THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 54/08

In the matter between:

HANNAH FLANDERS	1st Appellant
JOHANNES MATHYS PRETORIUS	2nd Appellant

and

TRANS ZAMBEZI EXPRESS (PTY) LTD	1st Respondent
THULANI WINSTON SIBENI	2nd Respondent

Neutral Citation:	*Flanders v Trans Zambezi Express* (54/08) [2008] ZASCA 152 (27 November 2008)
Coram:	SCOTT, BRAND JJA and GRIESEL AJA
Heard:	13 November 2008
Delivered:	27 November 2008
Summary*:*	*Delict – motor vehicle accident – collision with un-lighted obstacle at night – negligence of driver.*

ORDER

On appeal from: High Court, Cape Town (Louw, Allie and Dlodlo JJ sitting as a court of appeal):

1. The appeals are upheld with costs of both appellants, including the costs of two counsel where employed.

2. The order of the court a quo in each case is set aside and replaced with the following:

   'The appeals are dismissed with the costs of both appellants'.

JUDGMENT

GRIESEL AJA (SCOTT, BRAND JJA concurring):

Introduction

[1]This appeal arises from a collision between a passenger bus, owned by the first respondent and driven by the second respondent, and a stationary Puma army vehicle belonging to the Zimbabwean Defence Force. The collision occurred during the early hours of 12 April 2001 on the road south of Masvingo in Zimbabwe. Eight of the passengers on the bus were killed in the accident and many of them were injured, including the two appellants. This gave rise to a consolidated action in the Cape High Court

by the appellants (as plaintiffs), claiming damages from the respondents jointly and severally.[1]

[2]The trial judge (Denzil Potgieter AJ), was asked in terms of Uniform rule 33(4) to determine only the issue of liability. He decided this issue in favour of the appellants and issued a declaratory order holding the respondents liable for any damages which plaintiffs might prove. On appeal to a full court,[2] this order was reversed and replaced by one of absolution from the instance with costs. The present appeal comes before us with special leave granted by this Court.

Factual background

[3]The events leading up to the collision are largely common cause. The bus was en route from Lusaka, Zambia to Johannesburg, carrying some 40 passengers, including the two appellants. The collision occurred shortly after 02h00, approximately 8,5 km south of Masvingo on the main highway between Harare and the Beit Bridge border between Zimbabwe and South Africa. The driver at that stage was the second respondent, Mr Sibeni, who was acting within the course and scope of his employment with the first respondent. In the area where the collision occurred, the road has a tarred surface with two single lanes carrying traffic in opposite directions. The two lanes are separated by a broken white line down the centre of the road. Each lane is 3,3 m wide, measured from the inside of the broken white line to the inside of the broken yellow lines demarcating the tarred shoulders of the road on both sides. The tarred shoulders on either side of the road

[1] The somewhat unexpected venue for the trial is explained by the fact that the head office of the first respondent was in Cape Town.

[2] Per Louw J; Allie and Dlodlo JJ concurring.

surface are 1,6 m wide, including the width of the yellow line of 0,1 m. The width of the bus was 2,6 m, thus leaving a space of 35 cm on either side between the bus and the yellow and white lines when travelling down the centre of the lane. Approaching the scene of the accident from the north, the road was level and straight for approximately 2 km prior to the point of impact. Proceeding beyond that point, the road continues straight for approximately 300 m before it enters a gradual bend to the right. At the time of the collision, it was dark with no artificial lights in the vicinity; the sky was clear and starry and there may have been the light of a half moon.

[4]The Puma army vehicle had broken down and was left unlighted, unattended and parked at an angle on the side of the road, with its right rear protruding over the broken yellow line into the lane in which the bus was travelling. The angle at which the Puma was parked and the extent to which its rear encroached onto the road was hotly disputed during the trial. Some of the witnesses called on behalf of the respondents put the angle at as much as 45 degrees. The full court found, however, that the evidence was ‘simply too imprecise to enable the court to determine the angle at which the Puma was parked’.

[5]The extent to which the Puma protruded over the yellow line was also uncertain. Some of the witnesses estimated that the Puma obstructed at least half of the left lane of the road. Based on the objective evidence, it was calculated by the respondents’ expert, Prof Hillman, that the protrusion into the lane would have been some 83 cm beyond the yellow lane. The full court found it ‘impossible to determine with any degree of certainty how far the body of the Puma protruded into the left lane of the road’ save to find that the Puma ‘posed a definite obstruction to traffic moving in the left

lane and that the bus would not have been able to pass the Puma without the bus moving onto the incorrect side of the road'. In the event, the left front of the bus collided with the protruding right rear corner of the Puma, which caused the whole of the left side of the bus to be sheared open.

[6]Sibeni testified that he was driving in the centre of his lane and within the maximum permissible speed limit of 80 km/h. His further evidence was conveniently summarised by the court a quo as follows:

'Approaching the point where the collision occurred on a straight section of the road, he noticed the beams of the headlights of an approaching vehicle. It appeared to him to be coming round a bend from the right. He dimmed the lights of the bus in anticipation of the approaching vehicle and when its lights came into line, he flashed the lights of the bus to signal the approaching vehicle to dim its lights, which it did. However, as the vehicle came closer, its lights were switched to bright again. [Sibeni] geared down to seventh gear and flashed the lights of the bus to warn the approaching vehicle but at that moment the collision occurred. He did not brake or swerve at all before the collision. . . . He initially said that he did not see the Puma at all before the collision, but when he resumed his evidence in chief after the lunch adjournment, he said that the did see the Puma at the last moment while he was being dazzled by the lights of the approaching vehicle. In essence, his version is that there was nothing which he could do to avoid the collision. He saw the Puma at the last moment while he was partially blinded by the lights of the oncoming vehicle at a point where he could not take any effective avoiding action. He refrained from braking or swerving to the right because he feared that the bus, which had a luggage trailer in tow, would overturn and in any event, there was the vehicle approaching from the front.'

[7]Although the presence of an approaching vehicle was disputed on behalf of the appellants, the full court found, rightly in my view, that it had been established that there was indeed an oncoming vehicle shortly before the

collision occurred, the lights of which 'made it more difficult for [Sibeni] to see the Puma'. The version of Sibeni that the approaching vehicle did initially dim its headlights was contradicted by the evidence of an independent eyewitness, Mr Chame, who was called on behalf of the respondents and was a passenger on the bus, sitting three rows behind Sibeni on the right hand side. According to him, the oncoming vehicle did not dim its lights at any stage while approaching, notwithstanding the flashing of his own headlights by Sibeni. When the vehicle was quite close to the bus, still with its lights on bright, this alarmed Chame to the extent that he stood up in his seat, holding on to the seat in front of him in order to have a better view. The collision occurred moments after the oncoming vehicle had passed the bus.

[8]Sibeni did not impress the trial court as a credible or reliable witness and there is ample support in the record for this finding. By contrast, no adverse credibility finding was made against Chame and the transcript of his evidence does not reveal any obvious deficiencies. On the basis of his evidence it must be accepted that Sibeni drove for some appreciable distance with his own headlights dipped while facing the bright headlights of the oncoming vehicle.

[9]On the evidence as a whole, the court a quo accepted that Sibeni became aware of the obstruction caused by the Puma 'at the last moment when he could not take effective action to avoid the collision'. In considering the question whether or not it was due to Sibeni's negligence that he did not become aware of the Puma before it was too late, the court a quo examined the following factual issues:

- the speed at which the bus was travelling immediately before the collision;

- the visibility of the Puma, which, in turn, involves the questions whether it was fitted with reflectors and chevrons and whether there was an oncoming vehicle which had partially blinded the second defendant during the crucial moments before the collision occurred; and

- the question whether branches had been placed in the road to warn traffic approaching from the north of the obstruction posed by the Puma. (The evidence adduced at the trial revealed that this was a wide-spread practice in Zimbabwe – of which Sibeni was aware – aimed at warning approaching motorists of potential hazards in the road ahead.)

[10]In the course of a careful and detailed analysis of the evidence, the full court concluded that there was no reliable evidence to contradict Sibeni's direct evidence that, save for speeding up to overtake other vehicles, he kept to the speed limit of 80 km/h and that at the time of the collision he was driving within the speed limit. It found, further, that the Puma had probably been fitted with chevrons, but that it had not been established that those chevrons on the back of the Puma rendered the vehicle any more visible to traffic approaching it from the rear. As for the presence of branches, the court found that there were branches placed to the north of the Puma in order to warn oncoming traffic of the danger posed by the broken down vehicle, but that these branches were probably placed not on

the road surface, but either on the tar shoulder or off the tar surface next to the road where they would have been less easy to observe.[3]

[11]None of these findings were seriously challenged before us on appeal. Moreover, having found that Sibeni 'neither applied the brakes nor swerved to the right before the collision occurred', the full court held:

'In my view, this is a case where the second defendant should have slowed down once he dipped his lights in anticipation of the approaching vehicle. This is so because the existence of unlighted obstructions on the road was reasonably foreseeable and the combination of his perception that to brake strongly at the speed he was travelling could cause the bus to overturn and the reduction of his field of vision by the dimming of the lights of the bus.'

[12]Notwithstanding these findings, the full court was not persuaded that the appellants had discharged the onus 'to show what reasonable steps [Sibeni] had failed to take that would have avoided the collision', hence the order of absolution from the instance.

Discussion

[13]The negligence required to establish liability in civil actions is determined by a simple test, namely the standard of care and skill which would be observed by the reasonable man. That standard will, of course, depend on the peculiar circumstances of each individual case. A particular category of cases that has often given rise to difficulties and controversy arises from night-driving and collisions with unobserved obstructions.[4] In

[3] The presence of an oncoming vehicle and the effect of its lights on Sibeni has already been dealt with in paras and above.

[4] For a helpful analysis of the case law on this topic, see W E Cooper *Delictual Liability in Motor Law* (1996) 147–160 *sv Speed and Range of Vision*.

this regard, the full court referred to *Seemane v AA Mutual Insurance Association Ltd*,[5] where it was held 'that there is no generally valid rule of law that a driver must so regulate his speed that he can stop within the limits of his field of vision', and proceeded as follows:

'However, in circumstances where the driver of the vehicle should have foreseen the possibility of unlighted obstructions in the road and where he realises that he might be blinded by the lights of an oncoming vehicle, he might be held to be negligent if he does not apply his brakes and slow down because –

"(t)he ultimate issue always is whether the facts establish negligence, not whether they show that the driver in question failed to keep his speed within the range of his vision, *though such failure may in a particular case be a crucial factor in deciding whether or not there was negligence*."[6]' (my emphasis)

This is so, as pointed out by the court,[7] because 'there is obviously a relationship between speed and visibility'.

[14]It has frequently been argued that a driver who collides with an un-observed obstruction at night finds himself on the horns of a dilemma: if he had kept a proper look-out and been travelling at a reasonable speed in the circumstances, he would have been able to pull up before the vehicles collided; since admittedly he could not do so, he was either travelling too fast in the circumstances or failed to keep a proper look-out.[8] Based on the facts in *Manderson, supra*,[9] Van den Heever JA described the argument based on the driver's dilemma as 'an over-simplification'. Later in the

[5] 1975 (4) SA 767 (A) at 772G.

[6] *Hoffman v SAR & H* 1955 (4) SA 476 (A) at 478D–479B.

[7] At 478G–H.

[8] See eg *Manderson v Century Insurance Co Ltd* 1951 (1) SA 533 (A) at 537H–538A.

[9] At 538D.

judgment, however, he explained that in certain circumstances the argument may well be a valid form of reasoning:

'In our law a man is bound to guard against dangers which he could or should have foreseen. What is reasonably "foreseeable" will depend upon surrounding circumstances. If, say, he drives across one of the huge even pans on the borders of South West Africa where human beings rarely make their appearance, he may perhaps reasonably assume that his vehicle is the only one within a radius of many miles and if, relying upon that reasonable assumption, he drives at a speed which does not allow him to pull up within the limits of his vision and collides with some obstruction the presence of which he could not reasonably have anticipated, he may very well be held to be free from blame. On the other hand when travelling along a frequented road he may meet with an obstruction which so blends with the surrounding scene that he misinterprets the significance of the light impulses conveyed to him through his eyes, and he may perhaps be excused if he fails to pull up before he collides with it. If, however, he travels along a frequented road upon which he should have foreseen the likelihood of there being animals, pedestrians or stationary vehicles and he takes the risk of travelling through a section of the road which he has not probed with his eyes, at a speed which does not permit of his drawing up before reaching any object which suddenly appears within the range of his vision and an accident results, I have difficulty in seeing how – as a matter of reasoning, not law – he can escape from the dilemma. Of course when other factors, which such a person cannot reasonably have foreseen, contribute towards the collision, other considerations will enter into the inquiry.'

[15]In *S v Van Deventer*,[10] Ogilvie Thompson JA expressed the view that the remarks of Van den Heever JA quoted above are 'not incompatible with the majority decision' in *Manderson*. The facts *Van Deventer*'s case bear a

[10] 1963 (2) SA 475 (A) at 481D–E.

striking resemblance to the facts of the present case. Having analysed the evidence,[11] Ogilvie Thompson JA concluded as follows:[12]

'Once he became blinded, appellant continued to drive into what was for him a totally unseen stretch of road upon which an obstruction, whether lighted or unlighted, might well be present. No doubt the mathematical odds were considerably against such an obstruction being present in appellant's pathway precisely during the period when appellant was travelling blinded: but, in my judgment, a reasonably prudent driver would not, under the circumstances stated, have "taken a chance" the way appellant did. For the possibility of some obstruction being in appellant's path once he was blinded would, in my opinion, not have been regarded by a reasonably prudent person as one so remote as not requiring to be guarded against. Having regard to the evidence in relation to this particular road at this particular time, and bearing in mind that appellant had been travelling for some distance with dipped lights, I am of opinion that appellant should have anticipated the possibility of some obstruction – including a pedestrian – being in his path and that, accordingly, he should, immediately he was blinded, have applied his brakes in order to minimise the danger resulting from his being rendered unable to see.'

[16]In this instance, the obstruction was a stationary vehicle and not a pedestrian, but I do not think that this makes any difference in principle. As was held in *S v Bernardus*,[13] '[i]t is the general possibility of resultant injury which must reasonably be foreseeable and not the specific manner and nature thereof'. I accordingly share the view of the full court that this is a case where Sibeni should have slowed down once he dipped his head-lights. In my opinion, however, the finding of the full court does not go far enough. Aside from the reasons furnished by the court a quo,[14] there was a further compelling reason why Sibeni should have slowed down, namely

[11] At 481G–482C.

[12] At 483A–D.

[13] 1965 (3) SA 287 (A) at 307B–C.

[14] Para above.

the dazzling effect on him of the bright headlights of the approaching vehicle. As in the case of *Van Deventer, supra,* the effect of the lights on Sibeni cannot be described as 'totally unexpected'; on the contrary, as pointed out above, Sibeni drove for some appreciable distance with his own headlights dipped while his vision was impaired by the headlights of the other vehicle. Notwithstanding such impaired vision, Sibeni did not brake or reduce his speed. (Admittedly he testified that he had geared down to seventh gear – from eighth gear – but even if this were accepted, it quite clearly had no appreciable effect on the speed of the bus.) In these circumstances, and given the reasonable foreseeability of unlighted obstructions on the road ahead, the duty resting on Sibeni was not merely to slow down, but to reduce his speed by braking immediately so as to be able to stop within the range of his vision or even to stop.[15] This is not an unduly onerous duty to impose upon a professional driver in the position of Sibeni, especially having regard to the fact that he, literally, held the lives of more than 40 people in his hands. His failure in these circumstances to stop or to slow down to the extent necessary is a 'crucial factor' in holding that he was negligent.[16] Had he stopped or slowed down sufficiently after dipping his own headlights, the collision would not have happened.

[17]It follows that, in my view, the appellants have discharged the onus of proving, not only that Sibeni was negligent, but that such negligence was indeed a cause of the collision and their resultant injuries.

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[15] See eg *R v Wells* 1949 (3) SA 83 (A) at 88, 89; *S v Van Deventer, supra,* at 483D; *Santam Versekeringsmaatskappy v Byleveldt* 1973 (2) SA 146 (A) at 163C–E; *S A Mutual v Dickson* 1978 (1) SA 692 (A) at 699H; *Road Accident Fund v Landman* 2003 (1) SA 610 (C) at 617B–618D. See also Cooper *op cit* 155 and the authorities referred to therein.

[16] Cf *Hoffman v SAR & H, supra.*

Costs

[18]The second appellant applied at a late stage for leave to be joined as an appellant in the appeal, as he had omitted to note an appeal when the first appellant had done so. The application was not opposed, but it was conceded that, should the appeal succeed, the second appellant would not be entitled to the costs of the application for leave to intervene. It is accordingly recorded that the costs recoverable by the second appellant will exclude the costs of the application for leave to intervene.

Order

[19]For the reasons set out above, the following order is made:

1. The appeals are upheld with costs of both appellants, including the costs of two counsel where employed.

2. The order of the court a quo in each case is set aside and replaced with the following:

   'The appeals are dismissed with the costs of both appellants'.

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B M GRIESEL

ACTING JUDGE OF APPEAL

APPEARANCES:

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