IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 187/2015**
HOLDEN AT LUSAKA

(*Civil Jurisdiction*)

BETWEEN:

A VAN DER WALT TRANSPORT (NAMIBIA) LIMITED **APPELLANT**

AND

DAR FARMS AND TRANSPORT LIMITED **RESPONDENT**

Coram: Mambilima, CJ, Wood and Kaoma, JJS.

On 10th July, 2018 and 24th August, 2018.

For the Appellant : *Mr. M. Lisimba–Messrs Mambwe Siwila & Lisimba Advocates*

For the Respondent : *Ms. M.K Soko of Malambo and Company*

JUDGMENT

Wood, JS, delivered the judgment of the Court.

Cases Referred to:

1. *Tencor Services (EMDS) BPK v Loots EN Andere (1958) 4 SA 289.*
2. *Kruger v Coetzee (1966) 2 SA 488 (A)*
3. *Saureman and others v New Zealand Insurance Co. Ltd and another 1958 (4) SA 289 (N) (4)*
4. *AA Onderlinge Assurancie Assosiasie van SA v Van Rensburg en'n Ander (1978) 4 SA 771 (A) @ 780 E.G*

5. *Roberts v Ramsbottom [1980] WLR 823 (6)*

6. *Edmond Richard Hill and another v Zalbro United Transport Company and another (1970) Z.R. 61 (Reprint)*

7. *Levine v Morris [1970] 1 ALL ER 144*

8. *Industrial Gases Limited v Waraf Transport Limited and another (1995-97) Z.R. 183*

This is an appeal against a decision of the High Court, partially allowing a claim for damages against the appellant for damage arising out of a road traffic accident between two trucks one of which was laden with copper blisters while the other one was stationary at night along the Great North Road on 10th November, 2011.

The facts giving rise to this appeal are fairly simple. On the night of 10th November, 2011, the appellant's servant or agent was driving the appellant's motor vehicle from the north to the south along the Great North Road. The respondent's motor vehicle was stationary and partly off the road. The statement of claim alleges that the appellant's servant or agent failed to heed the presence of the respondent's motor vehicle despite reflective triangles warning of the motor vehicle ahead. As a consequence, the appellant's

motor vehicle collided with the respondent's motor vehicle, thereby causing extensive damage to it. The Police report issued in respect of the accident showed that the accident was caused by the negligent driving of the appellant's servant or agent.

The appellant admitted that while the accident took place, it denied that the appellant's motor vehicle negligently collided with that of the respondent and blamed the accident on the negligence of the respondent's servant or agent and at the same time denied any liability. It, instead, made a counterclaim for the damage caused to its motor vehicle arising out of the collision. The appellant alleged that the respondent's servant or agent was negligent in that he brought the respondent's motor vehicle to a standstill partially on the road at 21:00 hours when it was dark. Further, the respondent's servant or agent failed to take reasonable safety measures to ensure that traffic travelling in the same direction as him would be aware or otherwise alerted of the respondent's motor vehicle which was stationery. He had also failed to give consideration to the fact that there was no external lighting present to assist any oncoming traffic and had failed to give due consideration to the fact that the field of vision of any approaching

traffic would be severely impaired as a result of not providing adequate indication of the respondent's motor vehicle's whereabouts.

In her judgment, the learned judge quite rightly stated that she needed to determine from the two versions of evidence whether it was the appellant or respondent who negligently caused the collision. After analyzing the evidence she reached the conclusion that the collision occurred when the appellant's driver hit into the respondent's truck as he tried to get back to his lane after he failed to overtake. The appellant's driver's evidence on how the accident happened was as follows:

> *"I was coming from Ndola about 10km before Lusaka. This was on 10th November 2011 or 2012. I was on my way back to Namibia. After descending downhill I saw a truck in front of me with no hazards, no triangles, nothing was put even wood or branches to warn others. I tried to overtake, suddenly at right side there was an oncoming vehicle in front, I tried to go back to my lane then I hit the stationary truck with my horse and it fell."*

Further on in his evidence, he stated that the right tyre of the respondent's truck was inside the yellow line.

Arising out of these facts the judge posed the question whether the appellant's driver breached his duty of care to the respondent's driver by hitting into the respondent's stationary truck as he attempted to return to his lane after he failed to overtake. She concluded that a prudent driver would have foreseen the reasonable possibility that if he failed to overtake and with a stationary truck nearby his lane, he would have been unable to avoid hitting into the truck. She accordingly found that the appellant's driver did not take reasonable steps to guard against such an occurrence. She further found that the driver's testimony that he was trying to overtake then failed and hit into the respondent's truck as he returned to his lane all pointed to his negligence as his truck was laden with copper and he should have foreseen that he would not overtake in time. The learned judge also found the respondent to have been contributorily negligent for parking without any warning signs because the point of impact was in front near the wheel which was partially parked on the road.

The learned judge accepted that the respondent's truck was damaged as a result of the collision but that there was no evidence to show that it was damaged beyond economic repair and no

evidence was led to show the extent of the damage to the respondent's truck. There was no evidence to prove the value of the truck at the time of the collision. There was also need to give credit for any salvage value that was likely to be recovered from the chattel. Bearing these principles in mind, the learned judge reached the conclusion that a fair estimate of the value of the truck after taking into consideration its age was K100,000.00 and not the K760,857,500.00 (K760,857.50) that the respondent was claiming to be the value of the truck at the time of the accident. She dismissed the respondent's claim for damages for loss of use and loss of business because they were not pleaded as special damages.

She did not agree with the appellant's counterclaim of K200,000.00 for damages to its truck because the major cause of the collision was the appellant's driver's negligent driving.

Dissatisfied with the judgment in the lower court, the appellant has now appealed against the whole judgment raising five grounds of appeal as follows:

1. The trial court erred in law and fact when after accepting that the appellant's defence witness was a credible witness and the

only one present at the time of the accident, it decided to hold that negligence on the part of the appellant had been proved.

2. Having held that the respondent's driver parked the vehicle on the road at night without any warning signs, the lower court erred in fact and law in holding that the major cause of the collision was the appellant's driver's negligent driving.

3. The trial court erred in law and in fact in awarding the respondent K100,000.00 as damages without any basis for such award.

4. The trial court erred in law and in fact when it held that the appellant failed to prove its counterclaim.

5. The trial court erred in law in accepting the defence witness as an expert witness and yet rejecting his testimony on the extent of damages.

The appellant has, in relation to the first ground of appeal, argued that the judge had made a finding of fact that DW1, who was at the scene of the accident, was a credible witness. According to the appellant, since DW1 was the only witness and had no one to discredit him, he should not have been found to have been negligent because of the single act of overtaking the respondent's

stationary truck. This was so because all the facts showed that a heavily laden truck was going downhill and the court also found as a fact that there were no warning signals and it was at night. The appellant wondered if there would have been any accident had the stationary truck not been there at night without any warning signs. The appellant has argued that the cause of the accident was the careless manner in which the respondent's truck was parked and has relied on the South African case of *Tencor Services (EMDS) BPK v Loots EN Andere*[1] to persuade us that a driver who stops his vehicle on any part of the road even on the shoulder of the road to the left of the yellow line is under a legal duty to take steps to prevent his vehicle from creating a danger to other vehicles travelling in the same direction. We agree with this decision but the question in our view is: Was the accident wholly attributable to the respondent? We think not. The evidence and the judge's summation of the evidence leave us in no doubt that both parties were to blame for the collision. We say so because the accident happened at night; the respondent's stationary truck was across the yellow line without any warning signs or reflectors that it had broken down; the appellant's truck was coming down a slope

heavily laden with copper blisters; it attempted to overtake then DW1 saw an oncoming vehicle. He tried to avoid it by going back to his lane but it was too late, so his truck hit into the respondent's stationary truck. The evidence suggests that this was an accident waiting to happen. It was really a question of how to apportion damages between the two parties. We say so because as the judge correctly observed, the stationary truck should have had warning signs that there was a broken down truck ahead. The appellant's driver should also have foreseen the difficulty of maneuvering a heavily laden truck at night after descending a slope and should only have overtaken when the road was clear. The point of impact on the respondent's truck shows that the appellant could not, even if he had wanted to do so, return to his lane without hitting into the stationary truck. It was simply too late for the appellant's driver to take any evasive action as he was sandwiched between the oncoming vehicle and the stationary truck.

We do not agree with the appellant's argument that since DW1 was found to be credible by the judge then no liability should be borne by the appellant. We also do not agree with the respondent's argument in respect of the first ground of appeal that the

appellant's driver and agent had been the only one who was negligent. The fact that DW1 was found to be a credible witness does not wholly absolve the appellant of liability because the appellant owed a duty of care to the respondent just as the respondent owed a duty of care to the appellant. The judge was also entitled to make an assessment whether DW1 was credible or not on the basis of the other evidence before her which showed that even though DW1 was a credible witness, the appellant was to a large extent, liable for the accident. We therefore find no merit in the first ground of appeal and dismiss it.

The second ground of appeal essentially challenges the apportionment of liability. The main argument raised by the appellant is that the respondent had not taken any steps to warn other road users that there was a broken down truck ahead as there were no warning triangles or any other warning signs. The appellant has referred us to the South African case of *Kruger v Coetzee*[2] which places responsibility on a party to take reasonable steps to guard against the occurrence of an accident. The appellant has argued that in the circumstances, the respondent's driver owed a duty of care to the driver of the appellant's truck as another road

user and should have taken reasonable steps to guard against the accident which he did not. The appellant also has referred us to South African cases namely *Saureman and others v New Zealand Insurance Co. Ltd and another*[3] *and AA Onderlinge Assosiasie van SA v Van Rensburg en'n Ander*[4] which discuss the need to analyze the facts before proving negligence and whether what happened was reasonably foreseeable. Further reliance was placed on the case of *Roberts v Ramsbottom*[5] which stated that a person may escape liability if his actions at the relevant time were wholly beyond his control. The appellant argued that its driver was in a similar situation and as such should escape liability. The appellant has further argued that the causation of the accident was a direct result of the respondent's driver's negligence to take reasonable care to warn other road users that the respondent's truck was stationary and was partially on the road. The appellant's argument was that a reasonable driver should have been able to see the risk ahead of parking a truck partly onto the road and taken such reasonable steps as were necessary to ensure that other road users, especially vehicles travelling in the same direction as the respondent's vehicle were aware of the possible danger as a result of the obstruction

caused by the respondent's vehicle. The appellant has, for this proposition, relied on the case of *Edmond Richard Hill and another v Zalbro United Transport Company and another*[6] in which the High Court held that if one brings on the highway a hazard so sited that it was foreseeable that there would be an above average risk of serious accident, he is liable for bringing the hazard on the road. It was also held in the same case that where there is an unlighted obstruction in the roadway it cannot be said that a careful driver is bound to see it in time to avoid it and must therefore be guilty of negligence if he runs into it.

The respondent has on the other hand argued that it was the appellant's negligence which caused the accident. This was so because the appellant's driver saw the stationary truck and decided to overtake it without taking a proper lookout to see if there was any oncoming traffic that could lead to a collision taking place. According to the respondent, the appellant's driver was not taken by surprise of the appellant's truck which was off the road nor was he blinded by oncoming traffic. The accident was therefore as a result of his own lack of due care to slow down and take more

prudent steps to avoid a collision that any reasonable person would have foreseen in the circumstances.

We are of the view that in spite of the spirited arguments by both parties as to who was to blame for the accident, the undisputed evidence shows, as we have indicated above, that both parties were to blame. To start with, the respondent should not have parked its truck inside the yellow line thus obstructing the free flow of traffic. Further, the respondent should have put up warning signs such as triangles or branches of trees with leaves to warn other road users that there was a breakdown ahead. Had the respondent's truck been parked properly off the road, the appellant's truck would not have left its lane in a bid to overtake the stationary truck. The appellant's driver should also have exercised caution when overtaking the stationary truck. The evidence shows that the truck was not hit from the rear but was hit on its side at the front as the appellant's driver was trying to get back to his lane to avoid the oncoming traffic. This maneuver by the appellant's driver strongly suggests that he had actually seen the stationary truck but clearly misjudged the distance and speed of the oncoming traffic. This led to the accident. In *Levine v Morris*[7] it was held that

the putting of a hazard on a highway does not absolve a person colliding with it from liability for negligence. Similarly in this matter the fact that the respondent's truck was across the yellow line with no warning signs does not completely absolve the appellant of negligence. What therefore needs to be addressed is the extent of liability which each party should bear for the accident as this was clearly a case of contributory negligence.

Paragraph 76 of Volume 34 Halsbury's Laws of England offers the following guidance on apportionment:

> *"Apportionment. In a case of contributory negligence the damages recoverable by the plaintiff are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. The court has regard both to the blameworthiness of each party and the relative importance of the acts in causing the damage (often called causative potency). An appellate court will be very reluctant to interfere with the apportionment of blame or damages by the trial judge, but it will do so if the trial judge has erred in principle, misapprehended the facts or made a clearly erroneous apportionment. A partially successful plaintiff is entitled to full costs on the usual rule that costs follow the event."*

Although the judge found the respondent liable for contributory negligence, she concluded that the major cause of the collision was the appellant's driver's negligent driving. We agree

with her, but she should have gone further and applied the principle of apportionment as set out above instead of simply awarding the respondent the sum of K100,000.00 as damages and dismissing the counterclaim on account of the appellant's negligent driving. We are of the view that when all the facts are considered, the apportionment of liability should have been 70% for the appellant and 30% for respondent.

The third ground of appeal attacks the award of K100, 000.00 by the judge as damages to the respondent without any basis for doing so. The appellant reminded us of our decision in *Industrial Gases Limited v Waraf Transport Limited and another*[8] in which we lamented the fact that in an effort to do justice, trial judges have been driven into making intelligent and inspired guesses on very meager evidence and argued that the guesses must nevertheless be reasonable *"though"* with some meager evidence. In the instant case, it was argued that there was no evidence adduced to support any claim. In the circumstances, the court ought to have found for the appellant and in the absence of evidence, the award of K100,000.00 was unreasonable.

The respondent has argued that its truck was a total write off and a quotation from Southern Cross Motors showed that a replacement of the truck would cost Euros117,055.00 which was equivalent to the sum of K760,857.50. The respondent therefore submitted that the sum of K100,000.00 which was awarded was not in fact unreasonable. Even though the judge had very little information to assist her in reaching a decision on the quantum of damages, she, in our view, quite correctly reduced the claim after taking into consideration that the respondent's truck was quite dated and as such not entitled to a brand new truck valued at K760,857.50. We note that the respondent has accepted the sum of K100,000.00 as damages although there was an attempt to draw comparisons with the real value of the truck even though it was dated. After coming to the conclusion that what was due as damages was K100,000.00, the judge should then have deducted a portion to reflect the respondent's contributory negligence. Since this was not done we shall apportion it and award the respondent K70,000.00 after taking into account that it contributed to the accident through its negligence.

The fourth ground of appeal was in relation to the counterclaim which was dismissed. The argument by the appellant was that the accident was caused by the respondent and that the expert witness who testified on behalf of the appellant was not contradicted. As such, the court ought to have decided in favour of the appellant.

The counterclaim was dismissed on the basis that the collision occurred due to the appellant's negligent driving and that the counterclaim had not been proved even though DW2's testimony was accepted as an expert. We agree with this finding by the judge and as such see no basis for awarding the appellant what it is claiming under the counterclaim. Even though we apportioned liability in respect of the respondent's claim, the appellant is not entitled to the sum of K200,000.00 it claimed in the court below as the appellant did not prove its claim.

The fifth ground of appeal was not argued. We shall therefore treat it as having been abandoned. It follows from what we have stated above that this appeal only partially succeeds on the issue of apportionment. We accordingly set aside the sum of K100,000.00 awarded as damages and in its place award the respondent the sum

of K70,000.00 with interest at the short term deposit rate from the date of the writ to date of judgment and thereafter at the average lending rate as determined by Bank of Zambia up to date of payment. The respondent is entitled to full costs on the usual rule that costs follow the event. The costs are to be agreed or taxed in default of agreement.

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I.C. MAMBILIMA
CHIEF JUSTICE

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A.M.WOOD
SUPREME COURT JUDGE

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R.M.C. KAOMA
SUPREME COURT JUDGE