



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 1502/2012

In the matter between:

MILLING TECHNIKS (PTY) LIMITED

Plaintiff

and

T.W STENE (PTY) LIMITED

Defendant

C & F CONSTRUCTION

First Third Party

MM MTSHWENI

Second Third Party

JOSEPH MASUBE

Third Third Party

ORDERS

1. The defendant is to compensate the plaintiff for 100% of its proven or agreed damages.
2. The defendant is directed to pay the plaintiff's costs occasioned by the action including any reserved costs.
3. On payment by the defendant to the plaintiff of the amounts in paragraphs 1 and 2, the defendant will be entitled to recover 50% thereof from the first third party.

JUDGMENT

HENRIQUES J

Introduction

[1] The plaintiff's action is for payment of the sum of R1 145 000 [one million one hundred and forty five thousand rand] in respect of damages to a 2008 Bomag Roller and 2010 Bomag Starfire GPS System.

[2] The plaintiff alleges that on Friday, 10 June 2011, at approximately 15h15 pm, on the R38 near Carolina, a collision occurred between the Bomag Roller operated at the time by one Brian Ndlovu (Ndlovu) and a grader loaded on a mechanical horse and trailer driven at the time by one Fani Guliwe (Guliwe).

[3] The plaintiff pleads that at the time the collision was caused as a consequence of the sole negligence of Guliwe in that:

[3.1] he failed to keep a proper look out;

[3.2] he drove at a speed that was excessive under the circumstances;

[3.3] he failed to apply his brakes timeously or at all;

[3.4] he failed to avoid the collision when by the exercise of reasonable care he could and should have done so;

[3.5] he travelled within a restricted road construction area without having due regard to the Bomag Roller, aforesaid, which was within the construction area;

[3.6] he was driving an abnormal vehicle with a grader loaded onto a trailer which grader had a blade which was wider than the trailer, thereby protruding over the sides of the trailer causing danger to other vehicles;

[3.7] he conveyed an abnormal load without the necessary permit, alternatively, without complying with the conditions of the permit if it existed; and

[3.8] he failed to travel within the required distance of the lead escort vehicle escorting the abnormal load.¹

[4] The defendant denied any negligence on the part of its driver and subsequently joined the first to third third party to the action. In the plea filed, the defendant denied that its driver, Guliwe was negligent and pleaded negligence on the part of Ndlovu as follows:

[4.1] he failed to keep a proper lookout;

[4.2] he failed to have regard to the defendant's vehicle that was passing through and clear the road way;

[4.3] he failed to avoid the collision when by the exercise of reasonable care he could and should have done so;

[4.4] he failed to heed the instructions of the driver of the escort vehicles travelling at the front and rear of the defendant's vehicle.

[5] In the alternative, the defendant pleads that its vehicle was being escorted at the time of the collision by escort vehicles of C & F Construction (the first third party), and the drivers of the escort vehicles (Mtshweni and Masube) were negligent and caused the collision in that they failed to:

¹ Index to pleadings, pages 7 to 8.

[5.1] 'indicate to the driver of the Plaintiff's vehicle to clear the roadway to allow the Defendant's vehicle to pass through;

[5.2] ensure that the roadway was clear before instructing the Defendant's driver to pass through;

[5.3] keep a proper lookout;

[5.4] alert the driver of the Defendant's vehicle that the roadway was not clear and safe to pass through.'²

[6] In relation to the defendant and the first third party, the defendant pleads that it contracted with C & F Construction to supply certain drivers and escort vehicles to escort its vehicle and to ensure the safe passage of travel of its vehicle to its final destination. In breach of the agreement, the drivers of the said escort vehicles, Mtshweni and Masube, failed to maintain a safe path of travel for the defendant's vehicle and as a consequence of the negligent conduct of the second and third third party, the defendant's vehicle was involved in a collision en route to its final destination.

[7] The defendant pleads that in the event of the court finding that the defendant's driver was negligent in causing the collision, such negligence arose out of the negligent conduct of the second and third third party. Consequently, C & F Construction should be liable for the damages arising out of the collision as a consequence of the drivers acting as agent for it, alternatively, furthering the interests of C & F Construction, alternatively, in that Mtshweni and Masube were acting in the course and scope of their employment with C & F Construction.

[8] At the commencement of the trial, by consent, I ordered a separation of the issues of liability and quantum in terms of Rule 33(4) of the Uniform Rules of Court.

[9] Various exhibits were handed in by consent during the course of the trial, and

² Index to pleadings, pages 17 to 18.

I will refer to them in so far as they are relevant to the findings I make. The photographs, exhibits “D” and “E”, depict the scene of the collision, the overturned Bomag Roller, the abnormal load including the dozer, the blade of which appears to exceed the width of the trailer.

[10] The following were common cause, alternatively undisputed, namely:

[10.1] the date, time and area of the collision, and the fact that there was road construction taking place;

[10.2] the fact of a collision occurring;

[10.3] the plaintiff’s *locus standi* to sue;

[10.4] vicarious liability on the part of the plaintiff, defendant and first third party;

[10.5] the third third party was no longer represented by the attorneys of record when the trial commenced; and

[10.6] the contents of exhibit “A” being approximate figures in respect of the specifications of the particular vehicles involved in the collision.

Issues for Determination

[11] As between the plaintiff and defendant, whether the drivers employed by them at the time of the collision were negligent in causing the collision? As between the defendant and the first third party, in the event of the court making a finding of negligence on the part of the defendant’s driver, whether the defendant will be entitled to a contribution from the first third party arising from negligence on the part of the second and third third party?

The evidence

[12] The evidence presented during the trial is a matter of record and I propose to only summarize the evidence in so far as it is relevant to the issues to be decided and the findings made in this judgment regarding negligence.

Plaintiff's Case

[13] The plaintiff led the evidence of the following witnesses. Hendrik Pieterse confirmed he was employed by the plaintiff as a contracts manager at the time of the collision. On the day of the accident he received a telephone call from Mr Claassens whereafter he attended at the stop and go area which was the scene of the collision. He confirmed that the stop and go area only allowed traffic flow on one side, being on the tar section of the road. The stop and go area has traffic delineators. Immediately prior to the roadworks area are traffic signs indicating the speed limit. In addition, delineators are placed at intervals along the entire route proceeding toward and away from the stop and go area.

[14] He confirmed that at the time of the collision, the slushing process was taking place which involves the Bomag Roller and a water tanker which work hand in hand. The driver of the Bomag Roller as well as the water tanker are not in communication with each other and are merely involved in a forward and backward movement on the gravel area in which the slushing operation is taking place. In addition, he confirmed that the slushing process can only take place with the Bomag Roller and the water tanker. He confirmed that he placed the impact area to the left of the Bomag Roller as on his arrival at the construction area there was a 'huge indentation and gravel impact with some heavy form of metal that broke off from the Bomag Roller.'³ He confirmed that on his arrival at the scene, his focus was on the driver of the Bomag Roller who had sustained injuries when the Bomag Roller had overturned.

[15] Mr Pieterse prepared a sketch four to five days after the collision had occurred and did not place the water tanker on the sketch as it had not been involved in the

³ Transcript of evidence, page 18.

collision. He also confirmed that apart from the Bomag Roller, the vehicles in the vicinity had been moved after the collision.

[16] Brian Ndlovu, the operator of the Bomag Roller, confirmed that on the day in question, he was performing a slushing operation on the gravel work surface next to the tar strip. He confirmed that the Bomag Roller was behind the water tanker at the time. In the process of performing the slushing operation, he estimated that his Bomag Roller was a distance of approximately 1 metre to 1.5 metres behind the water tanker travelling at a speed of between 2 to 3 kilometres per hour. At the time, he was performing slushing operations extremely close to the tar strip.

[17] Whilst performing such slushing operations, he suddenly heard the sound of a collision. He confirmed he did not see the abnormal load approach, as he was performing the slushing operation behind the water tanker. His focus was on following the water tanker, ensuring he did not collide with it, but more importantly, that he did not encroach onto the tarred portion of the road. Ndlovu further confirmed that there was no escort vehicle in his immediate vicinity, neither did he receive any warning regarding an abnormal load⁴ approaching. Prior to the collision, no one hooted nor did any driver of a vehicle flash their lights at him.

[18] He confirmed having made a statement to the police which was handed in as an exhibit, but denied having informed the policemen that he saw the abnormal load coming towards him. In addition, he confirmed that the roller had a steering wheel and he was able to manoeuvre the Bomag Roller in a direction should he need to do so, but could not do so quickly as the movement of the Bomag Roller is slow.

[19] He confirmed that at the time of performing the slushing operation, traffic was moving from Carolina towards Hendrina and he would be able to hear the sound of any vehicles as they pass by the window of the cab of his roller. The cab of the roller is slightly lower than that of the water tanker. On the day of the incident he did not observe any vehicle collide with the roller.

⁴ In the judgment reference to the abnormal load refers to the defendant's vehicle, the truck with the flatbed trailer on which the dozer was loaded.

[20] During cross-examination, *Mr Jorgensen*, on behalf of the defendant, suggested to Ndlovu that the driver of the defendant's vehicle, Guliwe, would testify that at the time of the collision, there was an escort vehicle in front of his vehicle which approached the area where road works were taking place. The escort vehicle travelled ahead of Guliwe and warned Ndlovu and others of the approaching abnormal load. The occupants of the escort vehicle drew Ndlovu's attention to the abnormal load and as a consequence, Ndlovu moved further away from the path of travel of the abnormal load.

[21] As a consequence of Ndlovu's conduct, Guliwe then proceeded through the construction area. Ndlovu then changed direction and began moving backwards and when the front part of Guliwe's vehicle was more or less parallel with the Bomag Roller, Ndlovu altered his direction and moved forward which is why the collision occurred as the end part of the dozer connected with the Bomag Roller. In addition, Guliwe would dispute that there was a water tanker in front of Ndlovu involved in the slushing process.

[22] It was suggested to Ndlovu by *Mr Tucker*, who appeared for the first and third third party, that the driver of the first escort vehicle, Mtshweni (the second third party) would testify that he was driving the escort vehicle travelling in front of Guliwe. Mtshweni observed Ndlovu when he was approximately one hundred metres away from the bridge. There was no water tanker directly in front of Ndlovu. At the time, Mtshweni was travelling at approximately fifty kilometres per hour. On his approach to the stop and go area, when he was on the bridge approximately 80 metres away, Mtshweni became concerned about the proximity of the Bomag Roller in relation to the tar strip.

[23] He attempted to attract Ndlovu's attention by flashing his lights and when Ndlovu did not react he began to hoot. When Ndlovu still did not react, Mtshweni waved at him in order that Ndlovu move away from the tar strip. Despite Mtshweni trying to warn him for approximately 20 seconds, Ndlovu did not notice any approaching abnormal load, hence the collision. He testified that in his view the collision was caused as a consequence of Ndlovu not keeping a proper lookout.

[24] Vusi Richard Mabaso, (Mabaso) confirmed that on the day of the collision he was the driver of the water tanker and was performing a slushing operation with Ndlovu, who was working in the Bomag Roller. Mabaso testified that whilst he and Ndlovu were performing these slushing operations, he noticed the truck carrying the dozer approach and the blade of dozer protruding over the trailer. He was driving the water tanker in front of Ndlovu who was behind him in the roller. At the time they were facing the direction of Carolina on the untarred section of the road and were working in very close proximity to the tarred portion of the road. He confirmed Ndlovu's version that when they perform the slushing operations, they travel in a straight line behind each other and there should not be too much distance between the water tanker and the roller.

[25] He testified that he became aware of the abnormal load before it reached the bridge and recalled an escort vehicle travelling in front Guliwe's vehicle. Whilst this happened he kept the roller in his sight by looking through the side mirrors. As the abnormal load approached, the escort vehicle passed and he then saw the abnormal load and the blade of its cargo protruding. It was then that he realised that if he did not move that he would be struck by the blade.

[26] The abnormal load had not yet reached the bridge and appeared not to be travelling slowly, nor did it reduce speed as it was going downhill. At this stage he realised that the blade of its cargo presented a problem, he moved further towards his right side by accelerating and swerving. The driver of the abnormal load did not warn him of its approach, nor did the driver of the escort vehicle. He confirmed that as the abnormal load combination proceeded towards him, the blade did not strike his water tanker as he accelerated and swerved to the right. As he did so he heard a loud noise and when he looked in his side mirror, he noticed the Bomag Roller lying on its side. He then parked the water tanker a distance away from the collision and proceeded on foot towards the roller. He confirmed that the escort vehicle driving in front of the abnormal load combination did not do anything to alert him to its presence or the presence of abnormal load travelling behind him.

[27] Mabaso confirmed that the roller does not move as fast as the water tanker and could not say whether Ndlovu could have taken the same evasive action as he did. He testified that even if he did not see Mtshweni waving to alert persons of the oncoming traffic, he would have seen him flash his lights. He denied that there were any warning signals from Mtshweni before the collision.

[28] Harold Claasen, the construction supervisor employed by the plaintiff, confirmed they were busy with slushing operations at the time of the collision. He was at the milling machine approximately sixty metres from the scene of the collision but did not observe how the collision occurred. He testified that what often occurs when an abnormal load is to travel through a road construction area, they will inform the stop and go area of an approximate time that the abnormal load will approach the area. If an abnormal load approaches and the abnormal load's wheels are far over the work space, the driver of the abnormal load normally stops and asks for the road to be opened. The delineators in the closed off area of the road are then normally moved so that the abnormal load can enter in that area and pass through, whereafter the delineators are returned to the original position. On the day of the incident they did not receive any warning of an abnormal load.

[29] Mr Claasen testified that on the day in question he was not aware of any escort vehicle leading the abnormal load nor did he hear any hooting. He testified that immediately after the collision the roller was lying on the shoulder of the road, almost off the road and the tyres of the abnormal load were on the join of the tar strip and the gravel area where the slushing operation had been taking place. He testified that even though he could not comment on the speed of the abnormal load as it passed him, it came to a stop more than 300 hundred metres from the accident scene on the same path that it had been proceeding on. In other words, with the tyres of the vehicle on the join of the tarmac. The existing tarmac strip was between 3.5 to 3.6 metres wide.

[30] That then was the plaintiff's case.

Defendant's Case

[31] The defendant led the evidence of Fani Elias Guliwe (Guliwe), a driver employed by T W Stene, the defendant, at the time of the collision. On the day of the collision he was the driver and sole occupant of a horse and trailer which was transporting a grader from Badplaas to its final destination. He testified that the area where the collision occurred was under construction and that it was drizzling a little at the time of the collision. He testified that he was being escorted by two vehicles, one in front of him and one in the rear. The escort vehicles bore signs indicating he was carrying an abnormal load. Each escort vehicle had two red flags and flashing lights. His vehicle was equipped with four red flags, two in the front and two in the rear, and the headlights of his vehicle were on indicating he was carrying an abnormal load.

[32] He confirmed that the length of his horse and trailer was approximately 20 metres and the width of the trailer was wider than that of the horse but was such that the entire trailer fitted within the width of a lane, although the bulldozer protruded from the top of the trailer and was longer in width. He acknowledged that he was travelling from Carolina to Hendrina at the time and that the road which was under construction did not have any road signs indicating such. The portion of the road which consisted of two lanes had one lane enclosed and only the right lane was in use.

[33] Immediately prior to the collision, the escort vehicle did not warn him that it was not safe for him to proceed through the area. He confirmed that at all times whilst driving through the area he maintained his course and speed. He did not observe any water tanker performing a slushing process or travelling in front of the roller. He testified that there was nothing he could do to avoid the collision but rather that the driver of the Bomag Roller could have swerved away as there was space to the right side of the Bomag Roller. He testified that having regard to the photographs presented, the water tanker arrived at the scene after the collision had occurred. He confirmed that whilst driving over the bridge and exiting the bridge into the construction area, he did not deviate to his left or to his right as he could not do so as the low bed fits into the whole lane and consequently he remained on the tar strip. He disputed the evidence that he had travelled some distance past the bridge before

the collision occurred.

[34] During cross-examination Guliwe conceded that:-

[34.1] because of the overhang of the dozer blade over the bed of the trailer, he had a permit;⁵

[34.2] the escort vehicle had passed the Bomag Roller when he saw the Bomag Roller before he entered the bridge;

[34.3] he did not hoot or flash his lights to warn the driver of the Bomag Roller of his approach as the low bed truck has four red flags and a light on top of the cab which was flashing;

[34.4] as he was travelling slowly he could have stopped his vehicle in a short space of time;

[34.5] the driver of the Bomag Roller did not deviate from its path of travel; and

[34.6.] he observed Mtshweni move ahead of him and could not say if Mtshweni hooted or waved at Ndlovu as he approached him.

[35] He denied that he could move to his right onto the gravelled portion in an attempt to avoid the collision as the low bed trailer was too wide and would have possibly rolled over. He confirmed that as he approached the roller, the side of the Bomag Roller was on the left side of the road, parallel to the tar strip, approximately 1.3 metres from the edge of the road. He denied the version put to Ndlovu that he, Guliwe, had waved at him and flashed his lights at him and saw him swerve. In addition and most importantly, he conceded that the overhang of the blade from the dozer was into the construction area.

⁵ This ground of negligence was not pursued in argument.

[36] That then was the defendant's case.

Absolution from the Instance

[37] *Mr Tucker*, who appeared for the first third party then sought absolution from the instance in respect of C & F Construction. He submitted that the defendant's witness, Guliwe conceded that if he or Ndlovu had moved 10 centimetres to either side, there would not have been a collision. There was no negligence on the part of Mtshweni and consequently, the first third party was entitled to an order of absolution from the instance with costs.

[38] *Mr Frost*, appearing for the plaintiff, submitted that in terms of the defendant's plea, the first third party was required to ensure the safe path of travel of the defendant's vehicle. The version put to the witnesses differed and in addition, Mtshweni would have to explain what measures he took when it was apparent the driver of the Bomag Roller did not react to the hooting or flashing of lights. In addition, the defendant's driver, Guliwe, and Mabaso indicated that they did not observe Mtshweni wave or flash his lights or stop and speak to the driver of the Bomag Roller and warn him of Guliwe's oncoming approach.

[39] When a party applies for absolution from the instance, the applicable test is not whether the evidence establishes what would finally be required to be established, but rather whether there is evidence upon which a court applying its mind reasonably to such evidence could or might (not should or ought to) find for the plaintiff. This is often referred to as *prima facie* evidence or a *prima facie* case. The use of the words *prima facie* case means evidence sufficient to avert the ruling of absolution from the instance but in addition, is sufficient to cast a duty to adduce evidence. It requires an answer from the other party. Normally at absolution stage, questions of the credibility of witnesses are not investigated except when the witnesses have palpably broken down and it is clear that what they stated is not true. The court must refuse absolution from the instance unless it is satisfied that no reasonable court could draw the inference which is contended for.

[40] At the hearing of the matter, I refused absolution from the instance in respect of the application by the first third party and indicated my reasons would follow in the judgment. *Mr Frost* was correct that what was pleaded by the defendant was that the second and third third party were to ensure the safe path of travel of the defendant's vehicle. During cross-examination a version was put to the witnesses which called for a response from Mtshweni and as a consequence absolution was refused.

[41] The first third party led the evidence of the driver of the first escort vehicle Matthews Mtshweni. He confirmed that he was employed by the first third party as a driver of an escort vehicle in June 2011 and was dismissed by the first third party in March 2015. At the time of the collision, he was escorting the defendant's vehicle and was travelling in front of Guliwe. The escorted vehicle was a truck with a low bed trailer transporting a bulldozer. It was a hot, clear day and was not raining. He was travelling past Carolina proceeding towards Hendrina and observed a construction area. As he approached the construction area, he noted a Bomag Roller in the construction area on the left hand side of the tar strip. He proceeded before Guliwe's vehicle and entered the construction area and slowed down next to the Bomag Roller and hooted, indicating to Ndlovu, the driver of the Bomag Roller that there was an abnormal load approaching. According to him, Ndlovu waved him away dismissively. He denied that at the time he was unable to see the driver of the Bomag Roller because a water tanker was in front of it. He indicated that the driver of the water tanker was driving away and further that the abnormal load was not far behind him.

[42] During cross-examination, Mtshweni conceded that the driver of the defendant's vehicle, Guliwe, would have taken the lead from him. He did not signal to Guliwe to stop as it was not safe for him to proceed through the construction area. He conceded that it was his duty to ensure that Guliwe could pass safely through the construction area. He testified that even if he stopped his vehicle and got out of his vehicle to warn Guliwe to stop, Guliwe would not have been able to stop in time as he was travelling on a downward slope with a load and at an increased speed. He conceded that when he warned Ndlovu of the oncoming abnormal load driven by Guliwe, he was aware that Ndlovu did not listen to him.

[43] He did not answer the question put to him by *Mr Frost* that if Ndlovu was not listening to him, he should have stopped Guliwe, and that would have prevented the collision from occurring.

[44] Even though he acknowledged that there was a gravel portion close to Guliwe's vehicle, Mtshweni testified that Guliwe could not have swerved to avoid colliding with Ndlovu as there were coal trucks approaching. He also testified that the construction area allowed for two vehicles to pass at a time. [Had it not been for the coal trucks it would appear that Guliwe could have swerved to his right on Mtshweni's version.] Mtshweni confirmed that at all times Ndlovu was within a marked off area within the construction site. He denied that there were any road markings or cones or any delineated areas on the approach to the construction site or in the construction area.

[45] That then was the evidence.

Submissions of the parties

[46] *Mr Frost*, who appeared for the plaintiff indicated that there were two courses to follow in determining negligence. The first being⁶ whether or not slushing operations were taking place? In the event that slushing operations were not taking place, he submitted that on the versions of Guliwe and third party driver, Mtshweni, one could still find negligence on the part of these individuals for the plaintiff to succeed in its claim.

[47] *Mr Frost* also submitted that one has the evidence of Mabaso and Ndlovu as well as Claasen and Pieterse in relation to the slushing operation. There is also objective evidence, namely the photographs indicating where the gouge marks occurred. In addition, of further importance to the plaintiff's case, is precisely where the collision occurred. Whether the defendant's vehicle had travelled some distance away from the bridge when the actual collision occurred.

⁶ He conceded that this was crucial to the plaintiff's case.

[48] In contradistinction, *Mr Jorgenson*, who appeared for the defendant, indicated that the plaintiff's driver was negligent. It was clear on his evidence that the accident occurred a distance away from the bridge and that the driver of the Bomag Roller was travelling relatively close to the end of the gravel strip and close to the tar strip. He further indicated that as confirmation of the negligence of the plaintiff's driver is the fact that in his evidence he testified that he did not move his vehicle appreciably.

[49] In addition he submitted that the driver of the defendant's vehicle could not take any evasive action to the right despite there being a gravel patch, as the trailer was situated such that it would tip over. *Mr Jorgenson* also submitted that at the time there was no slushing operation taking place. He indicated that it was possible that slushing operations had taken place earlier on in the day and consequently this would explain the dampness of the gravel. He submitted that the defendant and third parties' witnesses corroborated each other on material aspects, more specifically, the presence or otherwise of the water tanker.

[50] *Mr Tucker*, who appeared for the first and second third party submitted that there was no negligence on behalf of the third party's. He submitted that the defendant had not succeeded in proving foreseeability, causation or any negligence on the part of Mtshweni. In addition, the defendant had not complied with the provisions of Rule 13 in so far as claiming an indemnification or contribution from the third party and the pleadings were defective in that regard.

[51] *Mr Jorgensen* on the other hand indicated that the defendant's driver relied on the escort vehicle being driven by Mtshweni. Mtshweni in his evidence, and Guliwe testified that the procedure was that Guliwe would stop his vehicle when Mtshweni brought his vehicle to a stop and would move it when Mtshweni moved. There was no indication to Guliwe from Mtshweni that it was not safe for him to pass through the area.

Analysis

[52] In assessing the evidence tendered, in deciding negligence in this matter, the credibility of witnesses and their reliability and probabilities are apposite. In

*Stellenbosch Farmers' Winery Group Ltd & another v Martell et cie & others*⁷

Nienaber JA formulated the test as follows:

'To come to a conclusion with disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another.'

[53] In assessing the evidence of the witness Zulman JA in *Santam Bpk v Biddulph*⁸ held that 'the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true'.

[54] The test for *culpa* although well-known is worth repeating. Holmes JA in *Kruger v Coetzee*⁹ said:

'For the purposes of liability *culpa* arises if –
 (a) a *diligens paterfamilias* in the position of the defendant –
 (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 (ii) would take reasonable steps to guard against such occurrence; and
 (b) the defendant failed to take such steps.'

[55] I agree with *Mr Frost* that what is of importance to the plaintiff in establishing negligence on the part of the defendant is the following:

⁷ 2003 (1) SA 11 (SCA) para 5.

⁸ 2004 (5) SA 586 (SCA) para 10.

⁹ 1966 (2) SA 428 (A) at 430E-G.

[55.1] Precisely where the collision occurred; and

[55.2] Whether or not slushing operations were taking place.

[56] On his version, Guliwe did not take any evasive action before the collision. Even though it was suggested during cross-examination of Ndlovu that he did, Guliwe's evidence was that he did not. He was aware that the blade of the dozer protruded over the side of the trailer bed. On his version he took no evasive steps to avoid the collision. Given the test for negligence, the question to be answered is would a reasonable man in the position of Guliwe foresee that in proceeding through the construction area without altering his speed and path of travel, there was a reasonable possibility of a collision with Ndlovu, given the abnormal load and being aware of the protrusion of the blade of the dozer on the trailer bed? In addition could he escape liability by relying on Mtshweni?

[57] On the objective evidence one must accept that slushing was taking place and that Ndlovu was working in a protected area. Having regard to the photographs and the evidence presented, especially of where the gouge marks were and where the vehicles were found after the collision, the collision occurred some distance away from the bridge.

[58] On the evidence of Mtshweni, prior to entering the construction area, Guliwe was a considerable distance away from him. However, when they entered the construction area, he travelled closer to Mtshweni, and at a greater speed.

[59] Prior to the collision, it would appear that Guliwe had sufficient time and opportunity to move to his right and avoid the collision. Mtshweni acknowledges the existence of the gravel strip onto which Guliwe could have moved, and says he could not do so given the coal trucks. The problem with this is that this presupposes the existence of coal trucks and two lanes of travel.

[60] The objective evidence is that there was only one lane for travel and no other witness mentioned coal trucks. Guliwe confirms one lane for travel in the stop and go

area, and his version as to why he could not take evasive action and proceed into the gravel area and avoid the collision, was that the area was not level and the trailer would have toppled over. However, on the plaintiff's version and that of Mtshweni, the gravel area was flat and Guliwe could have moved his vehicle into that area and avoid the collision.

[61] Having regard to the photographs Guliwe? travelled some distance before stopping his vehicle – this puts paid to his version in respect of the speed he travelled at and where he says the collision occurred.

[62] The first issue which requires consideration is whether there has been any negligence on the part of the plaintiff's driver Ndlovu? If one accepts that the slushing operation was in process, it would then mean that the water tanker driven by Mabaso was slightly in front of Ndlovu. Ndlovu was in a protected environment, being a construction area. Having regard to the objective evidence, namely the photographs which indicate that the construction area where the compaction process was taking place was slightly wet, in my view, on the probabilities, the slushing process was taking place. Inasmuch as Ndlovu was employed by the plaintiff, Mabaso, the water tanker driver, was not. His objective evidence is to the effect that he and Ndlovu were in the process of performing a slushing operation. This was also confirmed by Claasen and Pieterse.

[63] In addition, during his evidence, Mtshweni indicated that as he approached the Bomag Roller, the water tanker was driving away as if it was going to fetch water. So he too places the water tanker in close proximity to the Bomag Roller but disputes that the slushing process was taking place.

[64] Mabaso's evidence is that he observed the escort vehicle proceed through the construction area followed by the abnormal load driven by Guliwe. He did not observe the escort vehicle or Guliwe flashing lights or hooting to warn either him or Ndlovu of the presence of an abnormal load approaching.

[65] In addition, even though Guliwe and Mtshweni testified that there were no

road markings or warnings as one approached or proceeded through the construction area, of significance is Mtshweni's evidence that Guliwe could not slow down or move to the gravel strip to avoid colliding with Ndlovu due to the approach of coal trucks. This aspect of Mtshweni's evidence is consistent with the plaintiff's witnesses that there was an area into which he could have moved to avoid the collision. In addition, even though Guliwe and Mtshweni dispute the presence of road markers, chevrons and delineators immediately prior to and exiting the construction area warning vehicles of a construction area and reduced speed limit, one must accept that as it was not disputed this was an area where road construction was taking place, their evidence in this regard cannot be correct. The photographs depict this and therefore on the probabilities, Guliwe and Mtshweni's evidence in this regard must be rejected.

[66] Furthermore, Mtshweni's evidence is that Guliwe would have taken the lead from him. He confirmed Guliwe's version that he did not hoot or flash his lights at Ndlovu to warn him of his approach. Mtshweni's evidence is to the effect that it was his duty to ensure that it was safe for Guliwe to proceed through the construction area. He would have had the obligation to warn Ndlovu of Guliwe's approach. He indicated that he did not hoot or flash his lights, but rather waved at Ndlovu to warn him of Guliwe's approach. He also acknowledged that as Guliwe proceeded through the construction area, Guliwe was closer to him and would not have been travelling as slowly as Guliwe would have the court believe, due to the fact that he was proceeding on a downward slope. The objective evidence also does not support Guliwe's version that the collision occurred closer to the bridge. The objective evidence as depicted on the photographs and the evidence presented suggest that the collision occurred some distance away from the bridge.

[67] The difficulty which one has is that Guliwe's evidence and that of Mtshweni appear to contradict each other. Of further significance is the fact that what was put to the plaintiff's witnesses in relation to what Guliwe and Mtshweni would testify to was different.¹⁰ Moreover, Guliwe did not testify as to the movement of Ndlovu in relation to him moving out of his path of travel. Guliwe in addition was also aware of

¹⁰ Transcript of evidence, pages 63 and 100.

the fact that the dozer protruded and exceeded the width of the trailer bed. He ought to have been aware that while the truck and the trailer fitted within the width of the tarmac, the dozer blade would have protruded and thus have caused a danger to anyone travelling close by.

[68] It must also be noted that no mention was made by any of the witnesses of the presence of coal trucks as testified to by Mtshweni. This would mean that had Guliwe kept a proper lookout he would have been able to move the vehicle to the gravel strip, thus avoiding the collision with Ndlovu. The further difficulty in relation to Mtshweni's evidence is that he was aware, on his own version that Ndlovu was not listening to him. He ought to have taken steps to warn Guliwe not to proceed through the construction area.

[69] *Mr Jorgenson* suggested that the statement made by Ndlovu to the police was indicative that he was aware of the presence of the abnormal load and was aware of the danger posed by the blade of the dozer, and contradicted his evidence in court. In my view, not much can be made of the apparent differences between Ndlovu's evidence in court and the statement. He confirmed that he made the statement to a policeman and could not account for what had been written by the policeman as the statement was not read back to him before he signed same.

[70] In addition, not much can be made of the fact that Pieterse did not sketch the water tanker – his explanation that he did not do so as it was not involved in the collision is a plausible one especially as Mabaso said he had parked the water tanker some distance away from the collision. In addition he did not witness the collision and the sketch was based on his observations after it had occurred. Mabaso's explanation as to why he had parked the water tanker where he did and his subjective fears as he proceeded back to the collision area and the Bomag Roller, in my view also cannot be criticized.

[71] At the commencement of the trial the first third party's attorney had withdrawn as attorneys of record for the third third party. In my view this makes no difference to the vicarious liability arising on the part of the first third party. This is due to the fact

that at the time of the collision Mtshweni was employed by the first third party and it would have been vicariously liable for any negligence on his part during the course and scope of his employment. There is no plea that at the time of the collision he was engaged in an activity of his own. In addition, Mtshweni testified.

[72] This brings me to the third party notice. The third parties have been joined to the action by the defendant. The defendant pleaded that it had contracted the first third party to supply drivers and escort vehicles, to escort the defendant's vehicle to its final destination and ensure the safe passage of travel of the defendant's vehicle. In breach of that agreement the drivers of the escort vehicles failed to maintain a safe path of travel for the defendant's motor vehicle. The defendant pleads that in the event of the court finding that Guliwe was negligent in causing the collision, such negligence arose out of the negligent conduct of the second and third third parties.

[73] As a consequence the defendant seeks an order holding the first, second and third third parties liable, jointly and severally, the one paying the other to be absolved for the sum of R1 145 000 in the event of the court holding the defendant liable to the plaintiff. Such claim is conditional against the first third party and the second and third third party. Even though the third party notice does not specifically state the defendant seeks an indemnification or a contribution from the first third party, on a proper interpretation of such third party notice in the context of the pleadings filed, it is clear that the defendant seeks a contribution as against the first, second and third third parties, should it be found liable to the plaintiff.

[74] In its plea the first third party has merely denied any negligence on the part of its drivers and averred that the sole cause of the collision was as a consequence of the negligence of the driver of the plaintiff's vehicle and plead contributory negligence on the part of the defendant's driver, in the event of the court determining the collision was not caused solely by the negligence of Ndlovu. The first third party has not pleaded any contributory negligence on the part of the second and third third parties.

[75] Insofar as the *lis* between the plaintiff and the defendant is concerned, it is

apparent that Guliwe was the sole cause of the collision. He proceeded through a construction area when it was not safe to do so, and failed to make any attempt to avoid the collision by either swerving or alternatively travelling at a reasonable speed within the construction area, alternatively ensuring that it was safe for him to proceed through the construction area knowing full well that the blade of the dozer overhung the width of the lane in which he was travelling.¹¹ In addition he failed to take any steps to warn Ndlovu of his approach timeously.

[76] Even though the suggestion was that he would have relied on Mtshweni, the authorities are clear that this does not absolve him from his responsibilities as a driver¹² not does it absolve him from a finding of negligence as a consequence of Mtshweni's presence and the obligation to take reasonable precautions of his own,¹³ and exercise 'a reasonable measure of expertise and the ability to manage his vehicle.'¹⁴

Consequently, in relation to the plaintiff the defendant is liable for 100% of the plaintiff's proven or agreed damages. Insofar as the *lis* between the defendant and the third parties are concerned, even though the third third party was not legally represented at the trial, it was apparent that the first third party is liable for the conduct of the third third party arising from his employment. It is not disputed that Guliwe's negligence contributed to the collision. In addition, having regard to the version of Mtshweni as to how the collision occurred, in my view Guliwe and Mtshweni are equally to blame for the collision. It is appropriate that on payment by the defendant to the plaintiff of its quantum and costs, upon payment thereof the defendant will be entitled to recover 50% thereof from the first third party.

[76] In the premises the orders I issue are the following:-

¹¹ He ought to have allowed more clearance for Ndlovu's vehicle being aware he was in a protected environment and the blade of the dozer was protruding. *Mapalala v Marine & Trade Insurance Co Ltd* 1979 (4) SA 735 (N) at 744

¹² To keep a proper lookout, to travel at an appropriate speed in the prevailing circumstances, to take evasive steps to avoid the collision.

¹³ *S v Vishnu* 1970(3) SA 320 (N) at 322; *S v La Porta* 1987 (1) SA 779 ©; *Shleifman v Levin and Another* 1961 (3) SA 277 ©.

¹⁴ *Sardi and Others v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A)

[76.1] The defendant is liable to compensate the plaintiff for 100% of its proven or agreed damages.

[76.2] The defendant is directed to pay the plaintiff's costs occasioned by the action including any reserved costs.

[76.3] Upon payment of the amounts in paragraphs 1 and 2 to the plaintiff, the defendant will be entitled to recover 50% thereof from the first third party.

HENRIQUES J

Case Information

Date of hearing : 30 - 31 July 2014, 1 August 2014,
2 - 4 September 2015

Date of judgment : 2 May 2017

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