

SOUTH AFRICA / JUDGMENT

Mosiapoa v Tikane (CA 12/2009)

[2010] ZANWHC 47 (18 June 2010)

[2010] ZANWHC 47

COURT

North West High Court, Mafikeng

BEFORE

M.J. Mpshe, Samkelo Gura

CASE / FILE NUMBER

CA 12/2009

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NORTH WEST HIGH COURT, MAFIKENG

CASE NO. CA 12/2009

In the matter between:

M.G. MOSIAPOAAPPELLANT

and

MONTLENYANE MARTHA TIKANERESPONDENT

CIVIL APPEAL

MPSHE AJ.

A.

INTRODUCTION

[1] This is an appeal against the finding of a Magistrate in the Magistrate Court for the District of Vryburg. The finding was made on 05 November 2007 as follows:

“Dit is my bevinding dat die Eerste Verweerder nalatig was deurdat:

1. hy nie behoorlike uitkyk gehou het nie;
2. hy onder die omstandighede te vinnig gery het;
3. hy nie voorsiening gemaak het vir laterale beweging nie;
4. hy nie voldoende ruimte gelaat het om veilig verby te steek nie.

Die Eerste Verweerder het opgetree binne die bestek van en die uitvoering van sy pligte as werknemer teenoor die Tweede Verweerder en volg dit dus dat die Tweede Verweerder middelik aanspreeklik is.”

[2] The appeal is directed to the merits only.

B.

BACKGROUND

[3] On 01 December 2001, a collision took place on the Delareyville–Vryburg road, at a distance of ±20 km from Vryburg.

[4] The collision was between a combi (taxi), with registration No’s CKV 578 NW, driven by the first defendant Tebogo Xolise Mosiapo and a donkey-cart.

[5] The vehicle, a combi, had 13 passengers. They were travelling from Pretoria to Vryburg.

[6] As a result of this collision, one passenger, Itumeleng Stephen Tikane, died. Several other passengers sustained injuries.

[7] The matter served before the Magistrate as a claim for loss of maintenance. The respondent, Montlenyane Martha Tikane, was married

to the deceased in community of property.

[8] There was a separation of trial with regard to merits and quantum.

C. FACTS NOT IN DISPUTE

[9] Mr Mosiapo was the driver of a Toyota minibus taxi with 13 passengers, en route to Vryburg on the Delareyville–Vryburg national road, on 01 December 2001.

[10] Kupeledi, who was a passenger in the combi, sat in the row of seats directly behind the driver and in the middle of the seat.

[11] Mobeng, who was also a passenger in the combi, sat in the same row as Kupeledi, immediately behind the driver.

[12] The deceased, Mr Tikane, sat in the row of seats immediately behind Kupeledi and Mobeng and to the left of them.

[13] Weather conditions and visibility were good at the relevant time.

[14] The combi approached a donkey-cart, travelling in the same direction as the combi (towards Vryburg).

[15] The donkey-cart was approximately 100m from the combi when the driver noticed it for the first time.

- [16] The deceased shouted, “Hey man, hey man, daar is ’n kar”, to warn the driver of the donkey-cart in front of the combi.
- [17] The combi collided with the donkey-cart, overturned and Mr Tikane died as a result of the collision.
- [18] The driver hooted when he saw the donkey-cart, i.e. when he was approximately 100m behind it.
- [19] The occupants of the donkey-cart were aware of the approaching combi.
- [20] The driver of the combi travelled at a speed of 100km per hour and did not reduce speed upon noticing or approaching the donkey-cart.
- [21] The donkey-cart could not have travelled at a speed of more than 15km per hour.
- [22] The left front portion of the taxi collided with the donkey-cart.
- [23] At the time of impact, the combi still travelled at 100km per hour.
- [24] Inspector Mokonyane was on the scene of the accident shortly afterwards and located the glass from the headlights and indicator light of the minibus on the left-hand side of the road (looking in the direction of Vryburg).
- [25] The combi was located on the left-hand side of the road (looking in the direction of Vryburg), after the collision.
- [26] The driver did not testify that he made provision for any lateral movement on the part of the donkeys.
- [27] The driver was aware, from previous experience, that a farm road and entrance existed in the vicinity of the accident.

D. ISSUES IN DISPUTE

- [28] The dispute in the Court a quo could be summarised as follows, whether or not:
- (i) the taxi collided with the donkey-cart directly from behind, or whether or not the taxi struck the donkey-cart more to its right;
 - (ii) the donkey-cart turned to the right-hand side of the road at the time the combi was trying to overtake;
 - (ii) the first defendant (the driver) was negligent in the circumstances.

E. EVIDENCE IN THE COURT A QUO

- [29] Three witnesses, to wit, Sophia Kupeledi, Jama Mobeng and Samuel Makonyane testified for the respondent.
- [30] The first defendant testified, but called no witnesses.

[31] The appellant did not testify, but tendered evidence of Inspector Sekewana.

F. EVIDENCE FOR THE RESPONDENT

[32] I will deal firstly jointly with the evidence of Sophia Kupeledi and Jama Mobeng as both are eye-witnesses in the matter.

[33] I start by dealing with the corroboration between these two witnesses. These are that:

33.1 the deceased is the person who alerted the driver of the minibus;

33.2 the driver of the minibus could not have been able to avoid the collision because he, the driver, was near the donkey-cart. That when he heard the yelling by the deceased, he tried to swerve, but it was too late;

33.3 the donkey-cart and the minibus were in a straight line at the time of the collision;

33.4 the donkey-cart did not turn as alleged by the driver of the minibus.

33.5 the minibus did not reduce speed. The witness, Sophia Kupeledi, testified further to the effect that the driver of the minibus did not apply brakes.

“Het hy enigsins sy brike aangeslaan, gevoel hier kom die brieke? ---

Nee, hy het nie die remme aangeslaan nie.

Kan ek so vir u vra toe julle nou die donkiekar daar voor in die pad sien soos jy nou sien dit is daar van Checkers af min of meer so hele ent weg, het die bestuurder, mnr. Tebogo, het hy sy spoed verminder of het hy met dieselfde spoed gery of het hy vinniger gery of wat het hy gedoen?

Dieselfde spoed wat hy gery het, hy het nie verminder of vermeerder nie.

.....

Ons was aan die likerkant van die pad asook die donkiekar en ons het net so aangehou gery.”

The witness, Jama Mobeng’s evidence as follows, is important:

“Luister na my vraag. As die, was daar plek om die donkiekar aan die regterkant verby te gaan of nie?

Nee, daar was nie ’n spasie nie.

Nou kan u vir die hof sê waar die donkiekar getref? Was die donkiekar getref, is die donkies getref? U sê nou die donkiekar

ry voor die kombi. Waar het die kombi die donkiekar geslaan toe die botsing plaasvind? ---

Van agertaf.”

33.6 the minibus hit the donkey-cart on the right with its (the minibus’) left side.

[34] Those two witnesses' evidence is quite non-contradictory. They were cross-examined at length but stood by their versions. They are both illiterate, cannot read nor write, but their evidence was impressive. I accept their credibility.

[35] The witness, Samuel Mokonyane, was not an eye-witness. He arrived on the scene of the accident shortly after it had happened. He is a member of the South African Police Service (SAPS). He made certain observations on the scene, namely, that:

35.1 the minibus hit the donkey-cart from behind because both vehicles were travelling in the same direction;

35.2 the minibus was damaged in front and had capsized;

35.3 the donkey-cart faced another direction but was not damaged, but that the two donkeys were dead;

35.4 he found pieces of glass and these were on the left side of the road;

34.5 there is an entrance road from the main road, this road leads into an adjacent farm;

35.6 the said side road is ahead of the scene of accident;

35.7 he saw no brake marks, if they were there he would have seen them;

35.8 he was adamant, even under cross-examination, that the minibus hit the donkey-cart from behind.

“Nee, ek kom terug na die eerste vraag. Hy moet net mooi luister na daardie vraag. Ek vra die skade wat hy aan die voorkant van die kombi aangetref het, kan dit vereenselwig word met 'n botsing teen 'n donkiekar wat besig is om regs oor die pad te beweeg? --- Dit is nie so nie.

Hoekom kan dit nie? --- Ek sê dit is nie so nie omdat as die kombi gedraai (onhoorbaar), die skade op die kombi sou op die kant van die voertuig gewees het, maar hier is net voor die voertuig. Die skade was voor die voertuig gewees.

Kyk, as ek miskien sommer net vir u miskien kan verduidelik aan die hand van 'n skets wat ek bedoel. Kan ek net so ...? Hierso is Vryburg nou, hierso is Delareyville. Hier ry die donkiekar. As die donkiekar besig om regs oor die pad te beweeg en die kombi het hom daar getref, sal die skade wat u aan die kombi aangetref het vereenselwig word met so 'n scenario? --- As dit so waar is, as dit miskien die donkiekar beweeg soos wat u die beskrywing aan my gemaak het dit sou op die kant van die kombi beskadig, maar as hy dit so reguit so van agteraf, die skade gaan voor die kombi wee.

Ek stel dit aan u dat u nie korrek is nie, want soos die posisie van die voertuie daar is op daardie sketsplan, wanneer die kombi die donkiekar tref gaan die donkiekar omswaai sodat hy terugkyk na Delareyville toe soos wat u hom aangetref het. --- Soos ek reeds gesê het dat toe ek daar aankom, die voertuie, die donkiekar as hy beweeg na Delareyville se kant toe was op die linkerkant gewees en die kombi as jy beweeg na Vryburg se kant toe was ook op die linkerkant

gewees, maar as hy dit gebots soos u dit gewys het die kombi moet op die kant beskadig was. Soos ek reeds gesê het dat hy het dit van agteraf gestamp. Daarom die skade is net voor die kombi.”

[36] This is an independent witness who corroborated the eye-witnesses from the point of observation. I find him credible and honest.

G. EVIDENCE FOR THE FIRST DEFENDANT (DRIVER)

[37] The witness testified as follows, that:

37.1 he was the driver of the minibus;

37.2 he is in the employ of the appellant, his uncle;

37.3 he saw the donkey-cart for the first time at a distance of 300–400m;

37.4 at a distance of 100m he blasted the hooter to warn the occupants of the donkey-cart;

37.5 he proceeded to the right of the donkey-cart to overtake it;

37.6 when he was ±3m away from the donkey-cart, the said donkey-cart swerved to the right;

37.7 he tried to apply brakes but it was too late and the collision took place;

37.8 the minibus, with its left side, hit the donkey-cart on its right side;

37.9 he was driving at the speed of ±100km per hour; and

37.10 the minibus was on the right lane when the collision took place.

[38] This witness did not create an impression of a candid and honest witness. He appeared confused and could not clearly relate as to what happened. He was evasive when confronted under cross-examination. The following, *inter alia*, amplifies this:

“Ek wil verder aan u stel, die indruk wat ek gekry het, ek stel dit aan u, dat u te laat hierdie donkiekar gesien het. Toe u op hom is, het u ewe skielik besluit om regs uit te swaai, en dit is die rede hoekom u met hom gebots het. --- Ek bedoel as jy ’n voertuig verby gaan, jy moet tog skuif na ’n ander pad. As jy verby moet gaan.

Ja maar jy was te naby aan hom. U het sy spoed onderskat. Toe u bo op hom was, toe sien u maar ek moet uitswaai, maar toe was dit te laat. --- Die spoed van die donkiekar of wat?”

“Nou as u bestuur en u ry hier deur Taung en u sien die klomp diere, perde en donkies en sulke goed, dan moet u mos verwag dat hulle kan beweeg na ’n rigting toe, wat nie soos ’n mens is nie. Hulle kan voor ’n voertuig inbeweeg. --- Wat toegespan is of nie toegespan is nie? Ek verstaan dit nie.”

“So u kan nie sê of daar briekmerke was nie? Met ander woorde jy getuig maar net vir die Hof om nou stêre te red nie – om jouself te red en die eienaar van die kombi te red, dat daar was briekmerke? --- Maar ek getuig wat dit veroorsaak het.

Antwoord net my vraag meneer. --- Ek weet nie.”

“Die tweede ding is, hy sê die rede hoekom hy sê die voertuig is van agter getref is die volgende, aan die likerkant van die rybaan is die gebreekte glasstukke van die lig en die flikkerlig is aan die linker rybaan gedry. Die kombi was beskadig aan die likerkant voor en hy het met die mense wat in die kombi was gekonsulteer en daarom het hy die afleiding gemaak dat the kombi het die donkiekar van after geslaan en dit is gebaseer op feite wat hy na afloop van die ongeluk op die toneel gekry het en wat hy uit die getuieverklarings gekry het. U vermy ’n antwoord? --- Ek het bestuur, hierdie twee Getuie wat getuig het, was ...(onhoorbaar). Hulle het gesê hulle het geslaap. Ek het die ongeluk self gesien.”

H. ANALYSIS OF THE EVIDENCE

[39] Our law approaches the existence or non-existence of negligence through the eyes of a reasonable man (*diligens paterfamilias*). If a person does not act as a reasonable man, he/she runs the risk of being found to having been negligent.

[40] In determining the presence of negligence, the following have to be considered:

- i) would a reasonable man in the position of the defendant have foreseen harm;
- ii) would he have taken steps to guard against it;
- iii) what were those steps; and
- iv) did the defendant take them?

[41] I now turn to deal with issues in dispute.

41.1 Whether or not the combi collided with the donkey-cart, directly from behind or whether the combi struck the donkey-cart more to the right?

41.1.1 The evidence of the witness for the respondent is of assistance herein. Sophia Kupeledi testified that:

- i) the driver of the minibus could not have been able to overtake the donkey-cart because the minibus was close, and the collision

happened.

- ii) she could not see when the donkey-cart swerved or turned, it was on a straight road. She is corroborated by Jama Mobeng.

41.1.2 Having regard to the evidence *supra*, only one conclusion can be reached. The conclusion to be reached is that, given the evidence that the donkey-cart did not turn to the right, the probability is that the minibus struck it from behind, at the rear on the right of the donkey-cart. If I accept that the donkey-cart did turn to the right as alleged, then the donkeys could have been struck on their bodies and not the cart. Again, if indeed the cart turned to the right as alleged, I would find it difficult to understand as to how the minibus would have landed on the left side of the road and not the right side. The finding I make herein is that the minibus collided with the donkey-cart from the rear left of the donkey-cart.

41.2 Whether or not the donkey-cart turned to the right-hand side of the road at the same time as the minibus was trying to overtake.

41.2.1 I refer herein to the analysis under 41.1.2 supra. I then make the finding in the negative.

41.3 Whether or not the first defendant (the driver of the minibus) was negligent in the circumstances.

41.3.1 There is uncontroverted evidence that the driver was travelling at a speed of 100km per hour. That he saw the donkey-cart for the first time at a distance of 300–400m. Further that at the distance of 100m, he blasted the hooter. It is further uncontroverted that he tried to swerve to the right when the deceased yelled but for the distance the collision happened.

41.3.2 It is so that under the circumstances, applying the reasonable man test, that a prudent driver would have reduced the speed of the vehicle. However, in casu the same speed was maintained. If the speed was reduced, he would have been able to avoid the collision timeously. He, the driver, stated:

“ . . . Ek het toe weer prober om die ongeluk te vermy, maar ongelukkig kon ek nie.”

This is related to the speed with which he drove. I conclude that had he reduced speed, he would and should have been in a position to avoid the collision.

41.3.3 Even if I give an ear to the version of the driver that he was overtaking at the time of the collision, I still cannot make a different finding. In his own version, he testified that there was a distance of 3m between the vehicles. Again, if the speed was reduced as expected, he still would have been able to avoid the collision. The case of *Barkhuizen v White* 1949

(2) 116 SA (NPD) at 118 is apposite in respect of the duties of a driver passing mules and horses:

“His duty in the circumstances was either to allow a sufficient margin to enable him to avoid hitting the mule, should it make a sudden movement. Or if he elected to pass the animal to pursue at so slow a pace, as to ensure that no serious result would follow upon an impact brought about by a sudden movement in its part. Thus speed and clearance are related factors. The higher the speed, the wider should be the clearance and the nearer the clearance, the slower should be the speed.”

41.3.4 It is established law that the overtaking driver should allow sufficient berth between himself and the vehicle being overtaken, to allow for the possibility of a sideways movement of that vehicle. See, in this regard, the cases of *Marine & Trade Insurance Co. Ltd v Pauley* 1965

(2) SA 207 (A) at 212B–A; *Oosthuizen v Standard General Versekerings Maatskappy Bpk* 1981

(1) SA 1032 (A) at 1039F–H and *Messina Associated Carriers v Kleinhans* 2001

(3) SA 868 (SCA).

[42] I want to mention two aspects of concern that emanated from the record. I will not make a finding as I am not called upon to do so on the papers. These are:

- i) Counsel for the appellant, Mr Ferreira, after the first defendant (the driver) had finished his cross-examination of the first witness, requested an adjournment. Upon resuming, he made a request to the Court that the first defendant be allowed to cross-examine further. It transpired that the cross-examination was based on a statement made by this witness, of the appellant. The first defendant was undefended. There is no indication that he, Mr Ferreira, was appearing amicus curiae for the first defendant. The Magistrate allowed this. I am lost as to the procedure providing for this.
- ii) It is expected of counsels, albeit an attorney or an advocate, to behave in a professional manner. Officers of the Court are to respect one another during trial. In casu the acrimony and disrespect towards one another was very glaring. Officers of the Court are to act with restraint.

I.

CONCLUSION

[43] I consequently, on the evidence tendered, come to the conclusion that the driver of the minibus was negligent.

[44] I therefore make the following order:

- a) The appeal is dismissed; and
- b) The appellant is to pay costs of this appeal.

M.J. MPSHE

ACTING JUDGE OF THE HIGH COURT

I agree

SAMKELO GURA

JUDGE OF THE HIGH COURT

APPEARANCES

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DATE OF JUDGMENT : 18 JUNE 2010

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