Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates	YES / NO
Circulate to Magistrates:	YES / NO

NORTHERN CAPE HIGH COURT, KIMBERLEY

Saakno: / Case number: **1542 / 2006**
Datum verhoor: / Date heard: **23 / 09 / 2010**
Datum gelewer/Date delivered: **08 / 10 / 2010**

In the matter between:

RENIER REYNEKE CC Plaintiff

and

NORTHERN CAPE PROVINCIAL GOVERNMENT Defendant

Coram: Lacock R

JUDGMENT

LACOCK J:

1] The plaintiff instituted action against the defendant for payment of approximately R1,5 million in respect of damages allegedly suffered in consequence of an incident in which the left front wheel and left front fender of the plaintiff's Mercedes Benz Actros Mechanical horse (the Mercedes) collided against the left concrete apron and

railings of a small bridge on the N12 national road a few kilometres north of Hopetown. As a result of the said collision the Mercedes as well as the refrigerated tri-axle trailer it was towing overturned on the left side of the road.

At the request of both parties the issues of quantum and merits were separated and the trial proceeded on the merits only.

2] In its particulars of claim the plaintiff relied *inter alia* on the following averments

"*5. At all material times defendant was responsible for the planning, construction, control, maintenance and rehabilitation of the aforementioned road and for providing, establishing, erecting and maintaining facilities thereon for the convenience and safety of road users and as such:*

5.1 it was obliged to provide users of the road with safe passage; and

5.2 it owed road users a duty of care.

6. The sole cause of the Mercedes and trailer colliding with and plummeting from the bridge was the negligence of the defendant in that it failed:

6.1 to erect correct, alternatively adequate, road signage indicating a narrow bridge;

6.2 to warn, adquately or at all, motorists using the road in the vicinity of the bridge, of the impending narrow bridge ahead, to slow down and approach with caution;

6.3 correctly to position the lefthand yellow line in the roadway thereby misrepresenting to users of the road the true width thereof;

6.4 correctly to position the Catseyes on the roadway immediately before the bridge;

6.5 *to react responsibly subsequent to previous similar collisions at the same place."*

2.1 The defendant admitted the contents of paragraphs 5 to 5.2, but denied the contents of paragraph 6. In the alternative it pleaded,

"*6. <u>Ad paragraph 6 thereof</u>:*

6.1 The Defendant denies each and every allegation contained therein as if herein so set out and, in particular, denies that the Defendant was negligent either as alleged or at all.

6.2 The Defendant pleads that the collision was caused by the negligence of the driver of the Mercedes who was negligent in one or more or all of the following respects:

6.2.1 he failed to keep the Mercedes under proper control;

6.2.2 he failed to keep a proper lookout;

6.2.3 he drove on the extreme left side of the road when it was inopportune and dangerous to do so;

6.2.4 he failed to apply the brakes of the Mercedes timeously or at all;

6.2.5 he drove at an excessive speed under the circumstances; and

6.2.6 he failed to avoid the collision when, by the exercise of reasonable care and skill, he could and should have done so."

and further in the alternative,

6.3 In the event of it being held by this Honourable Court tht the Defendant was negligent, which is still denied, then and in that event the Defendant pleads that its negligence did not cause the collision.

6.4 *In the event of it being held by this Honourable Court that the Defendant was negligent and that its negligence was a cause of the collision, all of which is still denied, then and in that event the Defendant pleads that the driver of the Mercedes was also negligent and that his negligence contributed to the collision. The particulars of the negligence of the driver of the Mercedes are set out in paragraph 6.2 above."*

3] The only witness called on behalf of the Plaintiff was the driver of the Mercedes at the time, one Mr. Marthinus Johannes van der Walt (Van der Walt). The defendant called the police officer who attended to the scene of the accident, whereafter it closed its case. I need to add that the defendant gave notice of its intention to call an expert witness to express an opinion on the probable cause of the collision and how the collision occurred. This witness sadly passed away after the trial was postponed on 27 August 2008 and before it resumed on 21 September 2010.

4] Van der Walt testified that he left Tzaneen during the morning of 13 May 2005 with a 27 ton load of avocado pears en route to Cape Town. He was an experienced and properly licensed driver of huge trucks, and was employed as such by the plaintiff. This was the first time ever that he drove a vehicle from Tzaneen to Cape Town via Kimberley. Approaching the scene of the collision, he was driving – as was his habit at night – with his left front wheel on the yellow line forming the left hand edge of the left lane of the road. He observed an oncoming vehicle approaching from the opposite direction coming down a slope ahead of him. He dipped the headlights of the Mercedes, but the driver of the approaching vehicle failed to dip and kept the headlights of that vehicle on bright. Van der Walt reduced speed by taking his foot off the accellerator. Approximately one kilometer ahead of him, the approaching vehicle turned off the road to its right hand side. He then switched the headlights of the Mercedes back to bright, and at the same time saw the bridge immediately ahead of him. He was still driving with the left front wheel of the Mercedes on the yellow line. He realised that he would hit the concrete apron or walkway of the bridge ahead of him, but he was too close to the bridge to swerve the truck to the right.

5] The following factual circumstances were common cause

between the parties or not in dispute.

5.1 The collision occurred at approximately 02:35 in the early hours of the morning of 14 May 2005.

5.2 For about 25 minutes before he collided with the guard rails of the bridge, Van der Walt was travelling at a speed of approximately 96 km/h. When he hit the guard rails, the was travelling at a speed of 59 km/h.

5.3 The eastern lane of the road (on which Van der Walt was travelling from north to south) to the north of the bridge is 4 meters wide between the middle of the road and the yellow line.

5.4 The eastern lane of the road on the bridge itself, i.e. between the middle of the road and the western edge of the apron, is 3.65 meters wide.

5.5 The apron of the bridge was 800 mm wide, and the guard rails were mounted on the very edge (eastern edge) of the apron. The bridge was 30 meters long.

5.6 The eastern yellow line on the road dead-ended in the middle of the northern edge of the apron. The apron

rose approximately 140 mm above the tarred service of the road.

5.7 The width of the Mercedes at the front was 2.49 meters. The bull-bar protruded slightly beyond the body of the vehicle on both sides.

5.8 The speed limit on this particular section of the road was 100 km/h.

5.9 Approximately 100 meters to the north of the bridge was a warning sign to warn road users that the roadway ahead narrows from both sides. On the bullnose endwing of the metal guardrails running from the northern edge of the concrete guardrails of the bridge towards the edge of the tarred shoulder of the road in a northern direction, was attached a danger plate warning traffic of an obstruction on the left hand side of the road.

6] Adv. Bloem, on behalf of the defendant, conceded that the issue of negligence should be considered on the acceptance of the evidence of Van der Walt, save in two respects to which I will return shortly. Van der Walt impressed me as an honest witness. He had a good memory of the sequence of

events of the particular night, and at no time did I get the impression that he tried to conceal his own negligence.

7] On his own evidence, it was clear that Van der Walt negligently failed to keep a proper look-out for warning signs on the left hand side of the road. He did not observe the sign indicating that the road narrows ahead of him, and neither did he observe the danger plate attached to the northern end of the metal railing indicating an obstruction in the roadway alignment to the left side of the road.

Although Van der Walt focused his attention on the approaching vehicle, it is not an excuse for ignoring or rather not observing road signs next to the road. A reasonable driver would have observed these reflective road signs, would have been aware of the possibility of the road narrowing ahead and would have kept a look out for such a possibility. Had Van der Walt done this, the possibility and even the probability that he would have taken some evasive action timeously cannot be ruled out.

8] Mr. Bloem contended that the evidence of Van der Walt to the effect that he was temporarily blinded by the approaching vehicle, and that he was approximately 2 meters from the bridge before he saw it, needs to be

rejected. I agree. Van der Walt was clearly mistaken in his estimation of the distance between the Mercedes and the bridge when he first saw the bridge. Even with his headlights dipped, logic dictates that he should have and probably did see the bridge at some further distance. What cannot be disputed however is that he was too close to the bridge to swerve to his right to avoid colliding with the concrete apron, taking into account the size and the weight of the Mercedes and the laden trailer.

9] Mr. Bloem further submitted that the manner in which Van der Walt drove the Mercedes, i.e. with its left front wheel on the yellow line, in itself constituted negligence as well as his failure to apply his brakes when he was affected by the headlights of the approaching vehicle. He submitted that, had Van der Walt driven in the middle of the lane as a reasonable driver would have done, he would not have collided with the apron of the bridge. It can be accepted that, had Van der Walt driven the Mercedes in the middle of the left lane of the road, he would not have collided with the apron. What therefore needs to be decided is whether it can be said that Van der Walt was negligent by driving with the left front wheel of the Mercedes on the yellow line, and by failing to apply his brakes.

9.1 Mr. Bloem relied on three cases in support of his submission, viz **Manderson v Century Insurance Company Ltd**, 1951 (1) SA 533 (AD), **S v Van Deventer** 1963 (2) SA 475 (AD) and **Flanders v Trans Zambezi Express (Pty) Ltd** 2009 (4) SA 192 (SCA). The facts in all these cases are distinguishable from the facts of this matter.

9.2 In **Manderson** the plaintiff's car overheated and he stopped his vehicle in the middle of the gravel road he was travelling on, and switched off the lights of his car. Two vehicles appraoched with their lights on, one from the front and one from behind. The vehicle appraoching from behind collided with plaintiff's stationary vehicle. It was found by the trial court that the driver of the defendant's vehicle was not negligent. The appeal to the SCA failed. What Mr Bloem relied on was the following *dictum* of Van den Heever AJ at 537H.

> "*To my mind a man who travels in the dark at a speed which, because of the condition of the road or for some other reason, does not enable him to pull up within the range of his vision, is prima facie guilty of negligence. In doing so he accepts risks of injury to others which he is not entitled to take, for he is prepared to drive a potentially dangerous thing over a part of the road which he has not surveyed with his eyes - in other words blindly.*

Later in the judgment this *dictum* was qualified thus:

"*If, however, he travels along a frequented road upon which he should have foreseen the likelihood of there being animals, pedestrians or stationary vehicles and he takes the risk of travelling through a section of the road which he has not probed with his eyes, at a speed which does not permit of his drawing up before reaching any object which suddenly appears within the range of his vision and an accident results, I have difficulty in seeing how - as a matter of reasoning, not law - he can escape from the dilemma. Of course when other factors, which such a person cannot reasonably have foreseen, contribute towards the collision, other considerations will enter into the inquiry. Here there were no such factors and to my mind Verster was negligent in that he drove the car at a speed which did not permit of his pulling up before colliding with an object the possible presence of which he should have foreseen.* (at 540G to H).

The majority of the Court of Appeal differed from Van den Heever AJ and found that the driver of defendant's vehicle was not negligent.

9.3 In **Van Deventer** the issue was whether the appellant, who was momentarily blinded by a passing vehicle from the front, and collided with a pedestrian who was walking on the left hand side of the vehicular lane of the road, was negligent by failing to apply his brakes when blinded. Ogilvie-Thompson AJ found,

"*The possiblity that he might become blinded ought, therefore, to have been present to appellant's mind. Once he was blinded by the south-bound car's headlights, appellant did not apply his brakes. That is to say, save for removing his foot from the accellerator, he made no attempt whatever to minimise the risks*

attendant upon his car's proceeding on to a stretch of road which his eyes had not previously scanned." (at 482 A)

However, he immediately qualified this *dictum* by stating,

"*That is, of course, not to say that such conduct will necessarily always amount to negligence. The particular circumstances may be such that the presence of the obstruction encountered could not, in the view of the Court, reasonably have been anticipated at all.*" (at 482 C)

9.4 In **Flanders** the driver of a passenger bus collided with an army truck which was stationary and unlit and parked at an angle on the left hand side of the road with its right rear corner protruding over the yellow line and partially obstructing traffic in the left lane of the road. The driver of the bus was held to be negligent in that he failed to reduce his speed to enable him to stop the bus within his range of vision when blinded by an approaching vehicle. Griesel AJA held,

"*Notwithstanding such impaired vision, Sibeni did not brake or reduce his speed. (Admittedly he testified that he had geared down to seventh gear - from eighth gear - but even if this were accepted, it quite clearly had no appreciable effect on the speed of the bus.) In these circumstances, and given the reasonable foreseeability of unlighted obstructions on the road ahead, the duty resting on Sibeni was not merely to slow down, but to reduce his speed by braking immediately so as to be able to stop within the range of his vision or even to stop. This is not an unduly onerous duty to impose upon a professional driver in the position of Sibeni, especially having regard to the fact that he,*

literally, held the lives of more than 40 people in his hands. His failure in these circumstances to stop or to slow down to the extent necessary is a 'crucial factor' in holding that he was negligent." (at 199 H to 200 B)

9.5 Mr. Bloem submitted that it was insufficient for Van der Walt to reduce his speed when he was blinded by the approaching vehicle. He submitted that Van der Walt was negligent by failing to brake and to steer his vehicle more to the middle of his lane instead of continuing on the yellow line. He submitted that a reasonable driver would not under these circumstances have travelled on the yellow line since he travelled on an unknown road at night for the first time, was blinded by an approaching vehicle, and was driving a laden truck which required some distance to turn or swerve. It was further submitted that an obstruction in or on the road was not unforseeable.

10] As indicated above, I am not persuaded that Van der Walt was actually blinded by the oncoming vehicle in the sense that he was momentarily completely blinded and could not see anything ahead of him. It is common cause that the approaching vehilce was not less than 900 meters ahead of him when that vehicle turned off the road to its right. It is not probable that the headlights of that vehicle could at that distance, have blinded Van der Walt completely.

11] The question therefore is whethr a reasonable driver in the position of Van der Walt would have continued on the yellow line instead of moving more to the middle of his lane of traffic and to apply his brakes.

11.1 Van der Walt testified that he travelled on the yellow line to allow for more space between his truck and oncoming traffic, and more particularly larger trucks to pass one another safely. He explained that the closer one drives to the middle of the road, the higher the risk that the rearview mirrors of the trucks that protrude beyond the bodies of the trucks, can collide.

11.2 The tarred shoulder of the road on the left before it narrowed towards the northern edge of the bridge, was approximately 1.2 meters wide. Van der Walt did not travel with the left wheels of the truck outside the yellow line.

11.3 I do not find Van der Walt's mode of travelling on the yellow line unreasonable. His lane of traffic is that section of the road between the white line in the centre of the road and the yellow line on the left. He did not travel beyond the yellow line on the shoulder of the

road. To my mind the reasonable driver will be more inclined to travel more to the left of his lane at night than to the middle of the road. This would allow him or her more space to pass oncoming traffic safely and thereby minimising the risk of a collision.

11.4 Van der Walt decreased his speed to 59 km/h when affected by the headlights of the approaching vehicle and he dipped his own headlights. Should he have applied his brakes as well? I think not. He travelled on a straight section of the road with a broad shoulder on the left in the early hours of the morning whilst very little traffic was encountered. The likelihood of encountering cyclists or pedestrians or animals on the road at that time of night was negligible. To expect from Van der Walt that he should reasonably have foreseen the likelihood of the yellow line on which he travelled running into the concrete apron of the bridge on a national roadway, would be tantamount to expecting the impossible. In this regard I keep in mind what was said in **Seemane v AA Mutual Insurance Association Ltd** 1975 (4) SA 767 (AD) at 772 G to 773B, viz:

"*In later cases one or other of these approaches has been accentuated. It is, however, accepted at present, and conceded*

on behalf of the plaintiff, that there is no generally valid rule of law that a driver must so regulate his speed that he can stop within the limits of his field of vision. One of the most felicitous expressions of the general principle of our law in this context occurs in Wasserman v Union Government, 1934 AD 228 at p. 231. It is the following:

> *'A person must take precautions against harm happening to another if the likelihood of such harm would be realised by the reasonably prudent person. He need not take precautions against a mere possibility of harm not amounting to such a likelihood as would be realised by the reasonably prudent person.'*

It would hardly serve any useful purpose to analyse all the dicta contained in our case law on the present problem since every case must turn on its own set of facts. Counsel for the plaintiff has relied in his heads of argument and at the hearing on the case of S. v Van Deventer, 1963 (2) SA 475 (AD) at pp. 481A - 482D. The present case is, however, clearly distinguishable from the Van Deventer case in which case it had been established against the driver that he should have foreseen the possibility of an unlighted object in the road. It was also a finding of the Court that the driver should have realised that he might become blinded. He had furthermore taken inadequate steps to avoid a collision. In the instant case it has not been established that, in the particular circumstances, a reasonable driver would have foreseen the possibility of a virtually invisible cyclist being present in the middle of Langerman Drive on the evening in question, and, therefore, would have driven in a manner enabling him to cope with such a situation, particularly at a lower speed or more to the left of the road. Nor has it been established that Roux, in the conditions prevailing, should have seen the plaintiff sooner than he did. It has not been shown that the Judge a quo erred in holding that there was no acceptable proof that Roux could reasonably have been expected to avoid the collision and had thus been guilty of driving negligently. The appeal is therefore dismissed with costs."

12] For these reasons I am not persuaded that Van der Walt was negligent in any other respect save for keeping a proper look-out.

13] Mr. Bloem, correctly so in my view, conceded that the apron of the bridge together with the positioning of the yellow line constituted a dangerous obstruction in the lane of the traffic traversed by Van der Walt. The yellow line generally serves as an indication of the left edge of a traffic lane, and, to my mind, a resaonable road user would not expect such a line to dead end into a permanent obstruction such as the apron or walkway of a bridge.

Put differently: A reasonable provincial department in control of the road markings on national roads should guard against misleading road markings. A reasonable person in the position of the defendant would have foreseen the possibility that a motorist could be mislead by the placing of the yellow line in the position where it was immediately to the north of the bridge, and that this obstruction would cause a motorist damages.

The defendant therefore cannot escape a finding of negligence against it.

13.1 The defendant clearly realised the hazardous situation it created, since the poisitioning of the yellow line was changed subsequent to the relevant collision, and

repositioned to run past the northern edge of the apron and to the right of the eastern edge thereof.

14] What remains to be addressed is the degree of the negligence of Van der Walt and the defendant that contributed to the collision. No purpose will be served to revisit the nature of the negligence on the part of Van der Walt and that of the defendant, suffice it to say that the negligence of Van der Walt for failing to keep a proper look out and the hazard created by the defendant both contributed to the collision and the resultant damages. There is no magic formula whereby the degree of contributory negligence can be determined mathematically, and one has no other yardstick but experience and common sense to rely on. To my mind, the negligence of Van der Walt and the defendant contributed in equal portions to the occurrence of the collision. I regard the degree of fault on the part of Van der Walt as well as the defendant as a "*substantial deviation from the objective norm*". See **Jones N.O. v SANTAM Bpk** 1965 (2) SA 542 (AD) at 555 D to 556 E.

15] The following order is therefore made:-

1. IT IS DECLARED THAT THE DEFENDANT IS LIABLE

TO COMPENSATE THE PLAINTIFF FOR 50 % OF DAMAGES IT MAY PROVE TO HAVE SUFFERED AS A RESULT OF THE RELEVANT COLLISION.

2. COSTS TO BE COSTS IN THE CAUSE.

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HJ Lacock
JUDGE

On behalf of Plaintiff:	**Adv. Minnaar o.i.o. Elliott, Maris, Wilmans & Hay**
On behalf of Defendant:	**Adv. Bloem o.i.o. Towell-Groenewaldt**