



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case no: 602/04

In the matter between:

THE MINISTER OF TRANSPORT NO

1ST APPELLANT

TOLL ROAD CONCESSIONARIES
(PTY) LTD

2ND APPELLANT

and

D DU TOIT

1ST RESPONDENT

J L DU TOIT

2ND RESPONDENT

Coram : SCOTT, STREICHER, CAMERON, NAVSA
et LEWIS JJA
Date of hearing : 16 March 2006
Date of delivery : 29 March 2006

Summary: Driver mistakenly leaving freeway and driving through a 'T' intersection at the end of off-ramp – inadequate road signs – party responsible for signage liable for contributory negligence

Neutral citation: This judgment may be referred to as *Minister of Transport v Du Toit* [2006] SCA 40 (RSA)

JUDGMENT

SCOTT JA/...

SCOTT JA:

[1] The first respondent (to whom I shall refer as the plaintiff) was seriously injured when on 27 September 1995 a motor vehicle in which she was a passenger left the road and, after going over the edge of an embankment, landed in the veld. The driver was the plaintiff's husband. The incident occurred in the vicinity of the Grasmere toll gate on the National Road (the N1) south of Johannesburg. The plaintiff instituted an action for damages against the South African Roads Board alleging that it was the authority that was authorised and obliged *inter alia* to erect and maintain facilities, including road signs, for the convenience and safety of road users and that the accident had occurred in consequence of its negligent failure to erect and maintain adequate road signs.

[2] Subsequent to the commencement of proceedings the Minister of Transport (the first appellant) became the legal successor to the Roads Board and was substituted as the defendant. The latter joined a company, Toll Road Concessionaries (Pty) Ltd ('Tolcon') as the first third party (now the second appellant) and the plaintiff's husband as the second third party (now the second respondent). The first appellant alleged that the Roads Board had entered into an agreement with Tolcon in terms of which the latter had undertaken to exercise certain supervisory functions in relation to the maintenance and erection of facilities on the stretch of the road in question and to indemnify the Roads Board in respect of claims arising in respect thereof. As far as the plaintiff's husband was concerned, it was alleged that he had driven the vehicle in question negligently and that his negligence had contributed to the damage suffered by the plaintiff.

[3] At the commencement of the trial the court *a quo* was asked to separate the issue of negligence from the other issues and to determine only whether the first appellant was negligent and, if so, whether there was contributory negligence on the part of the plaintiff's husband and its degree. The formulation

lacked precision, both in relation to the issue of wrongfulness, ie the existence of a legal duty owed to users of the road (see eg *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12; *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) para 18) and in relation to the issue of the liability of a party who has engaged the services of an independent contractor whose conduct causes harm (see *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A)). However, from the debate that ensued between counsel and the court *a quo* (Lamont AJ) prior to the evidence being led at the trial, it appears that the issues which the court was called upon to decide were premised on the acceptance by the first appellant that he owed users of the road a legal duty to act without negligence in relation to road signs and other such facilities; and that in the event of it being found that the person or persons responsible for erecting and maintaining such signs and facilities had negligently failed to do so, and that such failure had contributed to the damage suffered by the plaintiff, the first appellant would be liable to the plaintiff. Included among the issues left over for later determination was therefore the issue of Tolcon's liability to the appellant in the event of the latter being held liable to the plaintiff. This was the basis on which the trial was conducted. At its conclusion Lamont AJ found the first appellant to have been negligent and that the degree of blameworthiness on the part of his employees in relation to the plaintiff's damages was 20 per cent while that of the plaintiff's husband was 80 per cent. The first appellant and Tolcon appeal against this finding with the leave of the court *a quo*. There is no cross-appeal by the plaintiff's husband.

[4] Before attempting to describe the road signs to which reference was made at the trial, it is necessary to give a brief account of how the accident occurred and a description of the locality. On the evening of 27 September 1995 the plaintiff and her husband, together with her parents and another couple, dined at a Johannesburg restaurant. Instead of returning to their home in Carletonville, on leaving the restaurant the plaintiff and her husband set out for the Vaal river where the plaintiff's parents had a holiday house. Their reason for going there

was that the plaintiff was travelling to Bangkok the next day and needed her credit cards and other documents which she had accidentally left at the holiday house on a previous visit. For this reason they did not take their usual route from Carletonville but instead drove south from Johannesburg along the N1 which was a route with which neither was familiar.

[5] The N1 is a double-carriage freeway with two lanes in either direction. The surface was described in evidence as being of concrete and 'off-white' in colour. At the Grasmere toll gate the road widens to accommodate a number of booths for vehicles travelling in either direction. In all there are some 11 such booths. The area is brightly illuminated with 'tower lighting'. The toll gate is different from most in South Africa in that it not only accommodates through-traffic but also south bound traffic leaving the N1. The exit gives access to the De Deur – Ennerdale road (then the R557) which at that point runs from approximately east to west and crosses the N1 on a bridge some 500 metres south of the toll gate. Although not entirely clear, it appears that the three booths to the extreme left of the toll gate (ie to the east) were dedicated for traffic leaving the freeway. On emerging from these booths on the southern side of the toll gate a motorist would find himself on a wide concrete apron with a temporary barrier of red and white painted blocks, said to be of the 'new-jersey type', barring his way back on to the freeway and directing him naturally to the off-ramp. The off-ramp is a tarred road four metres in width with a two metre strip on either side of the edge of the road. The edge is marked with a solid yellow line on the left side and a solid white line on the right. Beyond that on either side is a metal 'crash' barrier. The road runs approximately parallel to the N1 but curves slightly to the left, ie to the east. It is also on an incline rising gradually over a distance of 530 metres to gain the crest of an embankment which forms the spring point for the bridge over the N1. The off-ramp joins the R557 at a 'T' intersection. At a point some 150 metres from the intersection the road widens into two lanes. At the mouth of the intersection there is a triangular-shaped island dividing the lanes with the left lane curving away to the east for traffic going to De Deur. The right lane comes to an end at the 'T'

intersection with traffic going to Ennerdale being required to execute a right hand turn into the R557 before proceeding across the bridge over the N1.

[6] The plaintiff and her husband reached the Grasmere toll gate at about 11 pm. The plaintiff's husband was driving. On seeing that the booth on the extreme left was open, and believing it was for through-traffic, they went to it, paid the toll, emerged onto the concrete apron and from there proceeded south along the off-ramp. Still believing he was on the N1, the driver picked up speed and continued on his way. It was common cause that the tower lighting would have illuminated the road for a distance of about 350 to 400 metres from the toll gate. The nearest light was measured to be 191 metres from the 'T' intersection (and 341 from the toll gate). As the vehicle emerged from the illuminated area and proceeded into the darkness it therefore would have been about 150 to 100 metres from the intersection. Neither the plaintiff nor her husband could say whether the vehicle's lights at that stage were on bright or dim. Neither remembered or registered having seen any warning signs. What happened next, in the words of the plaintiff's husband, was that 'we ran out of road'. He said he had no idea what had happened. What in truth had happened is that he had driven straight through the 'T' intersection and down the embankment on the other side (the southern side) of the R557. He later explained that he was astonished to discover that he had left the freeway.

[7] It is necessary to mention at this stage that both the plaintiff and her husband denied that either of them had consumed alcohol that evening. They said that the only member of the dinner party at the restaurant who had done so was the plaintiff's father who had consumed one tot of whisky. It was suggested in cross-examination that this was untrue and it was said that the appellants would call a witness to say that after the accident the plaintiff's husband was under the influence of liquor. In anticipation of this evidence, the plaintiff called Mr Derrick Littleford who was one of those present at the dinner party. He confirmed the evidence of the plaintiff and her husband and denied that either

had consumed alcohol. In response to this evidence appellants no longer persisted in the allegation that the plaintiff's husband was intoxicated and the threatened witness was not called.

[8] Against this background it is necessary to describe the various road signs which were in place at the time of the accident and which the appellants contend were reasonably adequate to warn motorists of both the exit and the 'T' intersection. These were the subject of much debate in evidence and are shown in a series of photographs taken a day or two after the accident. Some of them have since been altered, removed or their position changed. I shall describe them as they were at the time of the accident. As one approached the toll gate travelling from north to south the first sign of relevance was a large information sign to the left of the road indicating a turn off to the left (the east) to De Deur and Ennerdale (the R557) one kilometre ahead. This was followed by a large circular speed limit sign indicating a speed limit of 100 km per hour (as opposed to 120 km per hour). At this point the toll gate would have been visible to an approaching motorist who would therefore have appreciated the reason for the reduction of the speed limit. Proceeding further in the direction of the toll gate, there was another speed limit sign reducing the speed limit to 80 km per hour. At a distance of 300 metres from the toll gate there was a large square sign painted yellow with black lettering warning motorists to reduce speed. Just beyond this, yet another speed limit sign reduced the speed limit to 60 km per hour. All these signs were to the left of the roadway. Just beyond the latter sign, and approximately at the point where the carriageway widens to the left, were two large overhead signs. One was square and the other rectangular. The square sign, which was positioned approximately above the yellow line on the left side of the road (before that line breaks away to the left as the road widens), read '46 R557 Ennerdale De Deur' with an arrow pointing straight downwards. The rectangular sign was to the right of the square sign. In the centre of the rectangular sign there appeared the letter and numeral 'N1' and adjacent to it a 'T' within a yellow painted circle. Immediately below this was the name

'Kroonstad' with two arrows similarly pointing straight downwards. Also on the rectangular sign, and to the extreme right of it, a motor car was depicted with the word 'autotol'. Immediately below this was an arrow pointing at an angle to the right. It is necessary to add that the roadway also breaks away to the right (as it does on the left) and the arrow clearly indicated that the way to the autotol was via the additional lane created by the widening of the road.

[9] I pause to observe that the direction of the arrow at the foot of the square overhead sign was obviously confusing. Had the arrow been positioned at an angle to the left it would have indicated to motorists that the turn off to the left was at that point. In other words, the arrow to the left would have corresponded to the arrow to the right on the rectangular board. The impression the notice created was that the turn off to the R557 was beyond the toll gate and that all the booths could be used by motorists intent on remaining on the freeway.

[10] Once through the toll gate and on the off-ramp, the first road sign a motorist would have encountered was a sign on the right hand side of the road. It displayed the number 46 (with the numerals on a white background) and beneath that an arrow pointing to the left (the arrow was white on a black background) and beneath that a yellow chevron with two black painted pointers, one to the left and one to the right. The number 46 is the number of the exit. The fact that the sign was on the right hand side of the road would have indicated that the driver was on the off-ramp. This sign was about 150 metres beyond the toll gate and 380 metres from the 'T' intersection.

[11] Approximately 90 metres beyond the exit sign in the direction of the 'T' intersection, but on the left side of the road, was a relatively small sign mounted on a single pole which read 'stop' and beneath that '300 m' (with the lettering in white on a green background). There was also a very much larger information sign barely 10 metres beyond it. The larger sign (also with white lettering on a green background) indicated with an arrow that the R557 to Ennerdale was to the

right and the R557 to De Deur was to the left. The proximity of the one sign to the other was such that the larger one would have been partly obscured by the smaller one from the vision of an approaching motorist. The larger sign was measured to be 300 metres from the 'T' intersection and 230 metres from the toll gate.

[12] Further up the road and at a point about 10 metres short of where the road widens to create two lanes there was an 'end of freeway' sign. As previously mentioned this occurs some 150 metres from the intersection. At the mouth of the intersection itself, but on the right hand side of the road, was a large octagonal stop sign with the word 'stop' in white on a red background. Finally, on the opposite side of the R557, that is to say on the southern side, and facing the off-ramp, was a large information sign with a 'T' intersection chevron beneath it. The information sign (with white lettering on a green background) indicated, as did the other information signs, that De Deur was to the left and Ennerdale to the right. The chevron was yellow with six pointers painted black, three to the left and three to the right. Of significance is that the sign was not aligned with the right hand lane of the off-ramp. It was slightly to the left of the left hand lane. A motorist approaching the intersection at night would therefore not have observed the sign to be directly ahead but, if under the impression that the road continued in the same direction, would have been likely to have thought that the sign was to the left of the road.

[13] Mr Konrad Lötter testified on behalf of the plaintiff. He is a mechanical engineer and described himself as an expert on accident reconstruction and a 'qualified road safety auditor'. He levelled various criticisms at the signs just referred to. First, he contended that traffic for the off-ramp should have been directed away from the other traffic. In this regard I have already referred to the possible confusion arising from the direction of the arrow beneath the overhead R557 sign. Second, he strongly criticised the positioning of the 'stop 300 m' sign some 10 metres in front of the much larger information sign. He expressed the

view that not only would the one partly obscure the other but that at night the two would tend to blend together so that the natural inclination of a motorist would be to try to read the obscured sign. He also criticised the positioning of the 'end of freeway' sign. Not only was it too far up the road, he said, but it was at a point where the road divided into two lanes. This, he thought, would send a 'conflicting message' to a motorist especially as at that stage the motorist would be emerging from an illuminated area and proceeding into the dark. A further criticism was the absence at the intersection of a stop sign on the left side of the road (in this case on the island) where a motorist would expect it to be. Lötter said he had never come across a stop sign on the right hand side of the road only. He also pointed to the fact that the stop sign was in a poor condition; the paint was badly faded and in some places the paint had come off altogether resulting in bald patches. Finally, he strongly criticised the positioning of the 'T' intersection chevron which he said should have been properly aligned with the road so that a motorist approaching the intersection would have found him or herself driving straight towards it.

[14] Subsequent to the accident, a number of changes to the signage were brought about. These have largely remedied the defects which formed the basis of Lötter's criticism. Thus, the overhead sign immediately to the north of the toll gate now no longer has an arrow pointing downwards, but to the left, to indicate the turn off to Ennerdale. (The R557 has been renumbered R558.) Furthermore, as the freeway widens to accommodate the toll booths, a broken line has been painted on the roadway to indicate which booths are for traffic leaving the freeway and which are for traffic remaining on the freeway. The 'stop 300 m' sign on the off-ramp has been removed and the 'end of freeway' sign has been brought forward to a point north of the information sign previously referred to. A stop sign has also been erected on the left side of the road at the intersection (ie on the island) so that there are now stop signs on both sides of the road. In addition, rumble strips have been placed in the road approximately where it widens into two lanes, ie about 150 metres from the intersection. Another

important change is that the information sign with the 'T' intersection chevron beneath it on the other side of the intersection, ie the southern side of the R557 (now the R558), has been repositioned so that it is now correctly aligned with the off-ramp.

[15] There can be no doubt that the plaintiff's husband was negligent and that his negligence was causally connected to the accident. It is true that his initial mistake in leaving the freeway was largely attributable to the confusing nature of the overhead sign. But his failure to realise what had happened before his vehicle finally plunged over the embankment is indicative of a high degree of inattentiveness. On emerging from the toll booth he would have had the jersey-type barrier immediately to his right which would have had the effect of directing him to a single-laned road with a tarred surface – a road very different from the double-laned highway with a concrete surface from which he had just come. Had he merely glanced to his right he would have seen the highway on the other side of the barrier. Moreover, the exit sign on the right of the off-ramp would have been clearly visible. Not only did he pay no heed to that but he failed to see, or register seeing, the 'stop 300 m' warning sign, the 'end of freeway sign', the stop sign or the 'T' intersection chevron. Indeed, there was no cross-appeal against the finding of the court *a quo* that the plaintiff's husband was negligent and that his degree of blameworthiness in relation to the plaintiff's damages was 80 per cent. The real issue in the appeal is therefore whether the servants of the first appellant (or his predecessor) were negligent and, if so, whether that negligence was causally linked to the accident.

[16] Before turning to this issue, it is necessary to make two observations. The first is that it is for the court, not a witness, to decide the issue. While regard may be had to Lötter's evidence as to the adequacies or otherwise of the various road signs, the extent to which the opinions advanced by him are to be accepted will depend upon whether, in the judgment of the court, those opinions are founded on logical reasoning or are otherwise valid. See *Michael and another v Linksfeld*

Park Clinic (Pty) Ltd and another 2001 (3) SA 1188 (SCA) para 36. Second, the fact that changes were effected to the signage subsequent to the accident does not necessarily give rise to the inference that the pre-existing signage was inadequate. See *S v Bochrus Investments (Pty) Ltd and another* 1988 (1) SA 861 (A) at 866J-867C. Indeed, the nature and extent of the warning signs erected at any particular place may not infrequently be influenced by the number of accidents occurring there.

[17] The parties were agreed that the first appellant was obliged to erect such road signs or provide such other facilities as were reasonable in order to guard against reasonably foreseeable harm to users of the road. On behalf of both appellants it was contended, however, that whether in any particular circumstances the steps taken by the first appellant were reasonable or not had to be determined with reference to the manner of driving of 'a reasonably competent and cautious driver'. If by this is meant that the authority responsible for erecting road signs and other warnings is entitled to assume that a driver will read and, if necessary, react to every sign regardless of its nature, size and positioning, I cannot agree. A driver of a motor vehicle is obliged to maintain a proper look-out. He (or she) must pay attention to what is happening around him; but most important of all, he must as far as possible keep his eyes on the road, particularly at night when his vision is limited. Depending on the state of the traffic, the nature of the road and the speed at which he is travelling, the opportunity which a motorist has to read and comprehend the import of each sign may be extremely limited. Indeed, it is not uncommon for even a competent and cautious driver to misread or fail to react to a road sign. For this reason it is imperative, particularly in unlit areas, for warning and other signs to be clear, unambiguous and appropriately positioned so that if necessary they may be read and comprehended at a glance. This is all the more so where there is a potentially dangerous situation ahead such as an unusually sharp bend or, for that matter, an unlit 'T' intersection which would otherwise not be anticipated by a driver who is unfamiliar with the road.

[18] It is clear that the 'T' intersection in question was perceived to be a potential source of danger for motorists on the off-ramp, particularly at night as they would come across it shortly after having emerged from an illuminated area and proceeded into an unlit stretch of the road. The need for appropriate warning signs was undoubtedly foreseen. In addition to the exit sign and the stop sign itself, the servants of the first appellant (or his predecessor) had considered it necessary to erect the two warning signs previously referred to, namely the 'stop 300 m' sign and the 'T' intersection chevron. In my view, the criticism levelled at these signs by Lötter was fully justified. The 'stop 300 m' sign was quite clearly inappropriately placed. The photographs show that it would have partly obscured the view which a motorist would have had of the larger information sign 10 metres beyond it. Both signs had a green background with white lettering and it seems probable, as Lötter contended, that the one would have blended in with the other, resulting in the possibility of neither being comprehended by even a vigilant motorist. No evidence was adduced to suggest that the photographs gave a false impression of what a motorist would have observed. The 'T' intersection chevron was also inappropriately positioned. No explanation was forthcoming as to why the sign was not properly aligned with the off-ramp, nor could there have been one; it was moved to its correct position after the accident. A motorist approaching the intersection at night could very easily have regarded it as yet another information sign on the side of the road and failed to appreciate the significance of the chevron at its base.

[19] The stop sign itself was in a poor condition with its reflective paint badly faded and in places worn off entirely. Criticism was also levelled at the condition of the reflective paint of the 'end of freeway' sign, but this was not readily discernible from the photographs. The more cogent criticism of this sign was its location some 350 metres from the toll gate and just short of the point where the off-ramp widens into two lanes. No explanation was given as to why the sign was located at this position and not at the start of the off-ramp.

[20] In view of the foregoing, I am satisfied that the court *a quo* was correct in finding that there was negligence on the part of the first appellant, or rather his servants.

[21] The further argument advanced on behalf of the appellants was that the plaintiff had failed to establish a causal link between the accident and any inadequacies found to have existed in the signage. It was contended that the inference arising from the driver's total failure over a distance of some 500 metres to appreciate that he was not on the freeway justified the inference that, even had the signs been adequate in every respect, he would still have ignored them. I do not think there is merit in the contention. In the first place, it is quite clear that the presence of the vehicle on the off-ramp was largely due to the misleading nature of the overhead sign immediately to the north of the toll gate. The driver's subsequent failure to appreciate that he had left the freeway was undoubtedly at least in part attributable to his firm conviction that he was still on the freeway which, in turn, flowed from the manner in which he had left it. But in any event, and apart from any other deficiencies in the signage, the probabilities are overwhelming that had the 'T' intersection chevron been properly aligned with the off-ramp so that the plaintiff's husband would have found himself driving directly at it, he would have been alerted to the danger and would have reacted accordingly.

[22] It was not contended that if the appellant's servants were found to have been negligent the court *a quo* erred in its apportionment of 80 : 20 in favour of the appellant. Nor, in my view, is there any basis for interfering with that apportionment. The appeal must, therefore fail.

[23] The appeal is dismissed. The appellants are ordered jointly and severally to pay the first respondent's costs.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

STREICHER JA
CAMERON JA
NAVSA JA
LEWIS JA