

REPUBLIC OF SOUTH AFRICA



GAUTENG HIGH COURT DIVISION, PRETORIA

Appeal Case No.: **A143/14**
04/02/2015

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

4-02-2015

In the matter between:

MADODI BUS COMPANY (PTY) LTD

and

COLDSURE DISTRIBUTION SERVICES

Appellant

Respondent

JUDGMENT

MNGQIBISA-THUSI, J

1. This appeal is against the whole judgment of Magistrate Semenya, Mokorong Regional Court, Limpopo, in which she dismissed the appellant's claim for damages arising from a collision between a motor vehicle ("the bus"), bearing registration number YTR 543 GP, driven by the appellant's driver ("the plaintiff at the trial") and motor vehicle ("the truck"), bearing registration number FKJ 826 L, driven by the respondent's driver ("the defendant at the trial"). The collision occurred on 19 November 2010 at the intersection of Grobler and Church Streets, Polokwane.
2. The appellant had instituted an action for damages suffered because of the collision and the defendant opposed the claim and instituted a counterclaim for loss suffered as a result of the collision. The parties agreed that should any of the drivers of the motor vehicles involved be found to have been negligent, the owner would be vicariously liable for the loss suffered by the owner the other vehicle.
3. Henceforth I will refer to the parties as in convention.
4. Mr Malesela James Thobakgale, the driver of the bus, gave evidence on behalf of the plaintiff. In brief, his evidence is as follows. On the relevant day, he was driving along Church Street, Polokwane, in a South-westerly direction, travelling on the left lane of a dual carriage

with two lanes in each direction. As he was about to reach the intersection of Grobler and Church Streets, which is controlled by traffic lights, travelling at a speed of approximately 50km per hour, the traffic light turned green in his favour and he proceeded to enter the intersection. When he was about to exit the intersection, he saw a truck entering the intersection on his left side from Grobler Street and he tried to avoid it by swerving to the right. However, his evasive action was unsuccessful, he collided with the truck, hitting it on its right side door, and the right head light of the bus was damaged. Grobler Street is a four lane street and the truck was travelling on the left lane. On approaching the driver of the truck who at that was still seated inside the truck, the truck driver apologised to him.

5. During cross-examination, Thobakgale testified that at the time he entered the intersection, there were no vehicles travelling in front of him. Furthermore, on being asked as to whether he saw the truck entering the intersection, Thobakgale testified that because of trees lining Grobler Street and vehicles parked at a dealership near the intersection which obstructed his view, he could not see further into Grobler Street. Thobakgale denied that when the collision occurred he was driving too fast. He further testified that after the collision and both vehicles had come to a standstill; both vehicles were facing in a

Northeast direction. Thobakgale further denied the truck driver's version that there were vehicles in front of him also crossing the intersection from West to East.

6. The next witness called by the plaintiff was Moses Masekwameng, a passenger in the bus, sitting on the third seat from the front, on the left side of the bus. His evidence is that when the bus was about to exit the intersection, he felt the bus swerving and he then saw the truck coming towards the bus from the left and colliding with the bus. He testified that when the bus entered the intersection, the traffic light was green in favour of the bus. During cross-examination, Masekwameng maintained that the traffic light was green for the bus when the bus driver entered the intersection. He further testified that at the time of the collision, the bus had already traversed three lanes of the four lanes Grobler Street.
7. The evidence for the defendant is as follows. Mr Jankie Sethato, the driver of the truck testified that when he reached the intersection of Grobler and Church Streets, the traffic light had turned red and he stopped. When he was already in the intersection he saw the bus on his right side and heard the bus driver, who at the time was driving fast, engage the lower gears. He then suddenly heard a sound and for a moment felt dizzy. He testified that when he entered the

intersection he had seen the bus. The bus had swerved to the right and he had swerved to the left and the front portion of the bus collided with the truck. However he later testified that he could not swerve hence the front portion of the bus collided with the truck. He further testified that there were other vehicles in the intersection, one of which was behind the truck. After the collision, he alighted from the truck and the paramedics attended him. He further testified that the bus driver inquired from him if he was all right.

8. During cross-examination, he testified that he saw the bus as he was moving from his stationary position. He further testified that when he entered the intersection the bus had not yet reached the last lane. Contrary to his evidence in chief, he testified that the bus driver came to him when he was already in the ambulance.
9. The following are common cause. On 19 November 2010 at the intersection of Grobler and Church Streets, Polokwane vehicles driven by the plaintiff and the defendant's drivers collided. Further, that the plaintiff's driver was travelling from South to North along Church Street, a dual road with one lane in each direction and the defendant's driver was travelling from West to East along Grobler Street, a dual road with two lanes in each direction.

10. The plaintiff and the defendant gave contradicting versions as to how the collision occurred, particularly with regard to who had the right of way when the two vehicles entered the intersection.
11. The court *a quo* was faced with two mutually destructive versions as to how the collision occurred. In *Stellenbosch Farmers Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA), Nienaber JA stated that:

“The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of various factual witnesses; (b) their reliability and (c) the probabilities. As to (a), the court will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or the improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities

in another. The more convincing the former, the less convincing the latter. But when all factors are equipoised probabilities prevail.”

12. In reaching its decision the court *a quo* rejected as false Thobakgale’s evidence that he could not see the truck as his view was obstructed by some trees alongside the road and that the plaintiff’s driver was negligent in not timeously stopping the bus when he saw the truck. At the same time, the court rejected Sethato’s version that he saw the bus when he was 500m from the intersection and that he heard Thobakgale shifting to lower gear on the ground that this version was not put to either Thobakgale or Masekwameng, the plaintiff’s witnesses. The court *a quo* concluded that the collision was as a result of the sole negligence of the plaintiff’s driver, and consequently, dismissed the plaintiff’s claim and upheld the defendant’s counterclaim without making a finding on the probabilities of the two differing versions as to how the accident occurred.

13. To reiterate, the plaintiff’s version is that as the bus approached the intersection of Church and Grobler Streets traffic lights turned green and he proceeded to enter the intersection and had traversed three lanes when the bus driver saw the defendant’s truck entering the intersection along Grobler Street. He swerved to the right in order to avoid colliding with the truck but failed. The defendant’s version is

that the truck driver had stopped at the intersection as the traffic light for traffic travelling along Grobler Street had turned red. He changed into first gear and when the traffic light turned green, he started proceeding into the intersection, when he saw the bus coming along Church Street and he tried to swerve the truck but could not and the two vehicles involved collided.

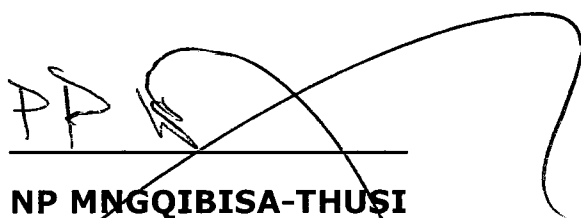
14. I am of the view that the court a quo misdirected itself in rejecting Thobakgale's evidence on the obstruction of trees. Thobakgale's evidence was a response to a question whether he could not see the truck when he entered the intersection. His evidence is that he could not see further into Grobler Street as along the street there were trees and not that the trees were at the intersection which is what is depicted in the photos used as exhibits. His further evidence is that when he entered the intersection, the truck was not at the intersection. On probabilities, I am of the view that the plaintiff's evidence as to how the collision happened is more probable than that of the defendant if one takes into account that for the bus to cross the intersection, it had to traverse four lane across Grobler Street. The plaintiff's evidence is that at the time the collision occurred, the bus was already on the fourth lane across Grobler Street. This evidence was not disputed. Sethato's evidence is that he had stopped at the traffic lights. It is, therefore, not probable that he could not have seen

the bus entering the intersection, particularly in view of the fact that the bus had already traversed three lanes of the intersection. It is not probable, as testified to by Sethato that he would have moved a laden truck from its stationary position, into the intersection without seeing the bus, which was already inside the intersection. Even if the truck driver saw the bus, bearing in mind that he had only started moving into the intersection, he could easily have applied his brakes to avoid the collision.

15. I am of the view that the plaintiff proved its case on a balance of probabilities and that the appeal ought to succeed.
16. Accordingly the following order is made:

ORDER:

1. The appeal is upheld with costs.
2. The order of the court below is set aside and replaced by the following:
 - 2.1 The plaintiff's claim is upheld.
 - 2.2 The defendant's claim is dismissed.'

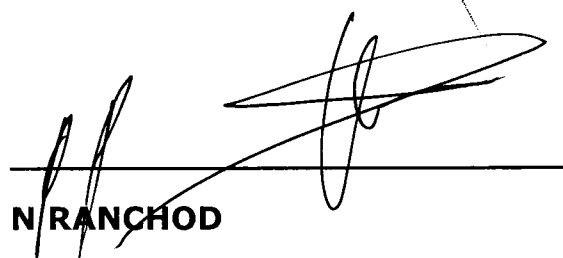


PP

NP MNGQIBISA-THUSI

Judge of the High Court

I agree



N RANCHOD

Judge of the High Court

Appearances:

For Appellant: Adv SPM Vorster

Instructed by: Blakes Maphanga Inc

For Respondent: Adv WW Geyser

Instructed by: Dyason Inc