IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

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DATE SIGNATURE

Case no: 11/3022

In the matter between:

GERBER, J M H **Plaintiff**

And

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

KATHREE-SETILOANE J:

[1] The plaintiff, JMH Gerber claims damages from the defendant arising out of bodily injuries sustained in a motor vehicle collision which occurred, on 13 February 2007 on the N3 Highway, between the insured motor vehicle and the motor vehicle which the plaintiff was driving.

[2] The determination of the issue of liability was separated from quantum by agreement between the parties at the pre-trial hearing. I am, therefore, only required to deal with the question of negligence.

[3] The following facts are common cause: The collision occurred on 13 February 2007 between a Scania Truck consisting of a horse and a double trailer ("the Scania") which was driven by the plaintiff, and a Toyota Hino ("the Hino"), which was driven by the insured driver Mr Matias Jacko Tshabalala ("the insured driver"). The collision took place on the N3 highway north bound (traveling from Heidelberg towards Johannesburg) shortly before the Leondale/Vosloorus off ramp, when the Scania collided with the Hino from behind. The Hino was carrying gas bottles of varying sizes.

[4] It is trite law that with a rear-end collision the driver who collides with the rear of a vehicle in front of him is *prima facie* negligent unless he can give an explanation indicating that he was not negligent.[1] Thus, in the absence of evidence to the contrary, it must follow that such negligence was the cause of the collision.[2] The plaintiff contends that he was not negligent as he was confronted by an emergency situation, when the gas bottles rolled off the back of the Hino onto the road, and he was required to take immediate action to avoid it. The situation was further exacerbated, on the plaintiff's version, because the Hino's rear lights were not functioning, and it did not have the signage required in law for the transportation of hazardous or dangerous

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1 H B Kloppers *The Law of Collision in South Africa* 7th ed p78

2 *Union and South West Africa Insurance Co Ltd v Bezuidenhout* 1982 (3) SA 957 (A) @ 966A – B

goods. The plaintiff urges the Court to draw certain inferences from the proved facts, in order to establish the absence of negligence on his part.

[5] The plaintiff testified that he has no independent recollection of the collision. This was not disputed by the defendant. However, in so far as the question of negligence is concerned, the plaintiff gave the following pertinent testimony: The Scania is, with electronic equipment, speed regulated to 80 kilometres per hour. The standard operating procedure for his employment as a truck driver is that he travels in the left hand lane with the Scania and proceeds to the right hand lane in order to overtake slower moving vehicles. The plaintiff confirmed under cross-examination that when driving the Scania, he cannot override its electronic speed regulation. Needless to say, the defendant did not seriously challenge this aspect of the plaintiff's evidence. Crucially, in this regard, the defendant failed to put a version to the plaintiff in relation to how the collision between the Scania and Hino occurred. Although the plaintiff, in all likelihood, would not have been able to comment on the defendant's version, it was essential for the defendant to establish a version of events, because it was aware that the plaintiff would be leading the evidence of an expert witness, who would need to consider and respond to the defendant's version of the collision.

[6] Mr F Hanekom ("Hanekom"), a co-worker of the plaintiff at the time of the collision testified on behalf of the plaintiff. He testified that on the evening of the accident in question, the plaintiff was travelling in convoy with him, as they often do. On arriving at Karan Beef in Heidelberg, on that evening, they off-loaded the cattle from their respective trucks. Since Hanekom had finished off-

loading the cattle first, he left Karan Beef before the plaintiff and travelled along the N3 highway towards Johannesburg. Upon reaching Total Petroport, which is situated on both sides of the Highway and is well lit, Hanekom noticed the Hino. He saw the Hino veering or swerving between the emergency lane and the white line of the left lane. This was not challenged in cross-examination. As he approached and overtook the Hino, he noticed numerous gas bottles on the back of the Hino, which were precariously secured. There were also no hazardous chemicals/dangerous goods signs on the rear of the Hino. He noticed three adult occupants in the cab of the Hino, who appeared to be having a jovial and animated conversation.

[7] Hanekom testified further that, as a truck driver he received training in the transportation of hazardous chemicals/dangerous goods and that the Hino did not, in his opinion, comply with the lawful requirements for vehicles which are used to transport hazardous chemicals/dangerous goods.[3] Hanekom pointed out that the Hino was required to have signage at the back indicating "no open flames", "no cellphones" and "no cigarettes"[4], as well as a fire

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[3] Hanekom, who is an Afrikaans speaker, testified in English, for the convenience of the Court. He found it difficult at times to express himself fully. For instance, when he described the Hino as being 'unroadworthy', what he in fact wished to convey is that the Hino did not comply with the lawful requirements for the transportation of hazardous chemicals/dangerous goods.

[4] See SANS 10087-4

"**7.3 Warning notices**

Each vehicle shall display at least two notices that comply with the requirements for PV1 signs (smoking prohibited), PV2 signs (fire or lights (or both) prohibited)) and PV3 signs (thoroughfare for pedestrians prohibited) given in SANS 1186-1, one on each side of the vehicle, that are painted on or securely attached to the sides of the vehicle, in letters of

extinguisher, but none were visible. He stated that other than an assistant to the driver, passengers are not allowed to be transported in vehicles carrying hazardous chemicals such as gas cylinders.[5]

[8] Not long after Hanekom had returned to the depot of his employer, he was informed of the collision, and immediately drove to the scene of the collision. On surveying the scene of the collision, on his return, he saw a gas bottle stuck underneath the front axle and silencer of the Scania, on the driver's side. The tap of the gas bottle pointed towards the silencer. A short while before Hanekom's arrival at the scene of the collision, a fire which engulfed the cab of the Scania had broken out. By the time of his arrival, however, the fire had already been dowsed and the plaintiff had been transported by ambulance to hospital. Hanekom spent approximately two hours observing the scene of the collision. He returned the following day and drew a sketch plan. The sketch plan indicates: (a) chip marks on the tar starting in the right lane and proceeding into the left lane; (b) other chip marks on the tar starting in the left lane, and continuing in a forward motion along the tar to the point where the Scania came to a standstill; (c) four tyre marks (yaw marks) in front of the chip marks in the right lane, that travel in a sharp curved direction from the right lane to the left lane, and finally to the edge of the road; and (d) gas bottles lying on

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height at least 60 mm in the case of the word "DANGER" and of heights at least 30 mm in the case of the remainder of the wording."

[5] See SANS 10231

"5.3 **En route procedures**

5.3.1 The driver shall not allow any passengers or unauthorized persons to be in or on the vehicle at any stage during the journey."

the island between the north and south bound Highways and the left hand verge of the north bound Highway, close to where the Hino finally overturned. Although Hanekom confirmed under cross-examination that he did not see the collision, he denied that that the rear lights of the Hino were functional, and that the gas bottles were properly secured to it. He also denied the version of the insured driver, which was put to him during cross examination.

[9] Mr Strydom ("Strydom"), an accident reconstruction expert was called to testify on behalf of the plaintiff. As required by Rule 36(9) of the Uniform Rules of Court, he provided an expert report in which he expressed an opinion on how the collision may have occurred. However, since he was present in court when both the plaintiff and Hankom testified, he limited his expert testimony to the evidence which the plaintiff and Hanekom presented in court.[6] His expert testimony on the question of negligence was that: (a) the chip marks on the road were caused by a hard object that had bounced and rolled on the tar; (b) the collision between the Scania and the Hino took place in the right lane (as agreed between Strydom and the defendant's expert, Mr Van Onsellen ("Onsellen") in their joint minute); (c) the chip marks and the yaw-marks, properly described, are in fact scrape marks which were caused by the gas bottle, that was lodged under the front axle of the Hino, being pushed along in a forward direction; (d) the point where the yaw-marks commenced, indicated the most probable point of impact between the Scania and the Hino; (e) the chip

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6 ***Holtzhauzen v Roodt*** 1997 (4) SA 766 (W)

"Fifth, the opinion offered to the Court must be proved by admissible evidence, either facts within the personal knowledge of the expert or on the basis of facts proven by others."

and scrape marks which were caused by the gas bottle falling off the Hino, commenced before the point of collision; (f) the yaw-marks were also formed by the Hino in an offside collision ie. a collision that is not a straight on direct collision, but rather a more serious side-swipe between two vehicles.

[10] The objective evidence of the photographs, which were taken at the scene of the collision, confirm that there was an offside collision between the Hino and Scania. It is clear from the photgraphs that the Hino has a distinct right rear dent with the Scania's bulbar being distinctly pushed back towards the Scania's body on the left front. In Strydom's opinion, the damage to the two vehicles indicate that the Scania had moved suddenly and rapidly from left to right.

[11] The insured driver testified on behalf of the defendant. I find his evidence to be most unhelpful as he did not put forward a version of how the collision occurred. The material aspects of the insured driver's evidence were that he and his assistant Mr Ngewenya ("Ngwenya") loaded gas bottles onto the back of the Hino. The smaller bottles were stacked next to each other as well as on top of each other, in an upright position against the cab of the Hino. The larger bottles were stacked against the smaller ones for support. The gas bottles were secured from left to right with a rope (single) that ran once across the larger bottles. A hazardous chemicals/dangerous goods sign was affixed the centre of the support beams at the back of the Hino. The rear lights of the Hino were fully functional, and he was travelling in the left lane when the collision occurred. He suddenly saw lights in his side mirror and felt a rear

impact. The Hino veered to the left and exited the road finally landing on its roof. He denied travelling past the Total Petroport. In addition to Ngwenya, his wife and three year old child were also seated in the cab of the Hino. The plaintiff and his fiancé assisted the insured driver, and his family immediately after the collision. On the plaintiff's return to the Scania, its horse exploded and the plaintiff's skin was covered in an ice-like substance.

[12] As alluded to, the defendant led no evidence as to the manner in which the Scania collided with the rear of the Hino. The insured driver conceded under cross-examination that his wife and child were not supposed to be in the Hino. More significantly, he conceded that due to the perilous manner in which the rope was fastened, if one gas bottle was to slip out from under the rope, then the rope would loosen around the remaining gas bottles and enable them to slip out and move about in the loading space of the Hino.[7] The insured driver also conceded that after the collision he closed the valves of various gas bottles.[8] The insured driver said that he could not recall if the Hino was fitted

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[7] See SANS 10231

"**8.1 Cargo securement**

Cargo securement shall be in accordance with SANS 10187 to minimize the risk of spillage in the event of the vehicle overturning or any other incident."

See SANS 10187-8

"**9 Stowage of gas cylinders**

9.1 Gas cylinders shall be carried upright in racks fitted on the vehicle, or in lift-on-off cribs or frames.

9.2 If gas cylinders are carried individually, they shall be well secured by straps or chains to prevent any movement in the load space, which could cause damage to the cylinders themselves, or to other load items."

[8] See SANS 10187-8

with fire extinguishers. When asked in cross examination to locate them in the photographs, he was unable to.

[13] The insured driver was also unable to point, in the photographs, to the hazardous/dangerous chemicals sign, which was allegedly affixed to the back of the Hino. Importantly, in this regard, the plaintiff had requested from the defendant, in terms of Rule 35(3) of the Uniform Rules,[9] documents relating to the insured driver's qualifications to transport hazardous chemicals/dangerous goods, and the Hino's registration, which permitted it to transport hazardous chemicals/dangerous goods. The defendant responded by stating that it did not have the documents in its possession. However, under the guise that they were irrelevant, the defendant made no attempt to obtain them. As demonstrated by the plaintiff, the requested documents were highly relevant to the issues in dispute, but were ultimately rendered unnecessary, by the testimony of the defendant's expert witness.

[14] Ngwenya confirmed that he had travelled in the Hino with the insured driver, and the insured driver's wife and child. His testimony materially contradicted that of the insured driver in respect to how the gas bottles were

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"9.3 The valves of gas containers shall be protected by fittings such as surrounding rings or caps."

See SANS 10087-4

"5.4.7 Protection of valves and accessories 5.4.7.1 All valves and accessories should be safeguarded against interference and accidental damage."

See SANS 10231

"**8.1 Cargo securement**

Cargo securement shall be in accordance with SANS 10187 to minimize the risk of spillage in the event of the vehicle overturning or any other incident."

[9] Page 148 to 151 of Bundle 2 of 2 (Index to Notices)

stacked and secured. He said that he first stacked the taller gas bottles against the cab of the Hino, then the medium bottles and lastly the shortest bottles. His testimony in relation to the presence of a hazardous chemicals sign above the left rear light of the Hino, materially contradicted that of the insured driver in relation to the the location of the signage. Ngwenya indicated that the front lights of the Hino were functional, but could not say if the rear lights were working. He also confirmed that he and the insured driver's wife were having a very lively and jovial discussion, which caused the insured driver to laugh heartily. He could not recall if the Hino had passed the Total Pertroport as he did not concentrate on the road. He was certain, however, that the collision took place in the left hand lane. During cross-examination, Ngwenya testified that he could not recall the gas bottles having been stacked in the manner described by the insured driver, but that the way in which he (Ngwenya) had stacked them, was as he had been trained to do.

[15] Van Onsellen, an accident reconstruction expert, testified on behalf of the defendant. He was of the opinion that the Hino had an inadequate structure for the transportation of gas bottles. It was of great concern to him that the Hino did not have a rear back flap to stop the gas bottles from falling off. He found the two support beams at the rear of the Hino to be completely inadequate, as there was ample space between the support beams and the base of the Hino, where gas bottles could pass or fall through. In cross-examination Van Onsellen confirmed that, in his opinion, various gas bottles fell of the back of Hino and onto the road.

[16] As already pointed out, the plaintiff bears the *onus* to prove that he was not negligent. The Court may draw certain inferences from the proved facts.[10] The evidence of the insured driver that the collision occurred in the left lane is not supported by the objective evidence of where the yaw-marks commenced on the road. Importantly, in this regard, it was not disputed by the defendant that the yaw-marks commenced in the right lane. Moreover, contrary to the eye witness testimony of the insured driver and Ngwenya, the defendant's own expert (Van Onsellen) is of the opinion that the collision took place in the right lane. His evidence is consistent with that of the plaintiff's expert witness Strydom. I accordingly reject the evidence of the insured driver and Ngwenya that the collision took place in the left lane. Their version on this crucial aspect is overwhelmingly improbable and simply untrue.

[17] Accepting the expert testimony that the collision took place in the right

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[10] *R v Blom* 1939 AD 188 @ 202-203:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn."

Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) @ 159B-D

*"*As to the balancing of probabilities, I agree with the remarks of SELKE, J, in *Govan v Skidmore*, 1952 (1) SA 732 (N) at p. 734, namely ". . . in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, 3rd ed., para. 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one". I need hardly add that "plausible" is not here used in its bad sense of "specious", but in the connotation which is conveyed by words such as acceptable, credible, suitable. (Oxford Dictionary, and Websters's International Dictionary)."

lane, and that the structure of the Hino was completely inadequate to transport gas bottles safely and securely, I find it probable that one or more gas bottles would have come loose from the back of the Hino and fallen through the space between the beams and the base of the Hino onto the road and in the path of the Scania. This would have created a sudden emergency situation which would have required the plaintiff to take immediate action to avoid the imminent danger of the gas bottles in his path, without weighing up the consequences of his actions[11][12] As opined by Strydom, the damage to the two vehicles indicate that the Scania moved suddenly from left to right to avoid the falling gas bottles in its part.

[18] The Hino was travelling in the right lane and the Scania in the left lane. In the absence of the Hino indicating that it was to proceed into the left lane, the plaintiff was entitled to assume that the Hino would remain in the right lane and that he could safely overtake the Hino whilst continuing to travel in the left lane.[13] It did not matter, to my mind, how close in proximity the Scania was

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11 *R v Cawood* 1944 GWL 50 **@ 54**

"A man who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger."

Thornton v Fisher 1929 AD 398 @ 412

"In judging the action of the motorist or a pedestrian faced with sudden emergency due allowance must be made for a possible error of judgment."

12 *Goode v SA Mutual Fire & General Insurance Co. Ltd* 1979 (4) SA 301 (W) @ 306G

13 Compare: *Jacobs v Road Accident Fund* (A402/2008) [2011] ZAGPPHC 121 (13 June 2011)

to the Hino when the gas bottles began to fall off the Hino. Once the gas bottles began to fall off the Hino, the plaintiff was faced with the imminent danger of gas bottles in his path, and was forced to take immediate action to avoid them by moving suddenly and rapidly from the left lane into the right lane, thus causing him to collide into the rear of the Hino, which was travelling in the right lane. In the event, I am unable to find that the plaintiff was negligent in colliding into the rear of the Hino.

[19] I now turn to the question of whether the insured driver drove the Hino in a manner that wrongfully caused damage[14] to the plaintiff. It is clear from the evidence of the defendant's expert witness that the manner in which the gas bottles were secured and transported was wholly inadequate, and provided no safeguards for other road users. Aware of the danger of transporting gas bottles, it was reasonably expected of the insured driver to exercise reasonable care and vigilance when driving the Hino and transporting the gas bottles. This he clearly failed to do.

"A driver is entitled to assume that those who are travelling in the opposite direction will continue in their course and that they will not suddenly and inopportunely turn across the line of traffic. This assumption may continue until it is shown that there is a clear intention to the contrary.
See also : *Van Staden v Stocks*, 1936 AD 18; *Rustenburg v Otto*, 1974 (2) SA 268 (C) ; *Old Mutual Fire and General Insurance Co of Rhodesia (PVT) LTD and Others v Britz and Another* 1976 (2) SA 650 (RAD).

[14] Section 3 of the Road Accident Fund Act 56 of 1997
"**3 Object of Fund**
The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles."

[20] Hanekom testified that shortly before the collision, he saw the Hino veering or swerving from side to side of the road, and the insured driver deep in an animated and jovial exchange with the other occupants in the vehicle. This was not disputed by the defendant. In the absence of a version from the insured driver as to how the collision occurred, I am compelled to infer from the proved facts that the insured driver drove the Hino recklessly and with complete disregard that the gas bottles, which were precariously secured at the back, could as a direct result of his driving coupled with the manner in which they were secured, come loose and fall onto the road, and into the direct path of other cars travelling behind him. Had the insured driver taken reasonable care and vigilance in keeping the vehicle under control and securing the gas bottles, in the manner required of him in terms of the South African National Standard (SANS) for the transportation of gas cyliners/bottles, the gas bottles would not have fallen off the back of the Hino into the direct path of the Scania, and he could have avoided the Scania colliding with the Hino. I am accordingly of the view that the collision was caused due to wrongful driving of the Hino by the insured driver. The insured driver ought reasonably, in all the circumstances, to have foreseen the possibility of a collision with the Scania, and should have taken all reasonable steps to guard against such an occurrence.

[21] The defendant pleaded a *novus actus interveniens.* The main plea and the two alternatives upon which the *novus actus interveniens* is pleaded do not require consideration, as the defendant did not lead any evidence on it. However, in so far as the defendant seeks to rely on the fact that the explosion occurred sometime after the collision, and cannot, therefore, be causally

connected to the collision, I make the following observations: The test to be applied in determining legal causation has been described as "a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all play their part."[15] In my view, had the plaintiff, on the version of the insured driver, not exited the Scania prior to the explosion taking place, there would have been no debate on the issue of legal causation. Similarly, If the plaintiff had exited the Scania and stepped a few steps away when the explosion occurred, and a wheel of the Scania came loose in the explosion and struck the plaintiff, there would be no debate as to the cause of his injuries. In this regard, the evidence of Hanekom demonstrates that the silencer and turbo, which are located in close proximity to each other, heats up to between 800 to 1400 degrees celius. Van Onsellen is of the opinion that the gas tank, which was lodged in close proximity to the location of the silencer and turbo, would have been a contributing factor to the explosion occurring. In my view, it is reasonable foreseeable that a gas bottle, damaged as it was, and lodged in the position it was, at the time that the Scania came to a standstill, even if empty, would have had enough vapour to cause an ignition of gas and/or fuel to cause the explosion.

[22] The gas bottle ended up beneath the Scania as a direct consequence of the wrongful driving of the Hino by the insured driver. It cannot, therefore, be said that the injuries suffered by the plaintiff as a result of the delayed explosion was not causally linked to the wrongful driving of the Hino. In the

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[15] ***Standard Chartered Bank of Canada v Nedperm Bank Ltd*** 1994 (4) SA 747 (A) at 764I - 765B

premises, I find that the plaintiff's injuries were caused as a result of the negligent and wrongful manner in which the insured driver drove the Hino.

[23] The defendant was aware, since 2014, that its own expert did not support the version of the insured driver. Notwithstanding such knowledge, the defendant persisted with its opposition on the merits of this matter. Such conduct, in my view, is simply unreasonable. As a mark of the Court's displeasure at the defendant's conduct in this matter, I am disposed to imposing a punitive costs order against the defendant. It bears mentioning that the defendant pleaded that the plaintiff attempted to remove the gas bottle from underneath the truck. This plea was based on an *extra-curial* statement. If the defendant had attempted to introduce this extra-curial statement, the plaintiff would have had to rebut the veracity of such extra-curial statement through the evidence of Mrs E. Gerber. In anticipation of such an attempt by the defendant it was necessary for the plaintiff to ensure the immediate availability of Mrs E. Gerber. Her attendance at Court was thus reasonably necessary.

[24] In the result I make the following order:

1. The Defendant is liable for 100% of the Plaintiff's burn and resultant injuries sustained as a consequence of the collision on 13 February 2007

2. The Defendant is to pay the costs of the Plaintiff on the scale as between attorney and client scale, inclusive of:

2.1 the reservation fee of the Plaintiff's counsel for Monday 4 May 2015;

2.2 the reservation fee of the Plaintiff's expert witness, Mr Strydom, for Monday 4 May 2015;

2.3 the waiting time of the Plaintiff's Attorney for Monday 4 May 2015;

2.4 the travelling, accommodation and subsistence costs of the Plaintiff and his necessary witnesses namely Mr F Hanekom and Mrs E Gerber.

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F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the plaintiff:	**Advocate C Thompson**
Instructed by:	**Schumann Van der Heever**
Counsel for the defendant:	**Advocate DLJ Ryneveldt**
Instructed by:	**Sishi Inc**
Date of hearing:	**8 May 2015**
Date of judgment:	**26 June 2015**