

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 1945/2007

In the matter between:

ARABIAN PENINSULA TRADING LIMITED

PLAINTIFF

and

ONELOGIX (PTY) LIMITED

DEFENDANT

AND

CASE NO. 13200/2006

In the matter between:

TREVTON FARM cc

PLAINTIFF

and

ARABIAN PENINSULA TRADING LTD.

FIRST DEFENDANT

ONELOGIX (PTY) LIMITED

SECOND DEFENDANT

JUDGMENT Delivered on 02 March 2011

SWAIN J

[1] Before me are two consolidated actions arising out of a collision, which it is common cause, occurred between two large trucks both travelling on the N3 highway, in the direction of Durban,

on 03 May 2006.

[2] In Case No. 1945/2007 the plaintiff, Arabian Peninsula Trading Limited (Arabian Peninsula) seeks payment of damages in the sum of R128,283.96 from the defendant, Onelogix (Pty) Limited (Onelogix), as a result of damage caused to the truck of Arabian Peninsula in the collision, which it is alleged was caused solely by the negligence of the driver of the vehicle of Onelogix.

[3] Onelogix denies the allegations of negligence and pleads that its driver was faced with a sudden emergency, in that an unknown vehicle in front of the Onelogix truck, “suddenly and unexpectedly braked”.

[4] In Case No. 13200/2006 the plaintiff Trevton Farm cc (Trevton) seeks payment of damages in the sum of R159,200.00 from the first defendant (Arabian Peninsula) alternatively, the second defendant (Onelogix) alternatively, both Arabian Peninsula and Onelogix jointly and severally, as a result of damage which it is common cause was caused to a vehicle of Trevton, by a door which was ripped from the truck of Arabian Peninsula in the collision and which struck Trevton’s vehicle, which was travelling on the opposite carriageway of the N3 highway, in the direction of Pietermaritzburg. Trevton alleges that the collision was caused by the negligence of the driver of the Arabian Peninsula vehicle, alternatively by the negligence of the driver of the Onelogix vehicle, alternatively by the

joint negligence of both of these drivers.

[5] It is common cause between all of the parties that the respective plaintiffs have *locus standi* to sue in respect of the damage caused to their vehicles and that Arabian Peninsula, Onelogix and Trevton are vicariously liable for any wrongdoing, which may be established against their respective drivers.

[6] I am only asked to determine the liability of the respective parties, as it is agreed that the quantum of Arabian Peninsula's damages is R92,005.00 and that of Trevton is R139,833.33

[7] On the evidence the following facts are common cause, or not in dispute:

[7.1] Both vehicles were travelling towards Durban on the N3 highway, where there are three lanes of traffic.

[7.2] On the day in question the left hand lane had been closed to traffic, because of construction work.

[7.3] In the vicinity of where the collision occurred, there were consequently only two lanes of traffic available for vehicles travelling towards Durban.

[7.4] At the time of the collision, the Arabian Peninsula

vehicle was in the process of overtaking the vehicle of Onelogix.

[7.5] The point of impact was between the left rear portion of the trailer of the Arabian Peninsula vehicle, and the right rear corner of the second trailer of the Onelogix vehicle (the “pup” trailer).

[7.6] The rear “pup” trailer of the Onelogix vehicle ended up partially in the fast lane, after the collision.

[7.7] The driver of the Onelogix vehicle braked before the collision.

[7.8] After the collision the driver of the Onelogix vehicle told the driver of the vehicle of Arabian Peninsula, that there was a vehicle in front of him which had “disturbed” him and he applied his brakes. In this regard there was however a dispute between the drivers, when giving evidence, as to the description of this vehicle. The Arabian Peninsula driver maintained that the vehicle had been described as a “bus”, whereas the Onelogix driver said he described it as a “construction vehicle”.

[7.9] As a consequence of the collision, a rear door was ripped off the vehicle of Arabian Peninsula, travelled across the road and struck the Trevton vehicle, causing damage to it.

[8] Mr. Mthwa, was the driver of the Arabian Peninsula vehicle, and Mr. Ndlovu drove the vehicle of Onelogix. Mr. Mthwa furnished an explanation of how the collision occurred between his vehicle

and the “pup” trailer of the vehicle of Onelogix, whereas Mr. Ndlovu, other than saying he heard a loud bang, did not venture an explanation, because he said he was looking forwards at the construction vehicle ahead of him at the time of the collision.

[9] Mr. Mthwa maintained that at the time of the collision he was travelling alongside the vehicle of Onelogix, both vehicles were level, when the vehicle of Onelogix braked because, as he put it “the problem was the road ahead which had an obstruction”. He stated however that he did not see any vehicle in front of the vehicle of Onelogix, which might have distracted the driver. It is therefore clear that the obstruction in the path of the Onelogix vehicle which, according to Mr. Mthwa caused the other driver to brake, was the closure of the left lane. He explained that the braking of the Onelogix vehicle caused it to jack-knife, with the result that the “pup” trailer collided with his vehicle.

[10] On the version of Mr. Mthwa, it is therefore necessary, for the accident to have happened as he alleges, that the vehicle of Arabian Peninsula was travelling in the middle lane at the time of the collision, and that of Onelogix was travelling in the extreme left lane. It is in this important respect that Mr. Mthwa vacillated in his evidence. He stated that before the accident he was travelling in the extreme left hand slow lane and changed into the “right” lane, because he noticed sign boards indicating construction works ahead. When I asked him by reference to photograph 5 on

Annexure “B”, which depicted the area where the collision occurred, whether the collision took place in the left, middle or right lane, he replied that it had occurred in the “right lane”. When I repeated the question, he then said the accident happened in the middle lane. When I pointed out to him that he had just said it occurred in the right lane, he said that he had moved to his right from the left lane, which was the middle lane.

[11] Regard being had to the fact that Mr. Mthwa was testifying through an interpreter, and is clearly not a sophisticated person, this contradiction standing alone may be more apparent than real, were it not for the problems he encountered in this regard, when cross-examined by Mr. Wolmarans, who appeared for Onelogix. Mr. Mthwa was referred to a motor accident claim form, appearing at pages 12 – 19 of Exhibit “A” and confirmed that his signature appeared upon it and that he had furnished the details of the accident contained therein. As regards a sketch of the positions of the vehicles at the time of the collision, he said he did not agree with the way the vehicles were depicted. In the sketch the vehicle he was driving, was depicted travelling in the fast lane. When I asked him to indicate on the sketch with an “X”, the lane he was travelling in, he again indicated the fast lane. He stated that although he was present when the sketch was drawn, he did not pay minute attention to it, but agreed the sketch had been shown to him at the time.

[12] As regards the description of how the accident occurred, the following is recorded:

“The truck in front of me put dead brakes. I put my indicators to change lanes to the fast lane and then his last trailer jack-knifed onto my trailer”.

This description obviously contradicts his evidence that the reason why he moved to his right, was because of the presence of signs indicating the left hand lane was closed. In addition the description indicates that he moved into the “fast lane” which is the right lane, which accords with the sketch plan. I am acutely aware that care must be exercised in not placing too much weight upon the accuracy of very terse descriptions of how an accident occurred, contained in an accident claim form. What is of concern however is how Mr. Mthwa attempted to explain the description of the accident under cross-examination.

[13] He agreed that the Onelogix vehicle was travelling ahead of him, but said this was while he was travelling in the slow lane. He agreed that it braked and because of this he moved to his right hand side. When Mr. Wolmarans put it to him that what he was now saying differed from what he had previously said, he replied that “he did not know”. When it was put to him, that on this version, the collision occurred whilst he was trying to avoid the Onelogix vehicle in front of him, he denied this. He maintained that he was already in his lane when the Onelogix vehicle braked.

[14] Mr. Mthwa’s problems were further compounded, when he was cross-examined by Mr. Oliff, representing Trevton. He said that

he was the distance of two small vehicles away from the Onelogix vehicle, behind it in the slow lane when the Onelogix vehicle braked. When he was challenged by Mr. Oliff, that regard being had to the speed he said he was travelling at, being seventy five to eighty kilometres per hour, this was too short a travelling distance, he maintained there was a very long distance between their vehicles. When he was asked whether he was behind the Onelogix vehicle, when he saw it braking, he replied that as he came behind this vehicle, it slammed its brakes on and he then moved to the other lane. He later added that he saw something was disturbing the driver of the Onelogix vehicle, because he saw him slam his brakes on and then release them and so he moved to the right lane. After this the Onelogix vehicle continued travelling forwards, but he did not see whether there was anything in front of the Onelogix vehicle. When Mr. Oliff asked him whether he had seen the Onelogix vehicle jack-knife he replied "not at that time" and maintained that he had left the lane he was travelling in and had moved to the right. When Mr. Oliff suggested to him that the alleged jack-knifing of the Onelogix vehicle must have happened at the same time as the braking, his reply was that he did not want to comment on this. When M/s Askew, who appeared for Arabian Peninsula, asked him in re-examination, whether the brake lights had any effect on the Onelogix vehicle jack-knifing, his reply was "No I can't explain what I don't know".

[15] Regard being had to the above, it is clear that on Mr. Mthwa's own evidence, his initial claim that he moved to his right to overtake the vehicle of Onelogix, because he saw that the left slow lane was

closed, cannot be true. It is also clear on his evidence that he moved to the right to avoid the Onelogix vehicle when it braked, and that at this stage, he must have been following the Onelogix vehicle in the middle lane. That he moved into the right fast lane, to overtake the Onelogix vehicle, is consistent with the sketch contained in the motor accident claim form. In addition, when regard is had to the fact that on his own evidence, he was travelling a distance of two small cars behind the Onelogix vehicle, whilst travelling at a speed of 75 – 80 kilometres per hour, approaching an area where construction work had blocked the left lane, he did not allow a sufficiently safe following distance behind the Onelogix vehicle. In addition, a finding that Mr. Mthwa moved to his right to avoid the Onelogix vehicle, is inconsistent with his evidence that at the time of the collision his vehicle was level with the Onelogix vehicle, travelling alongside it. There would have been insufficient time for the Arabian Peninsula vehicle to complete its manoeuvre into the fast lane and move alongside the Onelogix vehicle, if Mr. Mthwa only commenced taking avoiding action, when the Onelogix vehicle braked.

[16] It is therefore clear on the evidence of Mr. Mthwa, that he drove the Arabian Peninsula vehicle negligently, but the issue that remains is whether his negligent conduct was a cause of the collision and if so, whether it was the sole cause, or only a contributory cause, regard being had to whether the driver of the Onelogix vehicle was also contributorily negligent, in relation to the collision.

[17] The significance of this issue to the claim advanced by Arabian Peninsula against Onelogix, lies in the fact that in this claim, Onelogix does not allege there was any contributory negligence on the part of the driver of the Arabian Peninsula vehicle, being content to deny that its driver was negligent in the respects alleged and pleading that its driver acted in circumstances of a “sudden emergency”. In addition, there is no counter-claim advanced by Onelogix for the damage done to its vehicle. Consequently, although I have found that the driver of the Arabian Peninsula vehicle acted negligently, if it is established that the driver of the Onelogix vehicle, acted negligently and such negligence was a cause of the collision, Arabian Peninsula would be entitled to succeed against Onelogix, in respect of the damage caused to its vehicle.

[18] This issue is also of significance in relation to the claim advanced by Trevton, in order to decide whether Onelogix is jointly and severally liable with Arabian Peninsula, to compensate Trevton for the damage caused to its vehicle. It is also of significance in regard to the defence raised by Arabian Peninsula, in the alternative, to the claim of Trevton, that the collision was partially caused by the driver of the Onelogix vehicle, and that the damages of Trevton should be apportioned between them.

[19] Turning to the evidence of Mr. Ndlovu, what is immediately apparent is that on his own evidence he was never faced with a situation which may be described as a “sudden emergency”. In this regard, Onelogix alleged in its further particulars for trial, in the action instituted by Trevton the following:

“The third vehicle moved from right to left across second defendant’s path of travel, whilst braking hard, moving in the direction of the emergency lane”.

The third vehicle referred to, is the construction vehicle, referred to by Mr. Ndlovu.

[20] Contrary to this allegation, Mr. Ndlovu said that the construction vehicle in front of him indicated it was turning to the left into the closed left lane. He had followed this vehicle as it moved from the left lane to the middle lane, because of the closure of the left lane. He reduced speed when he saw this vehicle indicating it was turning to the left. Prior to reducing speed, he was travelling at fifty kilometres per hour and he was following this vehicle at a distance of twenty two metres, which he said was the same length as his truck. This distance was reduced to ten metres when the construction vehicle left the middle lane. When he applied his brakes to reduce speed his vehicle did not come to a dead stop, but was slowed sufficiently to allow the construction vehicle to leave the middle lane. He estimated that he reduced the speed of his vehicle to approximately twenty to thirty kilometres per hour but denied he had ever applied his brakes hard. He said that if he had not braked he would have collided with this vehicle. It was then that he heard

the bang of the Arabian Peninsula vehicle, colliding with his vehicle. He said there was no emergency which he faced, but that he was simply waiting for the construction vehicle in front of him to move in the direction it had indicated. The movement of the construction vehicle was a gradual movement and not a sudden one. He said he had seen the Arabian Peninsula vehicle behind him before the collision in the middle lane, but had not seen it in the right hand lane, before the collision. He said he had not seen the Arabian Peninsula vehicle at the time of the collision, because he was looking forwards at the construction vehicle, ahead of him. Whilst he was slowing down, he did not feel the “pup” trailer moving into the fast lane.

[21] I find the inference irresistible, that Mr. Ndlovu has falsely diminished the intensity of the braking applied to the Onelogix vehicle, in order to contradict the allegation made by Mr. Mthwa, that the severity of the braking caused the “pup” trailer of the Onelogix vehicle, to jack-knife and collide with the Arabian Peninsula vehicle. What other possible explanation could there be for such a glaring contradiction between the defence pleaded and the evidence of Mr. Ndlovu?

[22] The fact that Mr. Ndlovu has falsely diminished the severity of the situation he faced, with this possible objective in mind, does not however necessarily lead to the conclusion that his conduct was negligent and that such negligence, was a cause of the collision.

This is because it is clear he must have faced an obstruction ahead of him in the form of a vehicle, because otherwise his conduct in braking, would be inexplicable. Indeed, it is common cause that Mr. Ndlovu told Mr. Mthwa that he had been “disturbed” by a vehicle in front of him, although the description of that vehicle is in dispute. If the evidence of Mr. Ndlovu, as to the manner in which he applied his brakes, is to be rejected, because of its conflict with the defence pleaded of a sudden emergency, this does not mean that the version of Mr. Mthwa as to how the accident happened, must be accepted.

[23] The version advanced by Mr. Mthwa, was that he was travelling alongside the Onelogix vehicle which braked causing the “pup” trailer to jack-knife and collide with the Arabian Peninsula vehicle. For the reasons set out above I have rejected this version, because of the contradictions in Mr. Mthwa’s evidence, as well as the improbability of this version, even on Mr. Mthwa’s own evidence. It should be borne in mind in the present context that the major problem in Mr. Mthwa’s evidence, were the contradictory reasons he advanced for moving to the fast lane. It is clear he did so to avoid the Onelogix vehicle which braked ahead of him. Onelogix bears no onus to prove that the driver of the Arabian Peninsula vehicle was negligent, nor that its own driver was not negligent. The only duty that rests upon Onelogix, is to adduce evidence to combat a *prima facie* case of negligence against its driver, made by Arabian Peninsula. For the reasons set out above and below, I am satisfied that Arabian Peninsula failed to do this.

[24] The fact remains that there was a duty upon Mr. Mthwa, as a driver in a stream of traffic, to adjust his speed and the distance from the Onelogix vehicle in front of him, so that he was able to pull up in a way which would avoid his vehicle coming into contact with the preceding vehicle, should that vehicle make a sudden stop.

The Law of Collisions in South Africa

G. Leveson 6th Ed pg 49

Reemers v A A Mutual Insurance Association Limited

1962 (3) SA 823 (W)

In addition a following driver, in peak traffic in an urban area, ought to foresee that, for one reason or another, traffic ahead may suddenly slow down, or even stop, and he must conduct himself accordingly. The closer he is to the vehicle ahead of him, the greater is his duty of care.

Leveson supra at pg 49

Union & South West Africa Insurance Co. Ltd. v Bezuidenhout

1982 (3) SA 957 (A)

[25] Considering all of the above, and the inherent probabilities, as revealed by the evidence, I am satisfied that the collision was solely caused by the negligent conduct of Mr.Mthwa in following the Onelogix vehicle too closely. In attempting to avoid colliding with

the rear of the Onelogix vehicle by overtaking it, the left rear portion of the Arabian Peninsula trailer, collided with the right rear portion of the “pup” trailer of the Onelogix vehicle. The fact that the Onelogix vehicle may have braked more severely than Mr. Ndlovu was prepared to concede when giving evidence, cannot affect this conclusion.

[26] In coming to this conclusion I have not overlooked the evidence of Mr. Venter, who was driving the Trevton vehicle, that it looked like the vehicle in the middle lane, collided with the rear of the vehicle in the right hand lane. In other words, the Onelogix vehicle, collided with the rear of the Arabian Peninsula vehicle. In the context of his evidence that the trucks on the other side of the highway “all of a sudden seemed to run out of space” and a loud bang drew his attention to the collision, it is clear that he was not in a position to accurately observe how the collision happened, particularly as he was travelling in the opposite direction at one hundred, to one hundred and ten kilometres, per hour. It is however clear on his evidence, that there was nothing he could do to avoid the door from the Arabian Peninsula vehicle, colliding with the Trevton vehicle. The allegation of contributory negligence on his part by Arabian Peninsula, must accordingly fail.

[27] As regards the issue of the payment of the legal costs of the successful second defendant, being Onelogix in the case instituted by Trevton, Mr. Oliff, who appeared for Trevton, drew my attention to the decision of the Supreme Court of Appeal in

Body Corporate of Dumbarton Oaks v Faiga
1999 (1) SA 975 at 981 E

In this case Harms J A pointed out that the typical case where an unsuccessful defendant is ordered to pay the costs of the successful defendant, is where the unsuccessful defendant makes common cause with a plaintiff, to pin liability on the eventually successful defendant. It is clear that Arabian Peninsula sought at all times, to establish that the sole cause of the collision was the negligent driving of the Onelogix vehicle. I therefore agree with the submission of Mr. Oliff that the unsuccessful first defendant, being Arabian Peninsula, should be ordered to pay the costs of the successful second defendant, and that the plaintiff in the action, being Trevton, should be absolved from paying these costs.

The order I make is the following:

A. In case No. 1945/2007:

1. Judgment is granted in favour of the defendant.
2. The plaintiff is ordered to pay the defendant's costs.

B. In case No. 13200/2006:

1. Judgment is granted in favour of the plaintiff against the first defendant for payment of the sum of R139,833.33.
2. The first defendant is ordered to pay interest on the sum of R139,833.33 at the rate of 15.5% per annum, from 04 December 2007, being one year after the date of service of the summons on the first defendant, to date of payment.
3. The first defendant is ordered to pay the costs of the plaintiff and the second defendant.

K.

SWAIN

J

Appearances /...

Appearances:

CASE NO. No. 1945/2007

For the Plaintiff : M/s K. Askew
Instructed by : Askew & Associates
 Durban

For the Defendant : Mr. J. W. B. Wolmarans
Instructed by : Goldberg & De Villiers
 C/o Taverner & Co.
 Durban

CASE NO. 13200/2006

For the Plaintiff : Mr. M. A. Oliff
Instructed by : David Gardyne & Partners
 Durban

For the 1st Defendant : M/s K. Askew
Instructed by : Askew & Associates
 Durban

For the 2nd Defendant : Mr. J. W. B. Wolmarans
Instructed by : Goldberg & De Villiers
 C/o Taverner & Co.
 Durban

Date of Hearing : 21 February 2011
Date of Filing of Judgment : 02 March 2011