



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 13/2014

In the matter between:

**ROMAN'S TRANSPORT CC
APPELLANT**

and

SISA ZIHLWELE

FIRST RESPONDENT

**NELISWA NOBOMVU
RESPONDENT**

SECOND

Neutral citation: *Roman's Transport v Zihlwele* (13/2014) [2015] ZASCA 13 (16 March 2015)

Coram: Cachalia, Shongwe, Zondi JJA, Fourie and Meyer AJJA

Heard: 18 February 2015

Delivered: 16 March 2015

Summary: Negligence –sudden emergency – driver not negligent where collision caused by sudden deflation of the right front tyre –

Evidence – expert evidence – evaluation – basis for the rejection
of expert evidence.

ORDER

On appeal from: Eastern Cape Local Division, Mthatha (Dawood J sitting as court of first instance):

- 1 The appeal succeeds with costs.
- 2 The order of the court below is set aside and is substituted with the following: ‘The plaintiffs’ claims are dismissed with costs.’

JUDGMENT

Zondi JA (Cachalia, Shongwe JJA, Fourie and Meyer AJJA concurring):

[1] This appeal is against the judgment of the court below (Dawood J) holding the appellant (the defendant) liable to compensate the respondents (the plaintiffs) for personal injuries sustained in a bus collision. The appeal is with the leave of that court.

[2] In the court below the plaintiffs sued the defendant for damages sustained when the bus, owned by the defendant and driven by its employee, Mr Nyingwa (the bus driver) left the road and collided with the face of a rock-cutting, following a right front tyre blowout en route from Cape Town to Mthatha. The only pleaded ground of negligence on the part of the bus driver relevant in this appeal is that he failed to apply his brakes timeously, adequately or at all.

[3] In its plea, the defendant denied that the bus driver was negligent. Its explanation for the collision was that it was caused by a sudden unforeseen blowout of the right front tyre of the bus. This caused the bus to leave the road and collide with the rock-face and overturned. With regard to the allegation that the bus driver had failed to apply his

brakes, the bus driver's version was that he had actually avoided applying the brakes immediately after the blowout in an effort to keep control of the bus.

[4] By agreement between the parties, the court below was asked to determine only the question of liability. It decided that issue in favour of the plaintiffs and found that the defendant's driver had not taken the best possible course of action to avoid the collision and ought to have cautiously applied the brakes sooner.

[5] The evidence established that the bus, in which the plaintiffs were being conveyed, left the road and overturned after the right front tyre burst. According to the driver he was travelling at a speed of approximately 95 kilometres per hour on a straight road between Beaufort West and Aberdeen, when the blowout occurred. Photographs depicting the scene of the collision as well as a police plan and key thereto indicating a tyre mark at the scene were referred to by the witnesses. According to the police plan, the distance between the start of the tyre mark and the point of impact is 132,2 metres. The undisputed evidence of the driver was that immediately after the blowout of the tyre, the bus veered to the right-hand side of the dual-carriage way; the bus steering wheel was rotating fast in both directions causing the bus to bounce up and down making it difficult to control. According to the driver, the bus was 'jiving and dancing all over the road'. The bus then left the tarred surface, collided with the face of the rock-cutting on the right side of the road, capsized and landed in a ditch. The driver testified that he had not applied the brakes of the bus until the very last moment before the collision, but this was too late to avoid the accident. He explained that he had first tried to bring the bus under directional control and if he had succeeded in doing that, he would have tried to bring the bus to a stop, as he had been trained to do. His evidence was that the immediate application of the brakes in those circumstances would have resulted in an immediate loss of control.

[6] The driver's version regarding what he had experienced and how the vehicle

would, in general, have behaved after the tyre burst was accepted by Professor Dreyer and Mr Grobbelaar, the experts, who testified for the parties. They agreed that in the event of the right front tyre of the bus undergoing a sudden deflation (blowout), the steering wheel would pull strongly to the right and the bus would move to the right. The onset of the pull to the right of the steering wheel and the movement to the right would probably happen within one or two seconds after the blowout. The pull to the right on the steering wheel, after the tyre had burst and the movement of the bus to the right, would have been difficult to correct by the driver. They agreed further that if the brakes were applied, with a fully deflated right front tyre, the steering wheel would pull to the left and the bus would move to the left. But the severity of that pull would depend on the level of braking applied.

[7] But they differed on whether it could have been expected of the driver to have applied his brakes under the prevailing circumstances. Professor Dreyer, the plaintiffs' expert, was of the opinion that the brakes ought to have been applied almost immediately after the blowout to reduce the speed of the bus while the driver tried to keep the bus under control. The braking action, he considered, would have moved the bus to the left which would have aided him to keep it on the road. He stated that, if the driver had gradually applied his brakes over the distance of 132,2 metres the bus travelled after the blowout, it would have brought the bus to a stop before the point of impact. He made this calculation on the accepted evidence of the bus travelling at 95 kilometres per hour and covering this distance in five seconds.

[8] Grobbelaar, who testified for the defendant, expressed a contrary opinion. He was of the view that the driver's decision not to apply his brakes immediately was correct. He stated that the most appropriate action by the driver would have been to concentrate his efforts on keeping the bus under control (the steering wheel of which would have been bucking, shaking and pulling to the right), while avoiding braking. He was critical of Professor Dreyer's calculation, which he said, was only the function of time and

distance, but did not take into account other dynamics peculiar to a heavy motor vehicle suddenly developing a change in front steering geometry following a tyre blowout.

[9] The court below was faced with conflicting expert opinions on the issue whether the driver should have applied brakes. It was for the court to decide which, if any, to accept.¹ Opinion evidence is admissible when the court can receive appreciable help from the witness on the particular issue when, by reason of his special knowledge and skill, he is better qualified than the trier of fact.² An expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be proved. The court below, correctly disregarded Professor Dreyer's opinion on braking systems. He is a mathematician, not a mechanical engineer, and he conceded that he knew 'nothing about the braking systems of the bus', in particular the bus that was involved in this incident. His evidence therefore did not help the court.

[10] But the court also rejected Grobbelaar's opinion that the driver could not have been expected to apply brakes immediately after the blowout, as it did the driver's evidence on this aspect. It found that there was no factual support for Grobbelaar's opinion, and on the contrary, that both Grobbelaar and the driver had conceded that the vehicle would have been easier to control if the driver had applied brakes and reduced speed sooner than he did, which would have avoided the accident. It accordingly concluded that the driver was negligent.

[11] In the court below, the trial was conducted on the basis that the driver had been

¹ *Jacobs & another v Transnet Ltd t/a Metrorail & another* 2015 (1) SA 139 (SCA) para 15. See also *Buthelezi v Ndaba* 2013 (5) SA 437 (SCA) para 14:

'Yet that determination is bound to be informed by the opinions of experts in the field which are often in conflict, as has happened in this case. In that event the court's determination must depend on an analysis of the cogency of the underlying reasoning which led the experts to their conflicting opinions.'

² *Stock v Stock* 1981 (3) SA 1280 (A) at 1296E-F.

faced by a sudden emergency resulting from the right front tyre deflation and the question really was whether he exercised reasonable care and used reasonable skill to avoid the imminent danger.³ Accordingly, he could not be found to have been negligent if, while he was subjected to such an emergency, he chose an option which after the event is proved to be wrong. In other words, he is required to take such steps as a reasonable man exercising reasonable care and skill would fairly be expected to take in the circumstances.⁴ In applying the reasonable man test, the court should not adopt the hypercritical attitude of an armchair critic, as Els J said in *Ntsala and others v Mutual & Federal Insurance Co Ltd* 1996 (2) SA 184 (T) at 192F-H:

‘Where a driver of a vehicle suddenly finds himself in a situation of imminent danger, not of his own doing, and reacts thereto and possibly takes the wrong option, it cannot be said that he is negligent unless it can be shown that no reasonable man would so have acted. It must be remembered that with a sudden confrontation of danger a driver only has a split-second or a second to consider the pros and cons before he acts and surely cannot be blamed for exercising the option which resulted in a collision. Van der Heever J (as he then was) in *Cooper v Armstrong* 1939 OPD 140 at 148 said the following: “Where a plaintiff is put in jeopardy by the unexpected and patently wrongful conduct of the defendant, it seems to me irrational meticulously to examine his reactions in the placid atmosphere of the Court in the light of after-acquired knowledge; to hold that, had he but taken such and such a step, the accident would have been avoided, and that consequently he also was negligent. To do so would be to ignore the penal element in actions on delict and to punish a possible error of judgment as severely as, if not more severely than, the most callous disregard of the safety of others.”’

See *Road Accident Fund v Grobler* 2007 (6) SA 230 (SCA) para 10 in which this passage was cited with approval.

[12] The question therefore is whether the court below was correct in concluding that the driver was negligent. In attacking the findings of the court below, counsel for the appellant submitted that the driver’s decision to avoid using brakes immediately after the tyre burst was reasonable in the circumstances.

³ W E Cooper *Delictual Liability In Motor Law* (1996) at 275.

[13] Counsel for the respondents submitted that the court below was correct in finding that the driver was negligent in failing to apply the brakes. The thrust of his contention was that a reasonable driver faced with a similar situation would have tried to maintain the directional control of the vehicle by using the steering wheel in conjunction with the brakes which he would apply mildly.

[14] He raised two points in which he anchored his contention. First, he argued that the evidence established that the driver was inadequately trained to deal with the situation with which he was confronted. I disagree with the respondents. This was not an issue on the pleadings or during the trial and it was not a case which the appellant was called upon to meet. Secondly, his main contention was that, had the driver gently applied the brakes immediately after the blowout, which Grobbelaar conceded could have been done, the bus would have been brought under control.

[15] But counsel misstates Grobbelaar's evidence on this aspect. He testified that, theoretically speaking, had the driver commenced braking gradually, this would have balanced out the effect of the bus being pulled to the right by the deflated tyre. But he pertinently rejected the proposition put to him based on Professor Dreyer's opinion, that if the vehicle pulled to the right by virtue of the deflated right front tyre, it would be unreasonable to try and steer to the left without applying the brakes gently. This is how Grobbelaar explained the situation in which the bus driver found himself:

'That driver is confronted at the time, with a steering wheel pulling to the right so drastically he cannot get this bus back. At the same time he is bouncing up and down in his seat, as a result of this tyre that is folding up underneath the wheels. The steering wheel is bucking in his hands, and I think his evidence was exactly to that extent. He is bouncing up and down, he cannot apply a constant braking coefficient to the brake pedal. The manner in which he sits, and the manner in which the brake pedal is applied on a truck or a bus, is you sit more or less above the pedal, you don't sit in a backward motion like in a motor car, so if you are bouncing up and down, you also don't have your heel, on the, on the floor, or surface, because you can't apply the pressure required. So if you are sitting with your foot on

⁴ *Van Staden v Stocks* 1936 AD 18 at 22.

the brake pedal, and if you are bouncing up and down, then the brake pedal is bouncing up and down with your leg. So you cannot apply this precise constant point 1 or point 15, to balance the forces, there is so many other things happening at the same time, it just would not be possible for the driver to do that, and that's, that is my fundamental difference with Professor Dreyer in terms of the calculation. The calculation itself at point 4, will bring it to a stop, but there are too many other things happening, to this bus at the same time to allow you to do that.'

And, he continued:

'M'Lady, the — the problem arises in that, what I have been trying to explain, its not an armchair mathematical approach to say we need point 15, we just apply gentle braking, there is, there is a lot happening inside the bus at that point in time. You trying to keep the bus straight, it's pulling to the right, your first — the first thing that you are trying to do, and which you are taught to do is to get the bus under control, keep control. When you have control, then you can start applying the brakes, because when you haven't got control, and you apply brakes, the consequences would be disastrous, that's what people are taught, under these circumstances. Now, we sit with a situation of a driver sitting in this bus, the steering wheel is pulling him to the right, he to such an extent that he cannot bring it back, he is hanging onto the steering wheel. At that point we now expect him to apply just a gentle braking coefficient to bring this back. He doesn't understand the dynamics of the vehicle that we are now speculating on and with mechanical knowledge, and vehicle engineering knowledge, we know that this is what will happen. So all I am saying is theoretically one can do that, and theoretically it makes sense if you could do that, and if you could apply just this simple braking coefficient, one would be able to slow the vehicle down, and the consequences may be less. Practically it may have other consequences of the bus losing control to the other side for example, and that is why the driver does not apply his brakes, that's why they taught not to do that, because it changes the situation drastically.'

[16] So, it is clear from his evidence that although the driver could theoretically have maintained control of the bus by applying brakes gently, this may practically have had disastrous consequences in the prevailing circumstances. In fact, the driver's evidence on this aspect of the case (mild application of brakes), put the issue beyond question. His evidence was that, given the situation in which he found himself, it would have been practically impossible for him to have been able to decide on the level of braking that

would have been appropriate. It is therefore clear that the court below's rejection of Grobbelaar's expert evidence on the basis of lack of factual support, was incorrect. His conclusion was based on the driver's evidence regarding what he had experienced immediately after the tyre blowout. This matter involved the weighing of the risks against benefits of braking. I am satisfied that, in forming his view that the driver could not be expected to have applied the brakes in the circumstances, Grobbelaar had directed his mind to the question of comparative risks and benefits and had reached a defensible conclusion on the matter.

[17] It is clear from the driver's evidence and that of Grobbelaar that the accident was unrelated to any negligence on the driver's part. He was suddenly and without warning confronted with a situation which required him to respond immediately. He explained why he had used the steering wheel instead of brakes to maintain the directional control of the bus. In my view, the driver acted reasonably in deciding not to apply his brakes to avoid the collision. Although the accident nevertheless occurred, in spite of what the driver did to avert it, that does not render unreasonable the steps he took. As this Court put it in the *Grobler* case (para 12) it is 'wrong to examine meticulously the options taken by him to avoid the accident, in light of after-acquired knowledge, and to hold that because he took the wrong option, he was negligent. . .'. In the circumstances the court below's finding that the driver was negligent, was incorrect.

[18] In the result the following order is made:

- 1 The appeal succeeds with costs.
 - 2 The order of the court below is set aside and is substituted with the following:
'The plaintiffs' claims are dismissed with costs.'
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D H Zondi
Judge of Appeal

Appearances

For the Appellant: J D Maritz SC (with him B Boot)

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