THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 949/2013

In the matter between:

TYCO INTERNATIONAL (PTY) LTD **FIRST APPELLANT**

FAST 'N FRESH TRANSPORT **SECOND APPELLANT**

and

GOLDEN MILE TRADING 547 CC **RESPONDENT**

Neutral Citation: *Tyco International v Golden Mile Trading* (949/2013) [2016] ZASCA 44 (31 March 2016).

Bench: Navsa ADP, Swain & Zondi JJA, Tsoka and Kathree-Setiloane AJJA

Heard: 18 February 2016

Delivered: 31 March 2016

Summary: Apportionment of Damages Act 34 of 1956 – trial court erred in apportioning damages substantially in favour of respondent – negligence of the two drivers deviated in equal measure from the norm of the reasonable person – when appeal court may interfere with the narrow exercise of judicial discretion by trial court in apportioning damages.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Mathee AJ sitting as court of first instance):

(1) The appeal is upheld.

(2) Each party shall pay their own costs.

(3) The order of the trial court is set aside and replaced with the following order:

'1.The defendant is liable for 50 per cent of the plaintiffs' proved damages in convention.

2.The plaintiffs are liable for 50 per cent of the defendant's proved damages in reconvention.

3. Each party shall pay their own costs.'

JUDGMENT

Kathree - Setiloane AJA (Navsa ADP, Swain, Zondi JJA and Tsoka AJA concurring):

[1] During the early hours of 7 November 2005, on the national motorway (N1) approximately 40 kilo meters outside of Richmond, a collision occurred between a truck and semi - refrigeration trailer combination (the red truck), owned and operated by Tyco International (Pty) Ltd and Fast 'n Fresh Transport (Pty) (Ltd) (the appellants), and a truck tractor and trailer triple combination (the white truck) owned by Golden Mile Trading 547 CC (the respondent). At all times relevant the driver of the red truck was Mr Samuel Fakude (Fakude), an employee of the

second appellant, and the white truck Mr Daniel Groenewald (Groenewald Jr), an employee/member of the respondent.

[2] During the early evening of 6 November 2005 the red truck, driven by Fakude, was travelling, on the N1 between Richmond and Three Sisters, in a southerly direction from Johannesburg to Cape Town. The red truck hauled a trailer, on which a large white refrigeration box, containing a consignment of food, was mounted. The road was a carriageway with one traffic lane in each direction and emergency lanes on either side. The night sky was overcast and it rained lightly. There were no road lights.

[3] At about 20h15, after driving over the crest of a small rise in the road, Fakude noticed an approaching vehicle overtaking another approaching vehicle. In order to avoid colliding with the overtaking vehicle, which had moved entirely into his lane of travel, Fakude swerved sharply into the emergency lane to his left. This caused the wheels of the left hand side of the truck-combination to move completely off the eastern shoulder of the road and travel on the sloping gravel verge beyond it. Although the right hand side of the truck-combination remained on the tarred shoulder of the road, it was in danger of toppling over.

[4] After the overtaking vehicle had passed, Fakude attempted to get his truck-combination back onto the tarred surface of the road by swerving it. This caused the refrigeration box to dislodge and fall (upright and intact) diagonally across the road, at a distance of about 300 meters beyond the crest, obstructing both traffic lanes, as well as the tarred eastern shoulder of the road. The western shoulder remained unobstructed. Immediately thereafter, Fakude turned the red truck around to face north and parked it approximately 12 metres south of the refrigeration box

on the eastern shoulder of the road. He then illuminated the refrigeration box with the headlights of the truck, primarily for the benefit of vehicles approaching the obstruction from the south.

[5] According to Fakude he subsequently placed three reflective triangles north of the refrigeration box, on the eastern verge of the road. He placed the first triangle about 12 metres from the refrigeration box, and the remaining two about 24 metres from there. Fakude remained active on the scene, directing traffic around the refrigeration box. Consequently, both north-bound and south-bound traffic were able to pass the refrigeration box, along the western shoulder of the road, without incident − until the events described below took place.

[6] Fakude had, on several occasions, reported the incident to the control room of the first appellant which, in turn, reported it to the local police. The police had simply not arrived. Sometime before midnight, Fakude was tired and retired to the cabin of the red truck, where he fell asleep. Rather bizarrely, at about midnight three significant events occurred more or less simultaneously. First, a heavy vehicle, the particulars of which are unknown (the third truck) travelling in a northerly direction passed the refrigeration box on the western shoulder of the road.

[7] Second, an Iveco minibus, driven by Mr Mthobeli Ndinisa, (Ndinisa) approached the refrigeration box, also travelling in a northerly direction. He engaged his bright lights as he came closer, stopped the minibus on the western side of the road at a distance of about 15 to 20 metres from the refrigeration box, and he proceeded to get out of the minibus. He did not see the third truck as it had already passed the refrigeration box. Third, the white truck, travelling in a

southerly direction, approached the scene. Groenewald Jr, the driver of the white truck, was accompanied by his father Mr Gabriel Groenewald (Groenewald Sr). Groenewald Jr drove the truck at 85 kilo meters per hour, as this was the speed at which its cruise control was set. When Groenewald Jr drove over the crest, which was approximately 300 metres from where the refrigeration box lay, the third truck had already passed the refrigeration box and was approaching the white truck between the crest and the refrigeration box. As the two trucks approached each other, the third truck flashed its headlights at the white truck, temporarily blinding Groenewald Jr and limiting his range of vision to 25 metres.

[8] Although Groenewald Jr disengaged the speed control of the white truck, he did not appreciably reduce its speed and continued to travel at a speed of between 70 km/h to 85km/h. As a result, when Groenewald Jr saw the refrigeration box, he was too close to avoid it and the white truck crashed into, and through, the refrigeration box and collided with the red truck and the minibus beyond it. All three vehicles were damaged and the refrigeration box and its load were completely destroyed. Fortuitously Ndinisa who, at the very moment of impact, was about to get out of the minibus, had not yet done so and suffered no significant injuries. Peculiarly, other than being covered in tomato sauce from the refrigeration box, neither of the two Groenewalds suffered any injuries. Fakude too sustained no major injuries.

[9] The appellants instituted action, against the respondent, in the Western Cape Division of the High Court, Cape Town for damages arising from the collision between the two trucks. The respondent, in turn, instituted a claim in reconvention against the appellants, jointly and severally, for damages arising from the same collision. At the commencement of the trial it was agreed that the court would

decide only the merits of the competing claims and the question of quantum would be held over. The trial court (Mathee AJ) found the appellants to be negligent on the basis that Fakude had:

(a) retired to the cab of the truck leaving the refrigeration box, which caused an obstruction to a busy arterial road, unattended.

(b) placed the reflective triangles too close to the refrigeration box (the farthest at a distance of some 24 metres from it), hence providing insufficient warning of the obstruction in the road to the vehicles approaching from the north.

These findings are not challenged on appeal.

[10] The respondent sought to prove, in the trial court, that the appellants had been negligent in relation to the dislodging of the refrigeration box as it had, purportedly, not been properly secured to the trailer. The trial court found that the respondent had failed to prove that the appellants were negligent in relation to this aspect. The trial court did, however, find Groenewald Jr to be negligent for not taking more defensive and effective avoidance measures, when faced with the flashing lights of the third truck. It reasoned as follows:

'[I]t would have been prudent [for Groenewald Jr] to reduce the speed more than he did to better place himself in a situation to take more defensive and effective measures when the danger became clear to him. It also would have allowed the effects of his temporary blindness to pass. The probabilities are that had he done this, he would have been in a position to avoid the collision. His failure to do so, in my view, amounts to a measure of negligence on his part.'

[11] Having found both parties to be negligent, the trial court apportioned damages between them in terms of s 1(1)*(a)* of the Apportionment of Damages Act 34 of 1956 (the Act) (both in convention and in reconvention). The trial court found that the proven negligence of the appellants' driver (Fakude) - 'throughout [to remain] present and vigilant until the police arrived and/or the obstacle was

removed' from the road was causally linked to the collision. It, accordingly, apportioned damages substantially in favour of the respondent by issuing the following order:

'1. The plaintiffs are apportioned 80% liability for any damage defendant may prove.

2. Defendant is apportioned 20% liability for any damage plaintiffs may prove.

3. Plaintiffs are to pay defendant 80% of its taxed costs, such costs to include the qualifying costs of Mr Brinklow, flowing from the determination of the issue of apportionment of blame by the plaintiffs and defendant.'

It is these findings that the appellants challenge on appeal. The appeal is with leave of this Court.

[12] The issue in this appeal, consequently, relates only to the apportionment of damages as between the appellants and the respondent namely, whether there was a causal link between the proven negligence of the appellants' driver and the collision. Section 1(1)*(a)* of the Act confers a discretion upon a court of first instance to reduce damages, suffered by a claimant, on a just and equitable basis having regard to the degree to which the claimant was also at fault. As held by this Court in *Transnet Ltd t/a Metrorail & Another*:[1]

'[A]n appeal court will not decide the question afresh; it will interfere with the exercise of the discretion exercised by the trial court only where it is shown that:

"(T)he lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[2]

An appeal court is therefore entitled to interfere …where its assessment differs so markedly from that of the court a quo as to warrant interference… ."'[3]

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[1] *Transnet Ltd t/a Metrorail & Another v Witter* [2008] ZASCA 95; 2008 (6) SA 549 (SCA) at 557A.

[2] *National Coalition for Gay and Lesbian Equality & Others* v *Minister of Home Affairs* & Others [1999] ZACC 17; 2000 (2) SA 1 (CC) para 11 (cases omitted).

[3] Footnote omitted.

Therefore, in the absence of a misdirection or irregularity, an appeal court should not interfere with a trial court's apportionment of damages unless its own assessment varies substantially from that of the trial court.[4]

[13] The appellants initially contended for a complete reversal of the trial court's apportionment of damages on the basis that the trial court misdirected itself because it took into account, in its assessment of the relative degrees of fault of the parties, that Fakude had failed to remain on the scene until the police arrived or the obstruction was removed, when his failure to do so did not cause or contribute causally to the collision. Before us, however, the parties, after taking instructions, accepted that *ex hypothesi* if: (a) Fakude had stayed on the scene and directed the traffic around the obstruction on the road, as he had done before retiring to the cabin of his truck; (b) Fakude had lit the refrigeration box differently, so that it was illuminated for the benefit of vehicles approaching from both the south and the north; (c) Fakude had placed the reflective triangles further away from the obstruction in the road; and (d) Groenewald Jr had reduced his speed appreciably when alerted to the danger ahead by the flashing headlights of the third truck, then it can be accepted that the collision would have been avoided and, consequently, a just and equitable apportionment of damages as between the parties should be in the ratio of 50:50 or 60:40, as opposed to 80:20 in favour of the respondent as ordered by the trial court.[5] Of course, in advancing a 60:40 split, each party contended that the apportionment of 40 per cent should be in its favour both in convention and reconvention, respectively. I agree that an 80:20 split would not be

[4] *Shield Insurance Co Ltd v Theron, NO* 1973 (3) SA 515 (A) at 518 B-D.

[5] Subsequent to the hearing of the appeal, a note seeking clarification in respect of this proposal was filed of record. The concluding paragraph of the note reads:
'In the circumstances, the appellants' attorney intended to instruct counsel to accept a proposed apportionment of 60/40 in favour of the appellants (or an equal apportionment of 50/50).' This note was served on the attorneys for the respondent.

in accordance with the equities – and that the trial court misdirected itself as the proposed split of 60:40 or 50:50 or 40:60 are within a reasonable range.

[14] What then remains for determination is the degree of blame that should be attributed to each of the parties within the accepted parameters referred to above. In assessing the degree of fault to attribute to each party in relation to the damages suffered as a result of the collision, the court must determine how each of their acts or omissions, causally linked with the collision in issue, deviated from the norm of the reasonable person.[6] It is crucial, however, not to lose sight of the fact that the assessment of the degree to which a party is at fault, in relation to the damage suffered, 'involves an individual choice or discretion' as to which there may be 'differences of opinion'. As recognized by this court in *South British Insurance Company Ltd v Smit*[7]

'From the very nature of the enquiry, apportionment of damages imports a considerable measure of individual judgment: the assessment of "the degree in which the claimant was at fault in relation to the damage" is necessarily a matter upon which opinions may vary. In the words of LORD WRIGHT in *British Fame (Owners) v Macgregor (Owners)*, 1943 (1) A.E.R. 33 at p. 35:[8] "It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be difference of opinion by different minds."'

[15] The appellants argued for a 60:40 apportionment in their favour on the basis that even if Fakude had remained on the scene immediately prior to the collision, his presence would have made no difference because when the respondent's truck drove over the crest in the road on its final 300m approach to the refrigeration box,

[6] *South British Insurance Co Ltd* v *Smit* 1962 (3) SA 826 (A) 835H – 836A.
[7] *(above)* at 837F-H.
[8] Text omitted.

and came within sight of the flashing headlights of the third truck, the third truck had already passed the refrigeration box. This, it argued, would manifestly have been the case, even if Fakude had remained vigilant at the scene, because there was nothing that Fakude could have done which might have affected the way in which the third truck had responded to the white truck, as the third truck would have still flashed its lights at the white truck, blinding Groenewald Jr and restricting his range of vision to 25 metres. In addition, the appellants argued that Fakude did everything that a reasonable person in his position could possibly have done to alert oncoming traffic to the obstruction in the road by:

(a) Turning his vehicle around and parking it south of the obstruction with its headlights shining on the obstruction, thus illuminating it for traffic approaching from Cape Town to see;

(b) Alternating between the north and the south side of the obstruction, depending on the direction from which traffic approached, in an effort to warn approaching traffic of the obstruction; and

(c) Implementing an impromptu 'stop-go' control system to assist traffic around the obstruction.

[16] I disagree. I am of the view that Fakude's presence at the scene of the obstruction would have ameliorated any risk of an oncoming vehicle colliding with the obstruction in the road, as had been the case in the hours before he retired to the cabin of the red truck. As correctly found by the trial court:

'The fact of the matter is that while he remained on the scene, there was no incident. The probabilities suggest that had he remained on the scene, the collision would not have occurred. Mr Tyler argued that given the intrusion of the truck with the flashing lights, Mr Fakude's presence on the scene would have made no difference. This is to ignore the effect on that vehicle the presence of Mr Fakude would have had. In this regard the probabilities suggest that in the hours before the collision, when Mr Fakude was an active participant on the scene, there would

have been scenarios similar to what happened just before the collision. As already stated, during the period before the collision he had been central to controlling traffic from both directions in a way that ensured that no collision ensued. He had at times also commandeered assistance in this regard. The crucial consideration was that during that period there was a person on the scene taking responsibility to use whatever resources were at his disposal to minimise the danger to other motorists of the obstruction in the road. There was a person in charge to read each situation which arose and take appropriate action.'

In the circumstances, I am of the view that the trial court correctly concluded that because the road on which the collision occurred was a main arterial road used by heavy vehicles it was clearly negligent for Fakude to leave the obstruction in the road unattended. It cannot be ignored, in this regard, that prior to abandoning the scene, Fakude had been very active at the scene, and had successfully managed to warn traffic approaching from both sides of the obstruction – and for as long as he remained there – there was no incident.

[17] I am of the view that, if the appellants' driver had remained at the scene, and had continued to direct traffic around the obstruction, as he had done earlier that evening, then this would have, in all probability, eliminated the need for the driver of the third truck to flash its headlights at the respondent's truck. To ignore this, would be to discount the overwhelming probability that the driver of the third truck acted as he did precisely because no one was attending to the obstruction in the road. He, thus, took it upon himself to warn oncoming traffic of the obstruction in the road. This is borne out by the fact that, whilst the appellant's driver was present and in control of the obstruction in the road, he managed to safely and adequately control traffic approaching from both sides of the obstruction without incident. It is this which the trial court was referring to when it stated: 'This is to ignore the effect on that vehicle [the third truck] the presence Mr Fakude would have had.'

[18] In addition, and as was found by the trial court, the placing of the reflective triangles at a distance of 12 metres and 24 metres respectively from the obstruction in the road on a dark and wet night was of no use to vehicles (approaching from the north) travelling at a speed of 120 kilo meters per hour as they were entitled to. Placing the reflective triangles at a distance of at least 100 metres would, in all probability, have made a difference. In the same vein, lighting the obstruction primarily for the benefit of vehicles approaching from the direction of Cape Town was ill-considered, and hence negligent. A reasonable person in the position of Fakude would have illuminated the obstruction with the truck headlights shining at a 90 degree angle to either the east or west side of the obstruction. In that way, the obstruction would have been visible to traffic approaching from both the north and the south. In the circumstances, I consider Fakude's conduct to have deviated substantially from the norm of the reasonable person.

[19] I consider the conduct of the respondent's driver to have deviated from the norm of the reasonable person in equal measure to Fakude, primarily for failing to take heed of the warning lights of the third truck, especially since he had ignored it as a warning signal and further for failing to reduce his speed appreciably. The evidence reveals that the headlights of the third truck temporarily blinded him, so that he could see virtually nothing ahead of him. He estimated that his range of vision was limited to 25 metres. This notwithstanding, and although he disengaged his speed control, he failed to appreciably reduce his speed and continued to travel at between 70 kilo meters per hour and 85 kilo meters per hour.[9] Groenewald Jr conceded, in cross-examination, that when a driver sees flashing headlights of an approaching vehicle, he or she ought to 'ry op so 'n manier dat hy kan stop as daar so 'n gevaar in die pad is'.

[9] *Flanders & Another v Trans Zambezi Express (Pty) Ltd & Another* [2008] ZASCA 152; 2009 (4) *SA* 192 *SCA at* 200 A-C.

[20] He conceded that, in relation to a vehicle such as the white truck, which is a triple combination vehicle and one of the largest that you find on our roads, this precautionary measure would have required him to drive at a speed of lower than 70km/h. However, his reason for not having decelerated more appreciably was simply that he took a chance − hoping for the best. This paragraph from his cross examination in the trial court is instructive:

'Sou u saamstem, dit is maar 'n argument wat later gevoer sal word, dat u die voertuig sodanig – die spoed sodanig moes verminder het sodat u wel kon stop binne u gesigsveld as daar 'n gevaar in die pad is? – As daai lorrie my nie verblind het nie en daar was voor die tyd tyd om te stop, kon ons dit gemaak het, ja, meneer.

Maar die probleem is nou juis, mnr Groenewald, u is gewaarsku van 'n gevaar in die pad. Sou u nie saamstem dat u onder daardie omstandighede die spoed heelwat minder, na heelwat minder as 70 kilometer per uur moes verminder het nie? – Ja, meneer, maar ons het – lorries flits gewoonlik vir jou ligte. Jy verminder nie altyd spoed as hulle net ligte flits nie.

Is dit hoe u bestuur? – Ja, meneer.

So u vat maar daardie kans dat daar nie iets in die pad gaan wees nie – (geen hoorbare antwoord)

Wat sê u daarop? – Ja, meneer.

U hoop maar vir die beste, nie waar nie? . . .

Ekskuus tog? – Ja, meneer.'

Quite clearly, if Groenewald Jr had reduced his speed appreciably, then the collision would have been avoided. Accordingly, I find that the trial court erred in concluding that the negligence of the respondent's driver was 'of a small degree' when compared to that of the appellants' driver. He ought to have found that, the negligence of the two drivers deviated in equal measure from that of the reasonable person and, in the circumstances, it was just and equitable to apportion damages between them in the ratio of 50:50. The substantial difference in the degree of fault which is attributed to each of the parties on appeal, as compared to that attributed to each of them by the trial court, warrants interference by this Court.

[21] Finally, in view of the fact that the fault of the parties in relation to the damages suffered is equipoised, I consider it to be fair and just for each of them to pay their own costs in the appeal and in the court below.

[22] The following order is made:

(1) The appeal is upheld.

(2) Each party shall pay their own costs.

(3) The order of the trial court is set aside and replaced with the following order:

'1.The defendant is liable for 50 per cent of the plaintiffs' proved damages in convention.

2.The plaintiffs are liable for 50 per cent of the defendant's proved damages in reconvention.

3. Each party shall pay their own costs.'

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F Kathree-Setiloane

Acting Judge of Appeal

Appearances

For appellants:	TR Tyler Instructed by: Dicks Van Der Merwe Attorneys, Cape Town Honey Attorneys, Bloemfontein
For respondent:	A Troskie SC and MC Tucker Instructed by: Botha & Olivier Inc, Cape Town McIntyre & Van der Post, Bloemfontein