REPUBLIC OF SOUTH AFRICA

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

7/8/18

Date: **WHG VAN DER LINDE**

Case No: 11725/2013

In the matter between:

TRANSNET LIMITED — APPELLANT

(Defendant a quo)

and

LAEVELD SITRUS (PTY) LTD — RESPONDENT

(Plaintiff a quo)

Judgment

Van der Linde, J:

Introduction

[1] This is an appeal, with his leave, against a judgment and order of Maleka, AJ on 7 August 2015, in which the learned acting judge upheld – at least in principle, subject to proof - the respondent's claim for Aquillian damages against the appellant and issued a declaration to that effect.[1] The claim arose from a collision between the respondent's mechanical horse and two trailers and the appellant's locomotive at a level crossing known as Ledanna, at night. I will refer to these two as the truck and the train respectively. The main undisputed facts are these.

[2] Just before 20:00 one night the truck was travelling roughly north to south and the train roughly west to east. Along the course of each of them was a level crossing. From the level crossing the track runs in a westerly direction for about 1,3km , when it bends away.

[3] From the perspective of the truck, the approaching level crossing was forewarned by a traffic hump across the road, 1,5m in width and 200 to 250 mm high, traversed by yellow and white stripes. Some 15 metres further, there is on the left hand side a vertical pole (about 4 – 5 metres high, gauging from the photographs) with an octagonal stop sign on the top, two electric lights horizontally arranged immediately underneath it, and then a white and red level railway crossing sign. This vertical pole with its red lights is on the line of the stop street, and in turn the line of the stop street is three metres away from the railway track. In all therefore the humps are 18 metres away from the railway track.

[4] The normal operation of the lights is that when a train approaches the level crossing the two light up and flash intermittently in red until the train will have passed. When no train approaches, they do not light up and remain off. This was common cause between the parties, and is in any event borne out by the South African Road Traffic Signs Manual, 3rd Ed, chapters

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[1] The parties had agreed a separation of issues under rule 33(4), and he agreed and made a commensurate order at the commencement of the trial. The judgment is reported as Laeveld Sitrus (Pty) Ltd v Transnet Limited (2013/11725) [2015] ZAGPJHC 163 (7 August 2015).

14.2, 14.3.[2] The flashing aspect of these lights, and particularly what they convey when they are not flashing, assumes significance below.

[5] From the perspective of the train, the approaching level crossing was forewarned by a whistle board 400 metres out and then, 125 metres out, another whistle board. The purpose of those boards is to remind the train driver to blow a whistle to alert those wishing to cross the level crossing of the train's approach. In addition, the train itself has a prominent single headlight.

[6] On the fateful night these two heavy pieces of mechanical equipment collided on the level crossing, causing not only the material damage for which the respondent sued, but also the death of the co-driver of the truck.

The trial evidence

[7] The trial court heard the evidence of Ms Bradbury, Mr and Mrs Van der Merwe, and Mr Mlambu for the respondent; and Mr Ratshisusu and Ms Mashiane for the appellant. Ms Bradbury was not a witness to the collision. She was the truck driver's employer, and was

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[2](Emphasis supplied) *"**14.2 INSTALLATION***
1 The flashing red light signals at railway crossings SHALL be situated on the near side of the railway crossing, on the left side of each approach roadway.
2 The flashing red light signals shall conform in all respects to the requirements laid down for vehicular traffic signals at road junctions and pedestrian crossings, except that:
(a) The signal face shall comprise a single red disc aspect and shall be mounted on the same post as the stop signs R1 and the warning signs W403 or W404.
*(b) The red disc aspect shall be displayed only in flashing mode, as and when required to warn of the approach or presence of a train, **and shall not display a steady red light signal at any time**.*
(c) Two flashing red disc signal aspects shall be provided on the same post.
(d) ...
14.3 OPERATION
1 The two flashing red light signals are used to indicate to a driver that he or she shall stop his or her vehicle. The preferred mode of operation is that a flashing red disc light signal is displayed at least 30 seconds before the arrival of a train. If gates or barriers protect the crossing, the flashing red light signal should start 20 seconds before the gate or barrier closes.
2 The two flashing red disc light signals shall be arranged to flash alternately in such a way that the alternating flashes remain constantly out of phase i.e. when one disc is fully illuminated the other dischas zero luminous intensity and vice versa."
Although this comes from the SARTSM Digitised Version of 2012, after the collision in 2010, it is the earliest version available; and in any event, as appears from a treatise dated December 2011, *"Evaluating Railway Safety by Observing the Current Condition of Level Crossings in the Western Cape,"* by Ilse Malan, an engineering student at Stellenbosch University, p59, Appendix: Road Signs and Markings, this was the case too at the time of the collision.

called to say how it came that the truck driver found himself driving that truck there that evening. She added that she has seen the train approach the intersection at night, and when it does, the headlight is so bright that it appears as if the sun is rising.

[8] She arrived on the scene about half an hour after the collision. The train's light was then on, she said in cross-examination. She spoke to the truck driver. He told her that there were no lights on the train, and that he did not see the train.

[9] The two Van der Merwes, husband and wife, were eye-witnesses to the collision. They had approached the level crossing in their Toyota Double Cab from the direction opposite to that of the truck. As they approached, the truck had already started crossing the railway track, moving slowly. They stopped before the speed hump, looked left and right, saw nothing, and started moving across the speed hump. When their front wheels were over the speed hump, they heard the train's whistle. He looked left, and there the train was, only 50 metres away. The collision between the truck and the train happened in front of their eyes; they said that the train appeared to come out of nowhere, and its front light was not working, neither before nor after the collision. When the light is working, one can see the train when it comes around the bend, the witness said.

[10] In questions from the court, after his cross-examination, Mr Van der Merwe explained that the traffic lights were not, as normal, flashing that night. Neither side took up the opportunity offered by the court to take this issue any further.

[11] Ms Van der Merwe corroborated her husband's evidence. Mr Mlambu, the truck driver, explained that he approached the intersection with his 22 metre mechanical horse and trailer that evening; he moved onto the speed hump and then stop, it would appear at the stop sign beyond; he looked right and left; and since there was no train, he proceeded to cross. As he had just crossed with the mechanical horse, he heard a hoot. He looked, and still saw nothing. Next thing, the light of the train came on, but by then the train was on him, and it was too late to avoid a collision.

[12]For the appellant Mr Ratshisusu first testified. He was a section manager who arrived at the collision shortly afterwards. He described the scene; amongst others, that the truck with its trailers caused damage to the surrounds, and in fact: *"The traffic light that protects the cars from the level crossing was taken along."*[3] When he arrived at the scene, the train's headlight was on. The train is not permitted to leave the depot without the headlight switched on.

[13]Next the assistant train driver testified. She explained the drill they went through before departing with the locomotive. This included checking that the headlight was working. She said the headlight was switched on from when they departed. They approached the level crossing uneventfully until the first whistle board 400 metres off. They blew the whistle. On approaching the second whistle board, 125 metres off, they saw the truck approaching the level crossing. The driver started blowing the whistle continuously, and the truck stopped.

[14]The next moment the truck pulled off into the crossing. The train driver then applied his brakes but it was too late to avoid collision. Before the collision they were travelling at about 50 to 56kmph. The speed limit is 60kmph.

The judgment a quo

[15]The trial court commenced the evaluation of the evidence by adopting the approach laid out by the Supreme Court of Appeal in Goliath v MEC v Health, Eastern Cape.[4] The court accepted that all the witnesses testified honestly and proceeded to tested conflicting versions based on the witness' reliability and the inherent probabilities.

[16]Moving on, the court arrived at its essential factual findings in paragraphs [30] to [40] of its judgment. It is important to focus on these paragraphs, because in this appeal, which comes from the owner of the train, it is contended that the trial court erred in its factual findings, particularly those at paragraphs [30] to [40] of the judgment.[5]

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[3] Vol 2, 105/20 – 21.
[4] 2015 (2) SA 97 (SCA).
[5] Appellant's heads of argument, paragraph 4.

[17]The first factual finding[6] in this section then is the conclusion that the train's headlight was functional. This is of course a factual finding in the appellant's favour, so the appellant would not want to challenge it anyway. The second factual finding was that the headlight was on after the collision.[7] The remarks made apropos the previous paragraph apply equally here. The third factual finding was that the headlight was also on before and at the time of the collision.[8] Again, the same comments apply.

[18]The fourth factual finding was that the truck driver entered the intersection when it was safe for him to have done so.[9] This conclusion was reached with reference to three facts: first, that it was the truck's first trailer – and not the mechanical horse – that was collected by the train in the collision, confirming the truck driver's evidence that the mechanical horse had crossed the intersection safely when the train hit. Second, the court reasoned that its fourth factual finding was corroborated by the truck driver's inability to have seen the train until the last moment. And third, the court found corroboration in the twin evidence of the Van der Merwes who equally did not see the train when they were approaching the intersection.

[19]The fifth factual finding was that the reason why the train was not sighted was not because its headlight was off, but because in fact the train was not yet in sight.[10] The appellant attacked both this and the fourth factual finding on appeal.

Discussion

[20]Before indicating how the trial court reasoned in arriving at this crucial conclusion which, together with the fourth factual finding really immunised the respondent from any culpability, it is necessary now to remind oneself of the correct approach of the court of appeal to the factual findings of a lower court.

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[6] Vol 3/262/30
[7] Vol 3/262/31.
[8] Vol 3/263/32, 33.
[9] Vol 3/263/34; vol 3/264/35.
[10] Vol 3/264/36.

[21]For close on seventy years now, since the Appellate Division in Rex v Dhlumayo in 1948[11] to the Constitutional Court in Makate v Vodacom,[12] our courts of appeal jurisdiction have without fail affirmed and applied deference to the factual findings of courts of first instance. Jafta, J for the majority in Makate wrote (footnotes omitted):

"[37] In these circumstances interference with the factual findings made by the trial court is neither necessary nor justified. Ordinarily, appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial. In Bitcon Wessels CJ said:
'(T)he trial judge is not concerned with what is or is not probable when dealing with abstract business men or normal men, but is concerned with what is probable and what is not probable as regards the particular individuals situated in the particular circumstances in which they were.'
[38] In our system, as in many similar systems of appeal, the cold record placed before the appeal court does not capture all that occurred at the trial. The disadvantage is that the appeal court is denied the opportunity of observing witnesses testify and drawing its own inferences from their demeanour and body language. On the contrary, this is the advantage enjoyed by every trial court. Hence an appeal court must defer to the trial court when it comes to factual findings. In Powell & Wife Lord Wright D formulated the principle thus:
'Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing E conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.'"

[22]I would add, with due respect, another consideration that militates for deference and against interference in this field. Our Constitution establishes a hierarchy of courts. Litigants have a right – provided qualifying prerequisites are met, to the benefit of appeal jurisdiction(s) where they will have failed before a trial court. An appeal court that in effect rehears the case deprives litigants of the full effect of the constitutionally determined appeal jurisdiction. So, the appellant can illustrate some clear error in the reasoning of the trial court, this court cannot substitute its own view for that of the trial court.

[23]I return then to the (fifth) factual finding that the reason the truck driver did not see the train as he commenced engaging the truck on its passage across the railway track, was that the train

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[11] 1948 (2) SA 677 (A)
[12] 2016 (4) SA 121 (CC)

was then not yet in sight. The trial court relied on two aspects to support this conclusion. The first was the undisputed evidence that the truck driver actually stopped before engaging on the crossing endeavour. That much would appear uncontested on either version.

[24]However, the trial court held too that it was undisputed that the truck driver actually looked to either side before proceeding to enter.[13] The appellant submitted that this was an error. I agree. When regard is had to the driver's cross-examination by counsel for the appellant,[14] the issue whether the truck driver kept a proper lookout was in fact squarely contested.

[25]But it seems to me that this finding of the trial court (i.e. that the truck driver actually looked and did not see the train) is in any event squarely rooted in the inherent and objective probabilities.

[26]First, it does seem meaningless for the driver of a large mechanical horse and two trailers to take the trouble to gear down as he approaches the level crossing, and to bring his vehicle to a stop, all for the purposes of observing whether any trains were in sight; and then not actually observing, and instead immediately proceeding blindly over the level crossing.

[27]But second, the train actually had to cover the distance from its position of being out of sight around the bend to becoming visible. One knows the train was visible at least when it sounded its hooter, which was some distance away yet from the moment of impact. If the train was travelling at roughly 60kmph, it would have covered the distance from the bend to the area of the second whistling board in roughly a minute.

[28]The truck driver had to move his cumbersome charge from the stop line some three metres to the railway track, and then at least his mechanical horse across the railway track. That takes time, and although no witness was astute enough to quantify it, it was uncontested that the movement was slow.[15] The point is the train was travelling orders of magnitude faster than the train. The slower the mechanical horse and trailer moved from the stop line to and over

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[13] Vol 3/264/36.
[14] Vol 1/94/12 – 95/2.
[15] Vol 3/264/36, 37.

the railway tracks when the train arrived on the scene, the further back this pushes the position of the 60kmph approaching train at the earlier moment when the truck driver engaged his first gear to pull off.

[29]And third, the Van der Merwes of course also did not see the train, and it is certainly uncontested that they looked. They would argue that this was because the train's headlight was off, but from the perspective of the appellant, that argument is not available. How does the appellant discount their evidence? The only available avenue is to assert lack of credibility. And that avenue runs into the favourable credibility finding by the trial court in respect of all of the witnesses.[16]

[30]The trial court's conclusion then that the drivers of the two vehicles did not see the train because it was not there (yet), fits the unfolding tableau of the truck arriving at the crossing; the train not yet around the bend; the truck driver pulling away, focussing forward; the Toyota arriving at the speed hump before the crossing; the Toyota driver pulling away, focussing forward; the train coming around the bend at some speed; and within a minute arriving with its hooter sounding at within the sphere of attention of the truck driver and the Toyota driver.

[31]The latter two maintained that they did not see the truck earlier, and their empirical evidence stood. What did not stand, was their supposition that the train nonetheless there but invisible because its headlight was off; the court found that the inherent probabilities provided a different explanation for the train's invisibility.

[32] In these circumstances, even if the trial judge overstated the case by saying that it was undisputed that the truck driver actually looked on either side, in my view the probabilities support the conclusion that he did.

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[16] Vol 3/261/29.

[33]The trial judge then concluded as a matter of law, given his factual conclusions, that the train driver was not negligent.[17] Given the factual findings just discussed, that conclusion is in my view warranted.

[34]The trial court then went on to consider the negligence of the train driver.[18] In doing so, the court reached its sixth and final factual finding by concluding that the train driver was able to have stopped the train before the level crossing. This finding was attacked by the appellant before us.

[35]It does not appear to us to be necessary to examine that finding for this reason. Appeals lie against the substantive order of the court a quo, and not its reasons. As was said by Ponnan, JA in Tecmed Africa (Pty) Ltd v Minister of Health and Another (emphasis supplied):[19]

"[17] First, appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus whether or not a court of appeal agrees with a lower court's reasoning would be of no consequence if the result would remain the same (Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd 1948 (3) SA 353 (A) at 354)."

[36]In this matter there is a second reason – based on a factual finding which was common cause – on which the trial court founded the appellant's negligence. I return to the two red lights that form part of the stop sign assemblage, referred to at the outset of this judgment. The trial court recorded, in laying out the scene of the collision, that those traffic lights were not in a working order on the date of the accident.[20] As pointed out earlier, this fact was never disputed.

[37]The court concluded, at the end of the judgment in a paragraph dealing with the appellant's driver's negligence that, based on this factual finding, as a matter of law:[21] *"I emphasize the*

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[17] Vol 3/265/38.
[18] Vol 3/265/39, 40.
[19] (495/11) [2012] ZASCA 64; [2012] 4 All SA 149 (SCA) (21 May 2012). See also Atholl Developments (Pty) Limited v Valuation Appeal Board for the City of Johannesburg, [2015] ZASCA 55 (30 March 2015), per Salduker, JA at [11].
[20] Vol 3/254/12.
[21] Vol 3/268/43.

fact that the traffic lights were not flashing at that time, therefore did not provide any warning to the truck driver about the approach of the train."

[38]The unarticulated premise of this proposition is that the non-functioning traffic lights represented negligence on the part of the appellant. The matter of the non-functioning traffic lights was a triable issue. As counsel for the respondent pointed out, the plaintiff had pleaded a failure of the appellant – not simply the train driver - to provide any or adequate warnings of the approach of trains to users of the level crossing.[22]

[39]Counsel for the appellant submitted before us, when this issue was raised with him, that it did not matter that the traffic lights were not functioning; that in any event the other warning signs were not to be ignored by the truck driver; and ultimately that the non-functioning traffic lights did not contribute to the collision. In other words, counsel argued not that it was not negligent of the appellant to allow the traffic lights to remain unrepaired, but that the result of that conduct was not causally related to the subsequent collision.

[40]I do not agree. That set of intermittently flashing red lights, as the appellant's own section manager testified, *"... protects the cars from the level crossing..."*. Users of that level crossing will know that when they flash intermittently a train is on the approach. As indicated at the outset of this judgment, that is the function designed for them by the traffic regulations.

[41]The converse applies equally: when they are off, they convey that no train is on the approach. But even if it could be said that when they are off their message is merely neutral, still traffic lights that flash intermittently red only when a train approaches, impart at least - when they do not flash - some sense of assurance that a train is not on its way. A traffic sign that was required to be put up by the regulations[23] and that had in fact been put up, and that had been

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[22] Vol 1/4/6.2. Having regard to the other sub-paragraphs of paragraph 6 of the particulars of claim, this paragraph directly implicates the signage.

[23] SARTSM chapter 14.2.4 provides in relevant part (emphasis supplied): *"4 The use of flashing red disc light signals will be warranted by one or more of the following conditions: (a) when a crossing has a high accident history; (b) sight distance requirements are not met (these requirements are given in Chapter 2 of Volume 2 of the Road Traffic Signs Manual); (c) train operations involve reversals of movement across the crossing; or (d) train operations occur during the hours of darkness."*

functioning for some time prior to the collision to alert vehicles of an approaching train, was not functioning as it should have been at the time of the collision. The appellant was responsible for its functioning.[24]

[42] I accept that one does not know how the truck driver viewed the non-flashing traffic lights, nor what evasive action he could and should have taken had they been operative. But the reason for ignorance of these facts is the failure of the appellant to have examined the truck driver on this point. Should he have? Consider the following.

[43]From the perspective of the appellant's case, if the train was approaching the 125 metres whistle board when first the train driver and the assistant saw the truck, as the assistant train driver testified, and thereafter saw the truck driver stop, then – if they were operative – the traffic lights would have been flashing throughout this period, even from before the truck stopped before the railway tracks. This follows because according to SARTSM, chapter 14.3.1, the traffic lights must start flashing *"... <u>at least</u> 30 seconds before the arrival of a train."*

[44]Travelling at about 60kmph means that 30 seconds away from the level crossing the train would have been about 500 metres out. This is at a position even before the first whistle board (400 metres out) when, according to the assistant train driver, she and the train driver had not yet spotted the truck at the level crossing. At that time already the truck driver would have seen intermittently flashing red traffic lights, warning him of the oncoming train.

[45]Thus viewed, and absent rebuttal, causative negligence would have been established on the appellant's own version. This may explain why the appellant did not examine the truck driver any further on this point.

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[24] Mere non-compliance with a regulatory duty such as this does not of itself constitute negligence in law. But it does serve as an indicator; compare LexisNexis electronic publications, Law of Collisions in South Africa, HB Klopper BA LLD (UFS) Professor at Law, Department of Mercantile Law, University of Pretoria, Attorney of the High Court of South Africa, ch 3.1; 3.2.

[46]The court a quo held of course that at the point when the truck entered the level crossing the train was not yet in sight, inconsonant with the appellant's version. But still, in not examining further on this point was, as it happened, risky for the following reason.

[47]That night, the one feature that was inoperative of the totality of aids designed to ensure the safety of vehicles that traverse that level crossing was the set of intermittently red flashing traffic lights. There was no evidence before the trial court of how long the traffic lights would begin flashing red intermittently before the train would pass that level crossing. For them to have been effective, that period would have had to have taken account of the train speed limit of 60kmph that applied there.

[48]Had they been set at an effective margin, as one must assume they were, the truck driver and the Toyota driver would have been confronted by intermittently flashing red lights as they approached the intersection, this being the very function of these lights.

[49]In my view, in the circumstances then pertaining, a prima facie case[25] of negligence was thus raised by the evidence given by the respondent's witness Mr Van der Merwe in this regard (in response to questions by the court). This was never rebutted. On this basis causative negligence on the part of the appellant was established.

[50]Since the reasons for an order is not what is appealed but the substantive order itself, this conclusion means that the result in the court a quo remains undisturbed.

[51]In the result I propose the following order:

(a) The appeal is dismissed with costs.

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[25] I heed in this context, as Ponnan, JA suggested in Goliath supra at [12], the call of Lord Justice Hobhouse in Ratcliffe Ratcliffe v Plymouth and Torbay Health Authority [1998] EWCA Civ 2000 (11 February 1998)(emphasis supplied):

"In my judgment the leading cases already gives sufficient guidance to litigators and judges about the proper approach to the drawing of inferences and if I were to say anything further it would be confined to suggesting that the expression res ipsa loquitur should be dropped from the litigator's vocabulary and replaced by the phrase a prima facie case. Res ipsa loquitur is not a principle of law: it does not relate to or raise any presumption. It is merely a guide to help to identify when a prima facie case is being made out. Where expert and factual evidence has been called on both sides at a trial its usefulness will normally have long since been exhausted."

I agree

WHG van der Linde
Judge, High Court
Johannesburg

I agree, and it is so ordered.

B Mashile
Judge, High Court
Johannesburg

I agree

L Windell
Judge, High Court
Johannesburg

Date hearing: Monday, 30 July 2018
Date judgment: Tuesday, 07 August 2018

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