing down, but did not fall back far enough as he went over the railway bridge. On the downslope after the crest of the bridge his vehicle started to skid. He managed to control the skid by passing the TF truck. Otherwise he would have hit the TF truck from the rear. It was his duty to regulate his speed so that he could pull up before hitting the TF truck in front of him. He was on the horns of a dilemma, because either he was not keeping a proper look-out or else he was driving too fast in the circumstances. In either case he was negligent (**Thornton and Another v Fisser** 1928 AD 398 at 407 per Solomon CJ).

[28] Ferreira's evidence was that the ice caused the collision. If his truck had not skidded, there would have been no collision. He should, in the circumstances, have been driving at a speed no greater than admitted of him pulling up his truck in such way as to avoid its coming into contact with the back of the TF truck or being forced to pass the TF truck,

not knowing what was ahead (**Goldstein v Jackson's Taxi Service** 1954 (4) SA 14 (N) at 15G – H; 16A – B). The fact that Ferreira's truck skidded indicates that he was travelling too close to the TF truck ahead of him (17A). Ferreira knew that his view of the road ahead of the TF truck was obscured because of the large dimensions (height and width) of the TF truck, because he had been travelling behind the TF truck for 100 kilometres. The conditions on the road did not create a sudden emergency. Sudden emergency was never alleged by the plaintiff or Ferreira. As an experienced driver Ferreira should have realised that the stopping and road holding capabilities of his truck were diminished by the wet road in snowy conditions. He was negligent in only slowing down from his initial 80 km/h to 70 km/h, especially on the downward slope after the bridge, when he was so close to the TF truck that he could not see past it and was unaware of the stationary VALUE truck and defendant's vehicle.

- [29] Defendant's driver was also negligent although not to the extent of Ferreira. Defendant's driver crossed a solid barrier line. He should have made sure that it was safe for him to do so. Defendant's driver accepted the indication from the TF truck that he could pass the stationary VALUE truck. The TF truck driver was not aware that plaintiff's truck was so close to him, or that Ferreira would attempt to overtake, but by acting on the assumption that it was safe to overtake on a blind rise, defendant's driver was negligent.

[30] As to the expert evidence, courts generally prefer direct testimony to that of experts (**Stacey v Kent** 1992 (4) SA 495 (C) at 497D – E). In this case the expert contributed little. The facts make it clear that both Ferreira and defendant's driver attempted to get through the same gap at the same time, where there was place for only one of them. Had Ferreira been further back behind the TF vehicle, Ms Badenhorst said his view would have been less obstructed and he would have been able to see defendant's truck. The wet conditions should have warned Ferreira to be particularly careful with regard to the speed with which he went over the bridge, a blind rise. He saw the water coming out of the TF truck's wheels and should have realised the road was wet and slippery (**Hammar and Another v Nunes** 1976 (2) SA 785 (R, AD) at 787H). Ferreira did not leave sufficient distance between his truck and the TF truck ahead of him. He was only able to avoid the risk of hitting the TF truck from behind, which risk he created by his own conduct in being too close to the TF truck, by passing the TF truck without being aware of what was ahead of him in the road. That constituted serious negligence (**Kruger v Van der Merwe and Another** 1966 (2) SA 266 (A) at 273C – E). A driver in Ferreira's position must foresee that the traffic ahead of it, for whatever reason, can suddenly start moving slower and it is his duty to regulate his speed in such manner as to not collide with the vehicle in front or have to pass that vehicle without having ascertained that it is safe to do so (**U & SWA Insurance Co Ltd v Bezuidenhout** 1982 (3) SA 957 (A) at 965B – C). Ferreira's negligence was much greater than

that of defendant's driver. Ferreira passed the TF truck while he was trying to control the skid. He was not overtaking; he was skidding past the TF vehicle. Defendant's driver, on the other hand, had no reason to suspect that there was a vehicle hidden behind the TF truck, which had indicated to him that he could pass the VALUE truck. In my view, Ferreira was 80% to blame for the collision and defendant's driver 20%.

- [31] As to the *locus standi* and rights in respect of the vehicles involved in the collision, plaintiff admitted defendant's right to claim in respect of its truck-tractor and both trailers. Plaintiff only admitted defendant's right to claim in respect of its truck-tractor, not its trailer and Mr Venter, for plaintiff, conceded that plaintiff was not entitled to any damages in respect of its trailer.

ORDER

1. Plaintiff is responsible to pay 80% of defendant's proven or agreed damages and first defendant is liable to pay plaintiff 20% of its proven or agreed damages, excluding damage to its trailer.
2. Plaintiff is responsible for 80% of defendant's costs and defendant is responsible for 20% of plaintiff's costs.

A. KRUGER, J

On behalf of plaintiff:

Adv A.J. Venter
Instructed by:
Alberts Attorneys
BLOEMFONTEIN

On behalf of first and
second defendants:

Adv G.H. Dobie
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