IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO: 2842/2019
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
DATE 30/05/2024
SIGNATURE

In the matter between:

ENLOGUARD CC T/A MJ ENERGY **PLAINTIFF**

And

MARISYS (PTY) LTD T/A SATHALA LOGISTICS **FIRST DEFENDANT**

CHI CHERA GIVEMOR **SECOND DEFENDANT**

JUDGMENT

LANGA J:

Introduction and background

[1] This action for damages arises out of a motor vehicle collision which took place on the N3 South Bound intersection, Umlaas Road on 15 May 2018. The Plaintiff alleged that the collision was caused by the sole negligence of the Defendant's driver, the Second Defendant Chi Chera Givemore. The Plaintiff is seeking payment for damages in the sum of R1 547 708.75 together with interest. The Fist Defendant in turn also instituted a counter claim for payment of damages in the amount of

R100 573.25. In terms of Rule 33 the merits were separated from the *quantum* as per agreement between the parties and this court therefore proceeded to determine the merits.

[2] Although the accident took place on a freeway outside of the jurisdiction of this court, the jurisdiction of this court is found on the First Defendant's registered address which is situated within the jurisdiction of this court. It is common cause that the accident involved two vehicles/trucks belonging to the Plaintiff and First Defendant respectively. The Plaintiff's vehicle is a Scania combination truck tractor with registration K[...] 9[...] N[...] which was pulling a Flat Decker front and rear trailers bearing registration J[...] 0[...] N[...] AND J[...] 0[...] N[...] respectively. It was driven by Mr PT Mokoena ('Mr Mokoena'). The Defendant's truck, was a Nissan UD with registration H[...] 7[...] M[...] with a trailer with registration H[...] 5[...] M[...] and it was driven by Chi Chera Givemore.

[3] In its plea, the First Defendant mainly denied that the Second Defendant caused the collision. Alternatively, it was pleaded that to the extent that the Court would find that the Second Defendant was negligent, it was denied that the Second Defendant's negligence was the cause of the collision. In the further alternative the First Defendant pleaded contributory negligence and contended that to the extent that the Court would find that the Second Defendant was negligent, the plaintiff's driver was also negligent in causing the collision.

[4] It is further common cause that the drivers of both vehicles were driving these vehicles within the course and scope of their employment with the Plaintiff and the First Defendant respectively. There was accordingly no dispute that the Plaintiff and the First Defendant would be vicariously liable for the actions of their respective drivers.

Issues for determination

[5] As the parties agreed on the separation of the merits and the quantum in terms of Rule 33(4), the crisp issue for determination on the merits is whether or not the Second Defendant was negligent, and if so, whether his negligence caused the collision between the trucks. If the Second Defendant is found to have been

negligent, the court is further called upon to determine if there was any contributory negligence on the part of the Plaintiff's driver.

Evidence

[6] Each party called one witness. The Plaintiff called its driver Mr PT Mokoena whereas the First Defendant called Mr Konrad Lotter, the expert witness who essentially testified in respect of the reconstruction of the accident.

The Plaintiff's version

[7] Mr Mokoena testified that he was the driver of the Plaintiff's vehicle at the time of the collision on the N3 Highway, South Bound. He then saw the First Defendant's Combination truck ahead and thought it was travelling slower than his vehicle. When he switched on his bright lights, he observed the truck again and realized it was not moving. At that time, he also realized there were two passenger vehicles in the lane immediately to his right which, according to his version, obstructed him from moving into the right-hand lane in order to avoid contact with the now stationary truck. He testified that because of these vehicles, it would have been impossible for him to move over into the right-hand lane as that would have caused a collision with the said passenger vehicles. Realizing that the First Defendant's Combination truck was stationary, he attempted to brake but it was too late for him to stop. He, however, further stated that as he attempted to apply the brakes of his truck, he inadvertently applied the accelerator and consequently collided with the stationary combination truck from the rear. Mr Mokoena stated further that he did not see warning lights such as hazard lights or the warning triangle on the road even though the report procured by the Plaintiff, the KVTR report suggested otherwise. I deal with this report in the ensuing paragraphs.

[8] Under cross-examination, Mr Mokoena conceded that on approaching the First Defendant's Combination his view was not obstructed by anything. This is consistent with the KVTR mentioned above. He however confirmed that he could see the chevron at the rear of the First Defendant's truck when his lights were on both bright and dim. Mr Mokoena further conceded that the First Defendant's truck was stationary partly in the left-hand lane with the horse in the yellow line. He further stated that although he was travelling at 69km/h he at no stage removed his foot

from the pedal even though he was already aware of the truck which he thought was moving slower than his vehicle. When was confronted with a statement he made immediately after the accident in which he stated that the two vehicles in right-hand lane had already passed his truck before the collision took place, Mr Mokoena conceded that the vehicles were not to his immediate right and had already passed him before he reached the First Defendant's stationary truck. Under re-examination Mr Mokoena confirmed that although the right lane was empty at the time of the collision he could not successfully swerve to the right as there was no time and space to do so.

[9] Upon being questioned on the KVTR Report which showed that there was a warning triangle on the road approximately 20 meters behind the First Defendant's truck, Mr Mokoena denied seeing the triangle even though it is confirmed in the report which experts on both sides accepted. Although he testified that the First Defendant's truck had no rear lights on at the time of the collision, however when he was confronted with the photographs taken of the First Defendant's truck showing that the rear lights were working, Mr Mokoena simply said that he did not see that the lights were working after the accident. Further, upon being confronted with the discrepancies in the KVTR Report, in particular Mr Lötter's opinion that had he not accelerated or if he had at least reduced his speed there would not have been any impact, Mr Mokoena insisted that he still would not have stopped in time to avoid the collision. Likewise, although he conceded that he inadvertently pressed the accelerator instead of the brakes, he nonetheless insisted that he did not press it so hard for the truck to gain much speed.

The Defendants' version

[10] The Defendant called its expert witness Mr. Lötter who confirmed the correctness of his report. He testified that he and KVTR, the Plaintiff's expert, compiled a joint minute and that there were no issues or dispute between the two experts who were essentially in agreement on their findings. They agreed that chevrons on a warning triangle, or on the back of the First Defendant's truck would have been visible from at least 45 meters on dim lights and 100 meters on bright lights. He further stated that given the width of the road and the size of the vehicles involved, there was no swerve before impact.

[11] However, the gist of his opinion was that Mr. Mokoena had more than enough time to take appropriate action by either removing his foot from the accelerator or applying his brakes in order to be able to move comfortably into the right-hand lane and avoid any impact with the First Defendant's truck. Mr Lotter stated further that the fact that the incident took place at an incline would have also had the effect of slowing the truck down. He stated that in his calculations the Plaintiff's driver would have had a 13 second window to take appropriate action, act reasonably and observe the First Defendant's vehicle. He stated further that taking into account Mr Mokoena's evidence, in all likelihood he had closer to 17 to 20 seconds to avoid the collision.

[12] Under cross examination, Mr. Lotter's opinion was said to be speculative even though in the joint minute both experts took no issue with each other's observations and report. Mr Lötter, however, correctly pointed out that the Plaintiff's expert did not take any issue with his report. He concluded that Mr Mokoena had sufficient time to react and reduce speed by either braking or even just releasing the accelerator. If he had reduced speed instead of accelerating, he could have stopped the truck about 92 meters away. Further, he stated that it is not correct that the acceleration which happened according to Mr Mokoena's own version played a role in the collision.

KVTR Report

[13] It is common cause that after the Plaintiff served the summary of its expert Mr Havenga, employed by KVTR, and the Defendants served the summary of Mr Lötter, the parties filed a joint expert minute dated 15 November 2023. In terms of paragraph 3 of the said joint minute, the experts clearly confirm that "… *there is no disagreement between the respective reports and that the respective reports can be accepted as being in agreement with each other in relation to the observations contained therein".*

[14] It is trite that the effect of an agreement recorded by experts in a joint minute limits the issues on which evidence is needed. Unless a litigant gives fair and timeous warning of the repudiation of the agreement or any part thereof, the other

litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue.

[15] In *BEE v RAF* 2018 (4) SA 366 (SCA) the Supreme Court of Appeal confirmed the decision in *Thomas v BD Sarens (Pty) Ltd* [2012] ZAGPJHC 161 that "…*where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if it is sceptical about those facts (para 9). Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement 'unless it does so clearly and, at the very latest, at the outset of the trial' (para 11). In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference (para 12). Where the experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement. The trial court is not bound to adopt the opinion but the circumstances in which it would not do so are rare(para13)".*

[16] In this case the factual observations and opinions contained in the KVTR Report are common cause as they were accepted and endorsed Mr Lotter whose expert opinion is also based thereon. It is important to refer to some of the salient parts from the KVTR Report such as the following which are common cause:

1. That the section of the road where the collision occurred consists of 2 lanes of traffic in both directions and each lane is approximately 3.5 meters in width;

2. There was no rain at the time of the collision and the road surface was dry and not slippery;

3.There was no obstruction obscuring the visibility of Plaintiff's driver and there were no weather anomalies which impacted the visibility of the plaintiff's driver's;

4.That the First Defendant's truck was stationary at the time of the collision;

5. The two photographs under section 7.2 of the KVTR Report shows the Plaintiff's driver direct line of sight approaching the location where the First Defendant's Combination was stationary on the road;

6. Page 24 shows the final resting positions of the vehicles;

7. Page 15 shows the warning triangle found on the scene after the collision behind the First Defendant's Combination;

8. Page 17 reflects that the speed of the Plaintiff's truck was 69 km/h before the collision;

[17] Further, the report in section 11 highlights the following discrepancies in the version of Mr Mokoena. The first is that there was a triangle placed behind the First Defendant's truck which had been runover and it was approximately 20 meters behind the trailer in the emergency lane. The second is the evidence from photographs suggesting that the lights of the First Defendant's truck were working at least the time when the photos were taken after the collision. In the KVTR Report the experts opined that after the Second Defendant encountered problems with his truck tractor while travelling on the N3 Southbound, his truck came to rest in the left lane. The Second Defendant the placed an emergency triangle approximately 20 to 30 meters behind the vehicle in the emergency lane.

[18] The report further most significantly says that the Plaintiff's driver was travelling on the N3 Southbound in the left lane when he noticed the First Defendant's truck in the left lane and assumed that it was moving slowly whereas it was stationary. He only realised it was stationary when he got closer. The plaintiff's driver could not move to the right lane due to other trucks in the right lane next to him. The report says further that the Plaintiff's driver was so focused on the vehicles in front and side that he accidentally pressed the accelerator instead of the brake. He also did not notice the emergency triangle in the emergency lane. It further records that the Plaintiff's driver swerved to the right, when it was clear, but still collided with the stationary vehicle in the left lane.

[19] Although Mr Lötter, did not take issue with the aforesaid opinion, he, however, indicated in paragraph 3.2 of his report that if one considers the time that it would have been necessary for the Second Defendant to alight from the stationary vehicle, retrieve the triangle walk 20 to 30 meters behind the truck, place same in the road, and if the collision had occurred thereafter, "*it is evident that the leading truck would have been stationary for a period of more than 13 seconds as indicated in paragraph 3.2. This in fact indicates that the stationary truck would have been stationary from the first time the driver of the Scania observed the vehicle 13 seconds earlier*".

[20] In the report Mr Lötter further deduced that if one accepts that the Plaintiff's driver observed the stationary truck of the First Defendant 13 seconds before the collision and was travelling at 80k/h, it means that the plaintiff's driver was approximately 288 meters away from the stationary truck when it was initially observed and that if he applied brakes at that point in time, it would have taken approximately 84 meters to bring the vehicle to a complete stop about 192 meters from the rear of the stationary vehicle.

[21] Further, in paragraph 3.6, Mr Lötter states further that the plaintiff's driver would merely have to slow down slightly to allow the vehicles to his right to pass, as a slight reduction of the speed would increase the time to reach the stationary vehicle in front of him. If the driver only releases the accelerator, the combination of the slight gradient, with rolling resistance of the tyres and the slight engine braking would have been sufficient to slow the vehicle down to allow other vehicles to pass. Mr Lötter then opines at paragraph 4 of his report, that the second defendant had in fact placed the warning triangle in all likelihood some distance greater than 20 meters away from the stationary truck and that *"it is however also evident from the version of the Scania driver [the plaintiff's driver] that he saw the stationary vehicle approximately 13 second before the collision occurred. It is also evident that his view towards this vehicle would have been unobstructed for this whole period of time. As indicated above, he could have taken numerous actions during this period of approach, in order to avoid the collision. It is however evident that he continued at speed (based on the extent of the damage). It is also evident that he remained fully in his original lane. Further to this, on his own version he accelerated instead of braking when he was confronted with this situation which he created by continuing at*

speed, while the stationary vehicle would have been visible for the whole period of time".

Discussion and analysis

[22] It is trite that the Defendants do not bear the onus to prove that they were not negligent. As stated in *Ntsala and Others v Mutual & Federal Insurance Co. Ltd* 1996 (2) SA 184 (T) the onus rests on the Plaintiff to prove negligence. In order to succeed with the claim, the Plaintiff therefore had to show that the Defendant's driver was guilty of conduct which was negligent, wrongful and was the cause of the collision and damage to the truck. In *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para [12] the Supreme Court of Appeal stated the following basic rule. *'The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that "skade rus waar dit val". Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful ...'*

[23] The test for negligence is to be found in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G. *'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.

… Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding

steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case…'

[24] In the light of the evidence adduced in this matter, most issues are not in dispute. It is also not in dispute that the drivers of the vehicles involved did so during the course of their employment as stated in the preceding paragraphs. It is also common cause that a collision took place between the trucks belonging to the Plaintiff and the First Defendant. The crisp issue for determination is whether or not the Second Defendant was negligent, and if so, whether his negligence caused the collision between the trucks. If the Second Defendant is found to have been negligent, the court is further called upon to determine if there was any contributory negligence on the part of the Plaintiff's driver. The issue for determination is accordingly one of negligence.

[25] As a starting point I accept the uncontested evidence that the section of the road where the collision occurred consists of 2 lanes of traffic in both directions and each lane is approximately 3.5 meters in width. I further accept the evidence that the First Defendant's truck was stationary at the time of the collision and that although it was night time, there was no obstruction obscuring the visibility of Plaintiff's driver who had clear direct line of sight when approaching the stationary truck. I further accept the evidence that a warning triangle was found on the scene behind the stationary truck after the collision. Regarding the speed, I accept the evidence that the Plaintiff's truck was travelling at al least 69 km/h just before the collision.

[26] Although it was suggested by the Plaintiff that the stationary vehicle's lights were not on, it is however, not in dispute that Mr Mokoena did observe the stationary truck at some distance before the collision took place. It is further common cause that when he noticed the stationary truck, Mr Mokoena wrongly assumed that it was moving slowly whereas it was in effect stationary. He only realised it was stationary when he got closer. It is important to mention that despite his observations, Mr Mokoena conceded that he did not reduce speed. He did not apply brakes or lift his foot off the accelerator pedal.

[27] It is not in doubt that the fact that he thought the truck was moving slower certainly heightened caution and vigilance. In those circumstances it was reasonably foreseeable that the visible 'slow moving' truck could present a challenge and any reasonable driver would have been expected to reduce speed and assess that situation in front of him. Mr Mokoena did not do so. Consequently, in my view, even based on his assumption that the truck was moving slowly, there was a clear duty on Mr Mokoena to at least slow down his vehicle in order to be able to stop or take the necessary evasive action should the situation require him to do so. The duty became even more pronounced wen when he realized that the vehicle was stationary. He should have slowed down or stopped. By failing to slow down Mr Mokoena clearly disregarded the lurking and foreseeable dangerous situation unfolding in front of his eyes. In the end this failure to slow down contributed to the eventual collision as he could not stop his truck in time to avoid the collision. Mr Mokoena therefore in my view acted negligently.

[28] Furthermore, although Mr Mokoena attributed his inability to avoid the collision to on vehicles passing on the right had lane, this however cannot be correct as it is clear from his evidence that these vehicles had already passed when he attempted to execute that evasive manoeuvre. However, even if one accepted that the vehicles were impeding him, another problem for him to navigate is the action he took once he realized that the truck in front was stationary. While we know already that he did not slow down the vehicle in order to avoid the collision, the further problem is that instead of slowing down the vehicle, Mr Mokoena inadvertently accelerated the vehicle. Although this mistaken acceleration by Mr Mokoena may constitute an *actus novus interveniens* having the effect of neutralizing the causative strength of Mr Mokoena's original conduct, it cannot be argued that it was reasonably foreseeable that in that situation Mr Mokoena would accelerate into the stationary vehicle by mistake and not apply the brakes. It is therefore also safe to conclude that had he not accelerated Mr Mokoena could have avoided the collision. Based on Mr Mokoena's act of acceleration in the circumstances, the negligence clearly cannot be attributed the Defendant.

<u>Conclusion</u>

[29] In conclusion, considering the decision in *Flanders v Trans Zambezi (Pty) Ltd* 2009 (4) SA 192 (SCA), which is almost on all fours with the current matter, the Plaintiff's claim stands to be dismissed. Unlike in *Flanders,* considering the evidence, and in particular the Plaintiff's KVTR report, I am satisfied that the First Defendant's truck had lights on and there was also a warning triangle placed behind it. Further, it is evident that the road had no obstructions and that Mr Mokoena could see the stationary vehicle from at least around 300 meters away. It is evident that Mr Mokoena had ample time to properly observe and realize that the vehicle was stationary if he was paying proper attention to the situation before him.

[30] In my view it is immaterial whether the truck in front was moving slowly or stationary. Mr Mokoena should have reduced speed. It is evident that he could have managed the situation better and avoided the collision had he done so. Further he could have either stopped or safely passed the stationary vehicle after the two vehicles traveling on the right-hand lane had passed. The excuse by Mr Mokoena that these vehicles prevented him from evading the collision should be rejected as he created that situation by failing to reduce speed as soon as he saw the slow-moving vehicle in front. In any even his evidence is that these vehicles had already passed when the collision took place.

[31] I am accordingly satisfied that Mr Mokoena was the sole cause of the collision because he failed to stop his vehicle within his range of vision in circumstances where it was reasonably foreseeable that the 'slow moving vehicle' ahead could present a challenge for the vehicle coming from behind unless the latter's speed is reduced considerably. I further find that the Plaintiff filed to prove any negligence on the part of the Second Defendant's driver. The evidence instead justifies a conclusion that the Plaintiff's driver Mr Mokoena was the sole cause of the collision.

[32] In the result, based on the facts and also considering the *Flanders* judgment, I am satisfied that the Plaintiff's driver was the sole cause of the collision. The Plaintiff's claim therefore stands to be dismissed with costs. The First Defendant's counter claim should succeed.

<u>Order</u>

[33] I accordingly make the following order:

1. The Plaintiff's claim is dismissed with costs;

2. The First Defendant's counter claim succeeds and the Plaintiff is ordered to pay the First Defendant's proven or agreed damages;

3. The determination of the quantum in respect of the Furst Defendant's damages is postponed *sine die.*

MBG LANGA
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant/Plaintiff:	Advocate C Grant
For the Defendants:	Advocate M Louw
Date heard:	31 January 2024
Date Delivered:	30 May 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 30 May 2024 at 14h00