REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO A5042/09

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

26 April 2010 .....
SIGNATURE

In the matter between

SANDRA SMITH **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] On 2 January 2007 during the morning and on the R409 route between Nqamakwe and Ndabazaki, in the Eastern Cape, a collision occurred between a Ford Fiesta motor vehicle (the Fiesta) and a bus carrying 65 passengers. The appellant's late husband was the driver of the Fiesta while she, their two children and her mother were passengers in the vehicle. The appellant's husband, one of their minor children and her mother died in the accident, while the appellant and the other minor child were injured. The appellant, in her personal capacity as well as guardian of the remaining minor child,

instituted action against the respondent as the statutory insurer of the bus in terms of Act 56 of 1996, for damages arising from the bodily injuries sustained as well as loss of support. The matter came up for hearing before Lamont J who, following upon an application in terms of Uniform rule 33(4), was required to determine the merits of the appellant's claim as a separate issue. The learned judge decided the issue against the appellant and absolved the respondent from the instance, with costs. The appeal comes before us with leave of the court *a quo*.

[2] Before addressing the merits of the appeal it is necessary to refer to the application, brought by the appellant on notice of motion, to adduce further evidence before this court, to be considered on appeal. The application is opposed by the respondent. Although counsel for the appellant did not press for the application to be allowed, I consider it necessary briefly to deal with it. The further evidence sought to be introduced, in essence, consists of further photographs recently taken of the scene of the accident for the purpose of raising a number of probabilities and, further, to show when the bus driver would have been able to make certain observations in approaching the scene. In this regard it should be noted that the appellant was assisted at the trial in the court a quo by an expert in the reconstruction of accidents, who had visited the scene of the accident and taken a number of photographs. Those, as well as photographs taken by the appellant's brother of and at the scene of the accident shortly after the collision, were extensively referred to during the trial. All these photographs clearly depict most relevant aspects of the scene of the accident. The genesis of the events leading up to the accident, as will become apparent later in the judgment, was the Fiesta colliding with a goat on the road. By the time the first photographs were taken the dead goat had already been removed from the road surface and was lying in the grass to the side of the road. The exact position of the goat lying on the road surface after it had collided with the Fiesta was accordingly not photographed but this aspect was fully dealt with in the evidence of both the appellant and the bus driver. The further evidence seeking to introduce photographs of the assumed position of the dead goat on the road surface is seemingly aimed at attacking

the credibility of the bus driver in an attempt to show exactly when the goat would have been visible to him on his approach to the scene.

[3] The guiding principles governing applications for leave to adduce further evidence are well-established. In *Colman v Dunbar* 1933 AD 141 at 161, Wessels CJ dealt with one of the considerations as follows:

> 'It is essential that there should be finality to a trial, and therefore, if a suitor elects to stand by the evidence which he adduces, he should not be allowed to adduce further evidence except in exceptional circumstances. To allow fresh evidence on a point which calls in question evidence already led would necessitate a rehearing of the witnesses whose evidence is questioned, so as to give them the opportunity of answering the fresh evidence. This means that the case would be largely reopened which militates against finality…'

Applied to the present application the appellant, in my view, has failed to show exceptional circumstances on which the court ought to accede to the application. From the grounds advanced on behalf of the appellant for the late tendering of the further evidence, it is quite apparent that the appellant's attorneys decided on this course of action only after they were faced with the adverse judgment of the court a quo, which obviously caused them to re-considered the merits of the matter and the taking of the photographs, all in an attempt to bolster the appellant's case on appeal. It leaves one in no doubt that the further evidence, by proper diligence, could have been obtained for and presented at the trial. In *MFV Kapitan Solyanik* 1992 (2) SA 926 (NmHC), Hannah J, who wrote for the court, held that where the failure to adduce further evidence was due to inadequate presentation of a party's case at the trial, "further evidence will only be admitted in the rarest instances". This, no doubt, is not such a case. The further evidence in the present matter concerns issues of credibility and the allowance thereof would inevitably have led to the recalling of witnesses to respond to the new evidence and the probabilities now alleged to have arisen from the further evidence. The aspects now raised have in any event been fully ventilated, contested and decided at the trial. Finally, there is always the danger, in general, of allowing further evidence on

appeal, stated by Innes CJ in *Shein v Excess Insurance Company Ltd* 1912 AD 418 at 429, as follows:

> 'The points to which the trial Court attaches importance having been ascertained, and its view as to credibility of particular witnesses having been expressed, the right to call further evidence would be very apt to be abused.'

For these reasons this Court, in my view, should not allow the introduction of the further evidence.

[4] The collision and the events leading up thereto are largely common cause. It is firstly necessary to broadly describe the scene where the accident occurred. The bus was on its return en route from Butterworth to Rustenburg. The road has a tarred surface with two single lanes carrying traffic in opposite directions roughly from north to south. The two lanes are separated by a broken white line in the centre of the road. Each lane is approximately 3,7 metres wide and a yellow line on each side of the road demarcates emergency lanes of 1,5 metres in width. Approaching the scene from the north (as the bus did) there was a slight bend to the left straightening out at the area of the point of impact. Being in a rural area the bus driver's view ahead was unhindered for "hundreds of metres".

[5] The appellant and her two children were sitting in the rear of the Fiesta which was travelling in a southerly direction. She had earlier dozed off and woke up as a result of a "thud" which, it is common cause, was caused by their vehicle colliding with a goat. Her late husband made a u-turn to investigate and stopped a short distance away from where the dead goat was lying, on the western verge of the road facing north, in the direction the bus was approaching. He alighted from the vehicle, picked up a portion of bumper which had come off and threw it into the vehicle. He then got back into the vehicle.

[6] The bus, driven by Johan Molefe Ditibane, approached the scene in the western lane from south to north. He testified that he was still "at a distance" when he observed the deceased standing next to the Fiesta at the driver's

door, which was open, and him then getting into the Fiesta and closing the door. Ditibane, however, drove on maintaining a constant speed of 108 kilometres per hour. He realised that there was “also another object” in front of him in the middle of the lane the bus was travelling in, which it is common cause, was the carcass of the goat the Fiesta had minutes before collided with. The goat was lying about 3 to 4 metres behind the Fiesta. On approaching further he identified the object as a goat. In order to avoid the goat, he swerved across to the opposite (the eastern, southbound) lane, and applied brakes, leaving two tyre marks on the road surface of 13 metres long. The deceased at that stage started to execute a u-turn. When the bus was 13 metres before the area of impact, Ditibane for the first time attempted to reduce speed by braking. The bus however collided with the Fiesta pushing it northwards along the road, leaving tracks on the road for a further 55 metres until it finally reached its stationary position.

[7] The evidence shows that the point of impact (confirmed by gauge marks on the road surface) was on the eastern (southbound) lane. The collision occurred just after the Fiesta had already completed just over half of its u-turn and had already crossed the centre of the road in turning back (southwards) along the southbound lane. At the moment of impact, the bus was at an angle across the road and also with its front end in the southbound lane. The bus collided with the right-hand side of the Fiesta causing extensive deformed inward damage to the vehicle, extending from the right front door to the tail lights.

[8] This brings me to the question of foreseeability of the bus driver which is really the crucial issue in this appeal. The court a quo departed from the premise that “the foreseeability in relation to danger emanating from the goat is not transferable to the foreseeability of the vehicle moving across the path of the bus. The bus driver must be negligent in relation to the specific consequences of the acts”. In my view the learned judge erred in adopting this approach. In *S v Bernardus* 1965 (3) SA 287 (A) 307B-C it was held ‘[i]t is the general possibility of resultant injury which must reasonably be foreseeable

and not the specific manner and nature thereof' (also quoted in *Flanders and Another v Trans Zambezi Express (Pty) Ltd and Another* 2009 (4) SA 192 (SCA) para [16]). In *Kruger v Van der Merwe and Another* 1966 (2) SA 266 (A) 272F, Williamson JA dealt with this aspect as follows (at 272F):

> 'The doctrine of foreseeability in relation to the remoteness of damage does not require foresight as to the exact nature and extent of the damage; cf. *American Restatement of the Law,* Torts (Negligence), para. 435. It is sufficient if the person sought to be held liable therefor should reasonably have foreseen the general nature of the harm that might, as a result of his conduct, befall some person exposed to a risk of harm by such conduct.'

[9] In regard to the conduct of Ditibane the court a quo determined the issue whether he was negligent on the basis of:

> '[t]he true question to be asked as far as the Ford (the Fiesta) is concerned is whether or not the reasonable bus driver driving with the skill and expertise required of him on the road (a major road) on the day in question would have anticipated a right-hand turn by the driver of the Ford at the time that it was executed. In other words the bus driver driving along would notice the vehicle and would there from his point of view, be anything drawing his attention to the fact that it posed a threat to his travel.'

I am constrained to differ. As I see it, the issue whether the bus driver was negligent, directs the spotlight to an earlier stage in the events leading up to the collision than the one addressed by the court a quo. The use of mathematical odds and ends in an attempt to reconstruct the collision with reference to the bus driver's conduct at the stage when the goat became visible, and then to enquire whether he should have foreseen the possibility of the Fiesta making a u-turn as it did, in my view, was superfluous and accordingly unnecessary. The real enquiry, in my view, is to determine the bus driver's conduct at the stage when he observed an unusual and potentially dangerous situation right in front of him, in his line of travel, alerting him that something was amiss. This then is what he was confronted when at a distance of some 200 meters from the scene: a stationary vehicle on the verge of the road to his right facing north and therefore oncoming traffic in the south bound lane; a man (the driver of the Fiesta) standing next to and then

getting into the vehicle and seconds later an object (the dead goat) lying on the road within his lane of travel, just behind the Fiesta.

[10] A reasonable bus driver in these circumstances, in my view, should have realised that there was a potentially dangerous or unusual scene ahead of him. He accordingly should have slowed down so as to enable him to properly assess the situation and to stop timeously should it turn out to be necessary (see *Flanders* supra, para [16]). He therefore owed a duty, not only to his passengers but also other users of the road (*Rex v Masimango* 1950 (2) SA 205 (N) 208) having regard to the prevailing circumstances to approach the scene at a reasonable speed (cf *Woods v Administrator Transvaal* 1960 (1) SA 311 (T) 314; *Du Plooy v SA Onderlinge Brandversekeringsmaatskappy Bpk* 1975 (1) SA 791 (0) 794/5). In similar vein as was held by Griesel AJA in *Flanders* this is not an unduly onerous duty to impose upon a professional driver, in casu, in the position of Ditibane, especially having regard to the fact that he, literally, held the lives of 65 people in his hands.

[11] It is common cause that the bus driver did not reduce his speed at all until the very last moment when he swerved in order to avoid the dead goat. A speed of 108 km per hour in the continued approach to the scene was clearly excessive. His failure to reduce his speed, in my view, accordingly constituted negligence on his part. That negligence also contributed to the accident. The question of contributory negligence does not arise: a finding of negligence on the part of the bus driver entitles the appellant to succeed on the merits of her claim. I accordingly conclude that the appeal must succeed.

[12] It remains to deal with the costs of the application to adduce further evidence. The application was, strictly speaking, unnecessary. This raises the question of the wasted costs occasioned by the application. Those costs are insubstantial. No additional time was spent in argument on the application. The costs thereof accordingly only concern the affidavits that were filed. The appellant, being successful in the appeal, is entitled to the costs of the appeal.

But, those costs, in my view, should exclude any costs relating to the application to adduce further evidence.

[13] In the result the following order is made:

1. The appeal is upheld with costs, including those occasioned by the employment of two counsel.
2. The order of the court a quo is set aside and replaced with an order in the following terms:
    a. It is declared that the defendant is liable to compensate the plaintiff for the plaintiff's proven damages arising from the collision on 2 January 2007.
    b. The defendant is ordered to pay the plaintiff's costs thus far incurred relating to the merits of the plaintiff's action such costs to include the costs consequent upon the employment of two counsel.
    c. The determination of the quantum of the plaintiff's claim is postponed sine die.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

_____
JC LABUSCHAGNE
JUDGE OF THE HIGH COURT

I agree.

_____
F KATHREE-SETILOANE
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT	***ADV B ANCER SC*** ***ADV D GOODENOUGH***
APPELLANT'S ATTORNEYS	***NORMAN BERGER & PARTNERS***
COUNSEL FOR THE RESPONDENT	***Mr P UYS***
RESPONDENT'S ATTORNEYS	***LINDSAYKELLER***
DATE OF HEARING	***1 APRIL 2010***
DATE OF JUDGMENT	***26 APRIL 2010***