

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-DEL-2017/02202

In the matter between:

WP TRANSPORT (PTY) LTD

PLAINTIFF

and

G4S NAMIBIA (PTY) LTD

1ST DEFENDANT

RAYMOND JOSSOP

2ND DEFENDANT

Consolidated with:

CASE NO: HC-MD-CIV-ACT-DEL-2018/01737

G FOUR S CASH SOLUTIONS (NAMIBIA) (PTY) LTD

PLAINTIFF

and

ROADS AUTHORITY

1ST DEFENDANT

BRIGITTE LEANE (REGINA) GOASES

2ND DEFENDANT

Neutral citation: *WP Transport (Pty) Ltd v G4S Namibia (Pty) Ltd* (HC-MD-CIV-ACT-DEL-2017/02202) and *G Four S Cash Solutions (Namibia) (Pty) Ltd v Roads Authority* (HC-MD-CIV-ACT-DEL-2018/01737) [2020] NAHCMD 280 (10 July 2020)

Coram: OOSTHUIZEN, J

Heard: 12-14 November 2019, 28 February 2020

Delivered: 10 July 2020

Flynote: Motor vehicle accidents on B1 National Road – Causation – Combined actions – Statutory duties of Roads Authority – Damages

Summary: A cow belonging to Ms Goases found itself on the B1 Road on 19 November 2015 between Windhoek and Rehoboth in the vicinity of the D1320 trunk Road to the B1. During that evening and in the dark, an unknown truck collided with the cow and drove away. This resulted in the cow lying on the surface of the road and as a result an armoured vehicle of G4S collided with the cow causing it to veer into the lane of oncoming traffic and collide with the combined motor truck driven by a driver of WP Transport. The result was the fateful accident wherein lives were lost and damages ensued.

The court applied the “but for” test and had to decide whether the wrongful act of Roads Authority not to repair and maintain the motor grid gate on the D1320 trunk road was the probable cause of G4S’s loss. The enquiry was whether the cow of Ms Goases would probably have reached the B1 Road and caused a loss if the motor grid gate was properly maintained and repaired. The second enquiry following the first was whether the wrongful act is sufficiently close or direct to the loss for legal liability to ensue or whether the loss (of G4S) is too remote.

Held, livestock owners, land users and land owners have a statutory duty to maintain their fences bordering public roads to prevent their cattle and other livestock from encroaching on to the roads and create a danger to the vehicles making use of the road.

Held, that the purpose of a motor grid gate on a proclaimed trunk road is to restrict the movement of cattle or other livestock from one portion of the road to the next and the Roads Authority has a statutory duty to repair and maintain the motor grid gate on the D1320 trunk road.

Held further, the failure of Roads Authority to comply with its statutory duty was the cause of Ms Goases’s cow to reach and roam onto the B1 and the ensuing collisions

causing the accident between the G4S armoured truck and the Scania combined truck which resulted in the damage suffered by G4S.

ORDER

Having heard **Mr Diedericks** counsel for Plaintiff, **Mr Erasmus** counsel for Defendants in 2017/02202; and **Mr Erasmus** counsel for Plaintiff, **Mr Chibwana** counsel for 1st Defendant and **Mr Nanhapo** counsel for 2nd Defendant in 2018/01737 and having read the pleadings and documents filed of record in the combined actions:

IT IS ORDERED THAT:

- [1] The claim of WP Transport (Pty) Ltd against G4S is dismissed with costs.
- [2] The claim of G4S Cash Solutions (Namibia) (Pty) Ltd against the Roads Authority succeeds with costs.
- [3] Roads Authority shall pay the sum of N\$ 300,065 to G4S Cash Solutions (Namibia) (Pty) Ltd with interest at the rate of 20% per annum as from 12 November 2019 to date of payment.
- [4] G4S Cash Solutions (Namibia) (Pty) Ltd claim against Ms Goases is dismissed. No order as to costs.

JUDGMENT

OOSTHUIZEN J:

INTRODUCTION

- [1] The B1 highway running South to North roughly divide Namibia in two halves East and West.

[2] The B1 also connect Windhoek and Rehoboth to the South of Windhoek.

[3] From Windhoek, driving South to Rehoboth the D1320 trunk Road intersect with the B1 from the East. The D1320 lead to the town of Groot Aub. Between Groot Aub and where D1320 intersect with the B1 there is a cattle grid. The function of the cattle grid is to prevent livestock to move from the Groot Aub side to the B1 highway.

[4] Between the cattle grid and Groot Aub there are various farms and cattle enclosures. Livestock owners and land users have a statutory duty to maintain their fences bordering the D1320 in order to prevent their cattle and other livestock to encroach on to the D1320 and create a danger to vehicles making use of the D1320.¹

[5] The same apply to land owners bordering the B1 highway.

[6] The B1 highway is a tarred road bearing heavy traffic, both motor vehicles and heavy trucks. The B1 is the main route to the South and to the Republic of South Africa (and to the North of Namibia).

ADDITIONAL STATUTORY BACKGROUND

[7] The Roads Authority, established in terms of Section 1 of the Roads Authority Act, No. 17 of 1999 (the Act), has a statutory duty in terms of sections 43(1)(a) and 44 of the Roads Ordinance read with sections 3 and 16 of the Act and Government Notice 171 in the Government Gazette 2374 to erect, maintain or repair motor grid gates in any fence crossing a proclaimed road. Subsequent to GN 171 the Roads Authority “or the owner of a fence shall in no way by reason of the construction, maintenance or repair of any motor grid gate in such fence in terms of the provisions of this Ordinance be liable for any loss through possible damage or injury to any person, vehicle or stock passing or attempting to pass through any motor grid gate: Provided that this section shall not exempt the Executive Committee from liability for any loss through negligence in the construction, maintenance or repair of such motor grid gate in a trunk, main or district road.”²

¹ Section 42(1)(a)(i) of the Roads Ordinance of 1972 and Regulation 348(3) and (5).

² Section 44 of the Roads Ordinance: Executive Committee to be replaced by Roads Authority subsequent to GN 171.

COMMON CAUSE FACTS AFTER EVIDENCE

[8] It is common cause between the parties in the consolidated actions 2017/02202 and 2018/01737 that a cow belonging to Ms Goases found itself on the B1 Road on 19 November 2015 between Windhoek and Rehoboth in the vicinity of the D1320 trunk Road to the B1.

[9] It is also common cause that an unknown truck collided with the said cow and drove away.

[10] It is further common cause that an armoured vehicle of G4S subsequently collided with the cow on the B1 Road, veered into the lane of oncoming traffic from Windhoek and collided with a combined motor truck driven by a driver of WP Transport resulting in damage to the vehicle of G4S and the demise of its occupants and damage to the combined motor truck driven by the driver of WP Transport.

[11] But for the cow on the surface of the B1 Road it is probable that none of the aforesaid collisions would have occurred.

PLEADINGS

[12] WP Transport (plaintiff in case 2017/02202) claim damages from G4S based on the alleged negligence of the G4S driver. G4S however has pleaded that WP Transport's ownership of the combined motor truck is not admitted and puts WP Transport to the proof of its ownership (and *locus standi*) and denied its driver's negligence saying WP Transport's driver was negligent.

[13] In case 2018/01737 where G4S is the plaintiff it claimed for the damage to its armoured vehicle and indemnification from Roads Authority and Ms Goases in the event it (G4S) is held liable for the alleged damage of WP Transport. The claim of G4S is based on the statutory duties and negligence of Roads Authority and Ms Goases.

[14] Roads Authority pleaded to the allegations of G4S in the most precarious way. It denied the allegations against it and Ms Goases and pleaded that G4S has the onus to prove its allegations. In amplification it pleaded that G4S's allegations are fictitious, speculative and have no basis in law. It further avers that the alleged accidents (collisions) are a mere fiction for there is no grain of evidence that the collisions occurred. Roads Authority further pleaded that there is no statutory duty

on it to look after Ms Goases's domesticated animals. That there is no legal duty on it to prevent animals from straying onto public roads.

[15] Roads Authority further pleaded that G4S is suing the wrong entity because there is no nexus between the harm suffered by G4S and the alleged conduct of Roads Authority. It pleads that G4S's claim is too remote and against public policy. It denies negligence and say that G4S's driver is solely responsible due to his negligence.

[16] Ms Goases denied everything.

[17] From the pleas of Roads Authority and Ms Goases it is clear that they failed to apply sound pleading practices.

EVIDENCE AND LAW

[18] Neither Roads Authority nor Ms Goases tendered any evidence during the trial.

[19] G4S tendered the evidence of a member of the Namibian Police Force and an expert witness.

[20] WP Transport tendered the evidence of the driver of the Scania combined motor truck at the time of the accident between him and the armoured truck of G4S.

[21] Sergeant Mouton of the Groot Aub Police Station testified that D1320 on which the relevant motor grid gate is, is a proclaimed trunk road intersecting with the B1 Road. Sergeant Mouton confirmed that the said motor grid gate was not properly maintained and repaired until after the accidents on 19 November 2015. He testified that he regularly travelled on the D1320 gravel road during November 2015 and noticed that the motor grid gate was filled with sand and the wiring attached to the grid was not secure. He testified that the grid and the wiring was only repaired by Roads Authority the day after the accidents on the B1 Road. He testified that he witnessed 4 to 5 workmen and a Roads Authority vehicle at the motor grid gate removing sand from the grid, welding the grid bars and poles and fixing the wiring attached to the grid on 20 November 2015. G4S also tendered in evidence a photo depicting the repairs brought about by Roads Authority. No evidence to the contrary was presented.

[22] The only reasonable inference from the above is that Roads Authority complied with its statutory duty to maintain and repair the motor grid gate the day after the accidents on the B1 Road.

[23] The purpose of a motor grid gate on a proclaimed trunk road is to restrict the movement of cattle or other livestock from one portion of the road to the next.

[24] The evidence of Sergeant Mouton further was that the fencing on both sides of the trunk road on the western side of the motor grid gate was well maintained and secured. Also the fencing on the eastern and western side of the B1 Road where the collisions occurred. He testified that it was not possible for the cow of Ms Goases to reach the B1 Road without passing the motor grid gate.

[25] Sergeant Mouton testified that the brown cow of Ms Goases came from the eastern side of the motor grid gate where it was kept by Ms Goases. This evidence was un-contradicted and confirmed by Ms Goases's residential address where she was also personally served.

[26] Applying the "but for" test³ the court has to decide whether the wrongful act of Roads Authority not to repair and maintain the motor grid gate was the probable cause of G4S's loss. The enquiry is whether the cow of Ms Goases would probably have reached the B1 Road and caused a loss if the motor grid gate was properly maintained and repaired. The second enquiry following the first is whether the wrongful act is sufficiently close or direct to the loss for legal liability to ensue or whether the loss (of G4S) is too remote.

[27] G4S is not required to establish the causal link with certainty. It must only establish that the wrongful conduct of Roads Authority not to maintain and repair the motor grid gate properly was probably the cause of G4S's loss.⁴

[28] It should be common cause that cattle are not supposed to be on the B1 Road. The B1 Road is for vehicular traffic. Drivers of motor vehicles and trucks driving at night on the B1 Road should be able to reasonably assume that cattle on the road is not a given but only a possibility.

³ *Minister of Health and Social Services NO v Kasingo* 2018 (3) NR 714 (SC) at 729, paragraph [70].

⁴ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) paragraph 25.

[29] Mr Joubert, the expert of G4S and Sergeant Mouton, backed by admissible photographs, testified that the cow of Ms Goases was brown in colour. The collision of the G4S vehicle with the stationary cow lying in the lane of traffic of the G4S vehicle, happened at night in the dark.

[30] Mr Joubert (the only expert relating to accident reconstruction) testified that with headlights on dim a driver should see 45 metres ahead and on bright, 100 metres ahead; at 120 km/h a vehicle covers 33.3 metres per second; reaction time for an average driver is 1,5 seconds; bright lights of oncoming vehicles may temporarily blind the other driver, and it would have been almost impossible for the driver of G4S to see a dark cow lying on the road.

[31] The driver of WP Transport, Mr Junias, testified that just before the collision with the G4S vehicle, an Amarok vehicle driving south overtook him and when in front of him flashed its lights at least four times to the oncoming vehicle of G4S. He (Junias) did also not see the cow lying on the road, and the driver of the G4S vehicle dimmed its headlights after the flashing of the Amarok.

[32] Mr Joubert, supported by admissible photographs, placed the brown cow lying in the northbound lane on the B1 Road. That was the lane of travel of the G4S vehicle before it collided with the cow.

[33] The last recorded speed of the G4S vehicle before it collided with the brown cow of Ms Goases was 113 km/h.

[34] The combined truck driven by Mr Junias and the G4S vehicle driven by Mr Jossop (deceased) were driving in opposite directions with a combined approaching speed of approximately 196 km/h.

[35] The evidence of Mr Joubert as an expert in accident reconstruction and accident analysis, was to the court's satisfaction and is accepted. Mr Joubert's evidence, findings, opinions and reasons were based on 25 years' experience, a personal inspection on 2 December 2015, a copy of the relevant Namibian Accident form, statement by Sergeant Mouton, warning statement of Mr Junias, accident scene photographs by Scene of Crime, Windhoek (taken hours after the accident),

measurements of accident scene (by himself), scale plan of accident scene (by himself) and tracking reports supplied by G4S and WP Transport. All the above material was also properly discovered by G4S and did not elicit any requests for additional discovery in terms of Rule 28(8)(a) or requests for trial particulars by any of the other parties in the combined action.

FINDINGS

[36] The only reasonable inference on the evidence is that the driver of the G4S vehicle did not see the cow lying in its lane, collided with it and lost control of his vehicle. No evidence supporting negligence of either of the drivers of the Scania truck (Mr Junias) or the driver of the G4S vehicle was tendered by any party.

[37] The evidence of Mr Junias concerning the ownership of the truck combination he was driving is rejected on the basis that Mr Junias is only a driver of WP Transport (Pty) Ltd; has no first-hand knowledge of the ownership of the vehicles save for the name on the vehicles and registration papers in the glove box of the Scania Horse. Ownership of the vehicles were not admitted and proof was requested⁵ and was clearly agreed between the parties as a factual issue to be proved.⁶ No documents were discovered by WP Transport and tendered in evidence regarding ownership of the vehicles. WP Transport did not call any director or official of the company with first-hand knowledge concerning its ownership and to prove a direct and substantial interest in case 2017/02202.

[38] In the event of the court being wrong in the above finding, then and in any event no evidence was tendered to prove negligence of the G4S driver. The fact that the G4S vehicle was on the wrong side of the road was explained by Mr Junias and Mr Joubert and did not result in negligence of the G4S driver.

[39] The cow of Ms Goases did not cause an accident on the eastern side of the motor grid gate on the D1320 trunk road between the motor grid gate and Groot Aub, it caused the collisions and accident on the B1 Road.

⁵ *Absa Bank Limited v IW Blumberg & Wilkinson* [1997] 2 All SA 307 (A) at 309 and 310, concerning the application of Rule 22(3) of the Rules of the High Court in SA with similar wording as Rule 46(3) of the Namibian High Court Rules.

⁶ Pre-trial Report and Pre-trial Order.

[40] G4S proved the probability that the cow escaped its enclosure, roamed over the motor grid gate (which was not properly maintained and repaired by Roads Authority, filled with sand or soil between the grids) and roamed to the B1 Road and onto the B1 Road south of the intersection with D1320 where it was not supposed to be, causing the collision with an unknown truck and remained on the surface of the B1 Road in the northbound lane where the G4S vehicle collided with it and causing the G4S vehicle to land in front of the combined truck driven by Mr Junias during the late evening hours of 19 November 2015. The result was the fateful accident wherein lives were lost and damages ensued.

[41] Ms Goases cannot be held accountable for the damage caused to G4S due to the fact that her cow did not cause damage or was involved in an accident on the eastern side of the motor grid gate. The lack of maintenance and repair on the side of Roads Authority resulted in the cow being on the B1 Road, caused a *novus actus intervenience* concerning Ms Goases's liability and/or resulted in remoteness of Ms Goases's dereliction of duties concerning the cow.

[42] The court finds that the failure of Roads Authority to comply with its statutory duties was the cause of the accident between the G4S armoured truck and the Scania combined truck which caused the damage suffered by G4S.

[43] The argument of counsel for Roads Authority that Roads Authority was not a party to the agreed quantum of the G4S damage to wit N\$ 300 065, is rejected. When the agreement on losses was recorded in court, it was in respect of the consolidated actions and in the presence of counsel for all the parties. Counsel for Roads Authority and for Ms Goases did not object to the agreed quantum advised by counsel for G4S and WP Transport. They acquiesced in circumstances where they would be expected to object or to record that they do not accept the agreed quantum.

[44] WP Transport (Pty) Ltd has failed in its action against G4S Namibia (Pty) Ltd and the costs should follow the result. G Four S Cash Solutions (Namibia) (Pty) Ltd has succeeded in its claim against Roads Authority and the latter should pay the costs of the former. G Four S Cash Solutions (Namibia) (Pty) Ltd has failed in its claim against Ms Goases. Ms Goases shall pay her own costs due to the fact that it

was her cow which was not properly contained in its enclosure which caused all the accidents on the B1 Road.

[45] In the premises the following orders are made:

[45.1] The claim of WP Transport (Pty) Ltd against G4S is dismissed with costs.

[45.2] The claim of G4S Cash Solutions (Namibia) (Pty) Ltd against the Roads Authority succeeds with costs.

[45.3] Roads Authority shall pay the sum of N\$ 300,065 to G4S Cash Solutions (Namibia) (Pty) Ltd with interest at the rate of 20% per annum as from 12 November 2019 to date of payment.

[45.4] G4S Cash Solutions (Namibia) (Pty) Ltd claim against Ms Goases is dismissed. No order as to costs.

H Oosthuizen
Judge

APPEARANCES:

PLAINTIFF (2017/02202): J Diedericks
Instructed by Viljoen & Associates
Windhoek

DEFENDANTS (2017/02202): F Erasmus
Francois Erasmus & Partners
Windhoek

and

PLAINTIFF (2018/01737): F Erasmus
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1ST DEFENDANT (2018/01737): T Chibwana
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2ND DEFENDANT (2018/01737): T Nanhapo
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