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G.P.-S.25617—1974-75—3 000 J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate Provincial Division)
Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

Union National South British Ins Co LTD *Appellant,*

versus

S.A.R & H *Respondent*

Appellant's Attorney Mclntyre & Vd Post *Respondent's Attorney* STATE ATT BFN.
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate L.S Melunsky *Respondent's Advocate* JFJ v Rensburg SC
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op

0

(S/E.C.L.D)

Coram Rabie, Corbett Miller, Viljoen Wnd AK. et

Vir Appellante Melunsky 9h45 - 11h00
11h15 - 11h30 3h25 - 3h45

Vir Respondent van Rensburg
11h30 - 12h45 2h15 - 3h25

The Court allows the appeal C.A.V.

Bills taxed—Kosterekenings getakseer P.I.C.

Writ issued Lasbrief uitgereik	Date Datum	Amount Bedrag	Initials Paraaf
Date and initials Datum en paraaf			

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

UNION & NATIONAL SOUTH BRITISH COMPANY LIMITED ..... Appellant

versus

SOUTH AFRICAN RAILWAYS AND HARBOURS ..... Respondent

Coram: Rabie, Corbett, Miller, Diemont, JJA, et Viljoen AJA.

Heard on: 5 September 1978.

Judgment delivered: 29 September 1978.

J U D G M E N T

DIEMONT, JA.:

This appeal arises out of an unusual collision which took place five years ago between a train and a vehicle known as a "Fordson front end loader/digger". This vehicle, which I shall refer to as the loader, and a welding machine to which it was coupled, were both damaged beyond repair and action was instituted in the South Eastern Cape

/ Local.....

Local Division (KANNEMEYER J) for the recovery of damages in the sum of R4 436,00. It was alleged in the particulars of claim that the loader and the welding machine were held under agreements of hire purchase and lease by a partnership trading as H and M Installation Services (incorrectly described as a private company in the pleadings) and that all right, title and interest in this equipment and all claims arising out of the collision had been ceded to the insurance company which was the plaintiff (now appellant) in these proceedings.

The South African Railways and Harbours was cited as defendant (now respondent). I shall refer to the parties in this judgment as plaintiff and defendant.

It was stated in the pleadings that the collision took place near the Dom Pedro Jetty in the Port Elizabeth Harbour at about 2 p m on Monday 17 September 1973 and that the collision was attributable to the negligence of the driver of the train on several grounds. His negligence was not proved at the trial and as the issue was not raised

/ on.....

on appeal no more need be said about the matter. It was alleged in the alternative, however, that the collision was caused by the negligence of other servants of the defendant, in that:

(a) They permitted the loader and the welder to operate and to be at the Quays Exchange Yard on or in the vicinity of the railway line.

(b) They knew or should have known that if the trains used the line they were likely to cause damage to the loader and the welder.

(c) It was the duty of these servants to warn train drivers of the presence of the loader and welder or to prohibit trains from proceeding in the vicinity of this equipment.

(d) In breach of their duty they failed to give warning to train drivers and to prohibit them from proceeding in the vicinity of the equipment.

/ At.....

At the commencement of the trial an amendment to the particulars of claim was granted in terms of which an additional ground of negligence was alleged in the following terms:

" (i) Further and alternatively..... the said collision was due to the sole negligence of one Swartz and/or one Nance, who were stationed on the said train and who had the duty to advise the driver thereof of any obstructions in the path of the train, they having been negligent in one or more or all of the following respects:

(a) They failed to warn the driver of the train of the presence of the said loader/digger;

(b) They failed to give the driver timeous instructions to stop the train;

(c) They failed to cause the said driver of the train to give any or adequate warning of the train's approach;

(d) They failed to take any other or reasonable steps to avoid the said collision when, with the exercise of reasonable care, they could have done so.

/ (ii) .....

(ii) At all relevant times the said Swartz and the said Nance were servants of the Defendant and were acting in the course of their employment and within the scope of their duties as such."

Defendant filed a plea in which a special defence was first raised in the following terms:

"Defendant pleads that H and M Installation Services (Pty.) Ltd. is precluded from claiming any damages from the defendant inasmuch as the servants of the said company, when they, in the course and scope of their employment, entered, and operated in the harbour area (within which the collision occurred) knew, or should have known, of the terms of notices posted at each entrance of the said harbour area, reading:

' WARNING
ENTRANCE AT OWN RISK:
BEWARE OF CRANES AND SHUNTING MOVEMENTS '

and that, accordingly, the defendant was absolved from any liability to the said H and M Installation Services (Pty.) Ltd, or its servants, who entered and operated in the said harbour area at their own risk".

Defendant further denied that the collision was due to the negligence of any of its servants, as alleged,

/ or.....

or to their combined negligence. In the alternative, and in the event of the court holding that any of the defendant's servants was negligent, and that such negligence contributed to the cause of the collision, then it was said that the servants of H and M Installation Services, acting in the course and scope of their employment, were also negligent in one or more of the following respects:

" (i) They failed to keep a proper lookout.

(ii) They failed to give notice to defendant of their intention to do work in the said harbour area.

(iii) They failed to give any, or any adequate warning of the fact that work was being done adjacent to the railway tracks on which the defendant was operating.

(iv) They so placed the front end loader/ digger and generator/welder that portion thereof projected towards or over the railway tracks, and so formed an obstruction on the said tracks.

(v) They failed to prevent the collision when, by the exercise of reasonable care, they could have done so."

The plaintiff filed a replication in answer to the special defence in which defendant was put to the proof of

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the existence of the warning notices and in which it was averred that the servants of H and M Installation Services did not know, nor should they have known, of the terms of the notices. It was further pleaded that on a proper construction of the notices, the plaintiff was not precluded from claiming damages from the defendant in that:

> "(a) the said H and M Installation Services (Pty.) Limited had received specific approval and consent from the defendant to operate in the said harbour area;
>
> (b) the said notice was not intended to apply, and did not apply to workmen who were operating in the said harbour area with the approval and consent of the defendant".

On the issues set out above the parties went to trial, the quantum of damages having been agreed to in the sum of R3 485,00.

The circumstances which led up to the collision and gave rise to this litigation are fully set out in the

judgment of the court a quo and call for no more than a brief reference in this judgment. It appears that on the southern side of the Dom Pedro Jetty there are a number of fuel storage tanks which are surrounded by a concrete wall known as a bund wall. A ring pipe supplied with sea water for the purpose of fire fighting is situated inside this wall. The harbour officials considered the water supply inadequate and called on the oil companies concerned to lay a new pipeline with greater carrying capacity. This pipe would lead from the harbour to an existing pumphouse and thence under a railway line, then under a tarred road and then under yet another railway line to reach the bund wall. A company referred to in the evidence as "Servico", which operated on behalf of the Shell and BP Petroleum Oil Companies, was responsible for laying the new pipeline and entered into an agreement with the firm, H and M Installation Services, to make a trench and lay the pipe. A plan (exhibit "A") was submitted to and approved by defendant's officials.

It was common cause that the contractors started work on the pipeline on Saturday 15 September and continued

/ on.....

on the following two days until the collision occurred on the afternoon of Monday 17 September.

Plaintiff's case was that the work was preceded by a meeting on the site which took place a few days earlier and which was attended by representatives of Servico, of H and M Installation Services and of the Railways Administration, that a full inspection of the area to be excavated was carried out and that the man in charge of the work party, one Roberts, a pipe fitter and welder, was led to believe that the rail tracks would be kept free of traffic while the work was proceeding.

Roberts, the first witness called by plaintiff, testified that the tracks were not used and that the only train that he saw on the Saturday, the Sunday, or the Monday was the train that hit the loader. He did not expect to see any trains and he would not have been prepared to work on the site if he had known "that there were trains coming". He was told that while work was done under the line the trains would be switched to the other line and he was in consequence entitled

/ to.....

to assume that the line would remain out of use while he and his men were working under or alongside it. Accordingly it was contended in the court a quo that Roberts and his men were not negligent in placing the welding machine and the loader near the railway line where they were working. I should add in parenthesis that it was never suggested by any witness that the loader stood on the railway track. Roberts testified that it was standing close and parallel to the rails, and that it was the elbow of the digging arm which was subsequently struck by the leading truck causing both the loader and the welder to be pushed against the bund wall and crushed.

Morgan, who is a partner in H and M Installation Services and who assisted Roberts in some of the work, gave corroborating evidence. He too saw no trains while he was on the site on the Saturday or the Sunday, nor for the short time he was present on the Monday morning.

This evidence was rejected by the judge a quo. He held that as the ore traffic was very busy and the ore plant was working twenty-four hours a day, save on

/ Saturday.....

Saturday afternoons, the probabilities were that the trains continued to use both tracks while the work was in progress, but that in any event a register kept contemporaneously by the chief shunter in the yard showed that the railway line nearest the bund wall was in constant use on 15, 16 and 17 September. Indeed, it was established conclusively that "link 27", the train in question, had travelled backward and forward past the point of impact on no less than 12 occasions between 10.03 a.m. and 2.15 p.m. on the Monday and was making its unlucky thirteenth journey when it came into collision with the heavy equipment placed near the track. The court did not accept the plaintiff's evidence on this issue and found that:

> "the employees of H and M Installation Services were aware that the tracks near which they were working were in use and that they should have appreciated that their equipment would be endangered if placed too close to the lines on which trains were working."

/Accordingly.....

Accordingly it was held that Roberts and his workmen acted negligently.

This finding was not challenged on appeal but it was contended that there was also negligence on the part of the servants of the South African Railways which contributed to the collision. Two issues were raised and debated by counsel: the effect, if any, which the warning notices had on defendant's liability and whether the two shunters on the leading truck were negligent in failing to give adequate warning to the driver of the train that the loader had been parked close to the track. So far as the warning notices are concerned, Huisman, the System Harbour Engineer, and the first witness called by the defendant, told the court that he was responsible for all works in the harbour and that in 1972 he caused four notices to be erected, one at each of the main entrances to the harbour. Each notice was painted in bold letters in white on a green board about 1,5 metres

/ square.....

square and bore the legend:

" WAARSKUWING
TOEGANG OP EIE RISIKO
PASOP VIR HYSKRANE EN RANGEERBEWEGINGS

WARNING
ENTRANCE AT OWN RISK
BEWARE OF CRANES AND SHUNTING MOVEMENTS "

The trial judge said that on the inspection in loco he saw one such sign at the main entrance to the harbour but no sign was visible at the Baakens Bridge entrance as there were road works in progress. He said, however, that he was prepared to accept Huisman's evidence that at all relevant times notices were prominently displayed which were easily readable. He recorded further that both Roberts and Morgan denied having seen any sign at the Baakens Bridge entrance and that he accepted their evidence but, he added, that they could and should by the exercise of reasonable powers of observation have seen these signs. After referring briefly to the arguments advanced by defendant's counsel the judge a quo held that if this defence amounted to a

/ plea.....

plea of volenti non fit injuria the defendant had not discharged the onus of establishing that there was a voluntary assumption of risk and if the defence was based on a contract it had not been proved that there was any contract between the defendant and H and M Installation Services which could be equated to the "owners risk" cases in contracts of depositum.

Mr. Van Rensburg, for the defendant, invited us to say that the court a quo had erred in holding that this defence could not be based on contract, but he was less enthusiastic in advancing the argument based on volenti non fit injuria. I do not think there is any weight in either argument. It is obviously desirable and necessary to warn casual visitors to the docks, whether they are bent on sightseeing or business, of the hazards and dangers in the area. Where there is a network of railway tracks, a constant shunting of goods trains of inordinate length and a loading and unloading of cargo ships by day and night, there are

/ manifestly.....

manifestly perils from which the harbour officials cannot protect the unwary. Visitors are warned to take care of themselves but that does not mean that the harbour authorities are entering into an implied or tacit contract with every person who walks through the dock gates or steps ashore from a ship. There is no more substance in such an argument than there is in the suggestion that a man who puts a "Beware of the dog" notice on his front gate must be deemed to have contracted with every stranger who comes into his property - whether he be a tradesman or a trespasser. Nor does it seem to me that there is any merit in the contention that there was a voluntary assumption of risk by the persons laying the pipe. The warning notice is in cryptic terms. It implies that the visitor has a choice: he can enter the harbour area but if he does so it is by his own election and at his own peril. Those words are scarcely apposite in the case of persons who are under a duty to work in the dock area, whether they are

/ railway .....

railway employees - gangers, clerks, shunters, engine drivers - or contractors who are doing work with the knowledge, the permission and indeed in this case, at the request of the administration. There is, as counsel for the plaintiff said, no particular magic in the wording of these notices. If the administration intended to absolve itself from all liability for the negligence of any of its servants in the execution of their duties it should have framed the notices in clear and appropriate language. The onus was on the defendant to prove affirmatively that the workmen on the pipe trench were made aware of the risk of loss or injury caused, not by their own carelessness, but by the negligence of railway employees, and, that having been made so aware, they voluntarily accepted that risk. As was said by INNES, CJ:

> "It must be clearly shown that the risk was known, that it was realised, and that it was voluntarily undertaken. Knowledge, appreciation, consent - those are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent".

(Waring and Gillow Ltd. v Sherbourne, 1904 TS 340 at 344.)

/ The.....

The evidence of the notice boards on display does not satisfy me that the workmen on this project, assuming that they were literate and that they read or should have read these notices, appreciated and consented to accept the risk.

I turn now to consider the question whether, if the notices did not preclude plaintiff from claiming damages from the defendant as a result of its servants' negligence, any such negligence was proved.

The train which collided with the loader was an ore train, some 323,5 metres in length. It comprised four brake trucks and 25 trucks, each carrying 65 tons of ore, and a locomotive which was at the rear of the train. It is common cause that the train was proceeding at a slow speed, approximately 10 km/h, from west to east, that is from Deysel Siding to the ore handling plant on the track nearer to the bund wall. As the locomotive was behind the trucks the engine driver pushing the unit or "link" could not see

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what was happening in front of the trucks he was pushing. To ensure proper control of the unit while it was being pushed, two shunters were stationed at the top of the foremost ore truck. They were equipped with "walkie talkie" or two-way radios, as was also the engine driver. It is clear that these two shunters were both at all material times in direct communication with the driver and could direct his progress and warn him of any obstruction ahead. A test established that when the driver of a locomotive with four brake trucks pushing 25 loaded ore trucks at 10 km/h on the line in question received an instruction to stop at once and reacted promptly to such order, the stopping distance was 47 metres.

After carrying out an inspection <u>in loco</u> the trial judge recorded that from the spot where the collision took place (shown as point X on the plan, exhibit A.2) the line took a long gradual curve towards the north.

/ He.....

He recorded further:

> "I was shown that if one stands approximately 100 to 150 paces to the north-west of where the accident occurred, it is difficult accurately to judge how far an object is away from the railway line because of this curve".

He also recorded that he was shown a spot —

> "... which is now vacant ground approximately 150 paces to the north-west of the spot where the machinery was standing at the time of the accident. I understand, there will be evidence (that) a building called African Line Building existed on this spot. The railway line on which the train was travelling, was to the south-western side of this building and it would appear that a building there would have caused an obstruction to the view of both a train coming towards the machinery and also have obscured the train itself from people at the machinery for a certain period".

The two shunters, Swartz and Nance, whose task it was to instruct the engine driver, gave evidence. They informed the court that they were on duty on the train "link 27", and that on the Monday morning they had made some 5 to 6 trips in each direction before the collision occurred. Both of them witnessed the collision.

/ On....

On the inspection in loco the trial judge recorded that " a shunter demonstrated the point where he was on the front of the front-most truck and he said he was approximately 20 paces from the west of where the machinery was standing when he appreciated that it was causing an obstruction". It is not recorded who the shunter was but it was probably Swartz, since he stated in the witness box that he had paced out the distance and found that he was approximately 20 yards away when he appreciated that the machine was not clear of the truck and shouted "Hokaai" to the driver. However, under cross-examination he admitted that on 19 September 1973, two days after the collision, he had made a written report to the Harbour Master (exhibit G) in which he stated, inter alia:

> "Toe ek ongeveer tien na twaalf treë van die laaigraaf af was, sou ek sien dat die trokke hom sal raak. Ek het duidelik vir die drywer - ek het dadelik vir die drywer beveel om stil te hou so gou hy kan om die ongeluk te vermy, maar die 25 erts-trokke was té swaar om dadelik te stop".

He also admitted giving a written statement to the Police (exhibit H) in which he stated:

/ "Toe....

> "Toe die trok waarop ek gestaan het ongeveer 10 tot 15 tree vanaf hierdie masjien was, het ek gesien dat dit nie ruim staan van die treinspoor nie en het besef dat die trok waarop ek staan daarmee gaan bots..... Ek het toe onmiddellik vir die lokomotief oor die loopgeselser gewaarsku om stil te hou en met my hande tekens gegee aan die persone by die masjien om pad te gee".

The evidence given by Nance on this issue was confusing and in conflict with the report which he gave to the Railway Police (exhibit J) a month after the collision, but he admitted that he shouted the warning "Hokaai" only after Swartz had given his order to the engine driver to stop.

There can be no doubt that both shunters delayed their signal to the driver until a very late stage, probably when the leading truck was within 20 yards or less of the loader. There can also be no doubt that when the warning was given it was too late for the engine driver to stop the train before the collision took place since 47 metres was shown to be the stopping distance of a train of that length, travelling at that momentum. And finally there appears to be no doubt that if the two shunters had kept a sharp

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lookout they must have seen the loader and people working around it at a distance of approximately 150 yards as Swartz conceded when he was cross-examined on the report he had made to the Railway Police:

" '.... ek het daardie dag saam met rangeerder A.C. Nance op rangeerskakel no. 27 gewerk met lokomotief no. 1813 met drywer H. Williamson en stoker C. Smith in beheer'. Is dit reg?-- Korrek.

Is dit wat gebeur het op daardie dag?-- Korrek.

Maandag. Goed. 'Om ongeveer 2.15 nm. op gemelde datum het ons n rangeerbeweging uitgevoer vanaf die spoorwegterrein bekend as die Deyselsylyn na die ertskaai'. Reg?-- Korrek.

'Die lokomotief het 25 gelaaide ertstrokke gestoot ongeveer in die rigting noord na suid op die treinspoor bekend as die deurloop vanaf Deyselsylyn na die ertskaai'?-- Korrek.

'Terwyl hierdie beweging uitgevoer was, het ek op die erts in die voorste trok no. CR. 1-60031697 gestaan. Ek was in besit van n loopgeselser waarmee ek met die drywer van die lokomotief en rangeerder Nance in verbinding was'. Reg?-- Korrek.

'Rangeerder Nance het saam met my op die voorste trok gestaan. Die spoed van die trein was volgens my mening ongeveer 10 kilometer per uur'. Is dit reg?-- Korrek, ja.

'Naby die ertskaai maak die treinspoor waarop ons trein beweeg het n lang draai van

/ links...

links.... na links, d.w.s. na die ooste'.?-- Korrek.

'Terwyl die trok waarop ek gestaan het om hierdie draai gegaan het, het ek opgemerk dat n groot geel masjien aan die regterkant van die treinspoor, d.w.s. aan die suidekant van die treinspoor staan'. Dit is wat jy opgemerk het toe jy om die draai kom?-- Dit is korrek, ja.

Nou kan ek net jou daar inval mnr Swartz. Dit is die plek min of meer 150 treë vanwaar die ongeluk gebeur het?-- Dit is korrek.

Ja. 'Hierdie masjien het in die oop spasie tussen die treinspoor en die veiligheidsmuur van die firma Shell and B.P. Diensmaatskappy gestaan'. Dit is waar hy gestaan het?-- Korrek, ja.

'Toe ek hierdie masjien die eerste keer langs die treinspoor sien staan, het dit vir my voorgekom asof hy ruim staan van die treinspoor en daar was ook geen waarskuwingstekens aangebring dat dit nie ruim vanaf die treinspoor af gestaan het nie. Ek kon sien dat daar mense..... dat daar persone besig was om aan die masjien te werk'. Is dit reg?-- Korrek, ja."

The critical question is why the train driver was not given adequate warning by the two shunters. Both men were subjected to a rigorous cross-examination and each put forward unsatisfactory explanations for the delay. Swartz told the Court that his view of the loader was deceptive:

/ U;:....

"U kon daardie masjien voor u binne daardie 20 treë gekom het, u kon hom gewaar het, nie waar nie?-- Ja, as jy om die draai.... as jy verby die gebou kom kan jy hom gewaar maar jy kan nie sê hy is ruim of hy is nie ruim nie want dit is... die draai is baie bedrieglik, jy kan nie..... voor jy feitlik by hom is nie, kan jy nie sê hy is nie meer ruim vir daardie spoor nie.

Het u enige rede gehad om te verwag dat hy nou verskuif is van die vorige posisie?-- Nee, ek het nie verwag nie want hy het daar gestaan met die verbygaan slag".

This evidence was in flat contradiction to the last paragraph in the statement which Swartz made to the Railway Police which read as follows:

"Ongeveer 'n halfuur voordat hierdie botsing plaasgevind het, het ons oor dieselfde treinspoor beweeg, vanaf die ertskaai na Deysel sylyn, toe was hierdie meganiese stootskraper nie daar gewees nie waar die botsing plaasgevind het nie. Ek het hom daardie tyd glad nie gesien nie".

When pressed to explain this statement Swartz admitted to Counsel that what he had told the Railway Police was untrue and said that the statement had been given so long ago that he could not remember what questions had been

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put to him.

Nance could throw no light on this issue either, as it appears that at an earlier stage he had travelled behind on the four brake trucks and paid scant attention to where the loader was standing.

On the evidence the trial judge came to the conclusion that neither Swartz nor Nance had previously noticed the loader near the railway line. I have no doubt that this finding is correct and that consequently there is no substance in the submission that Swartz was misled by what he claimed to have seen earlier in the day.

Nance told the court a different story. He alleged that when the train was three "bogie lengths" from the loader its digger arm, that is its rear arm, moved towards the truck and, realising that there was going to be a collision, he called on the driver to stop the train. He added that before the arm moved he thought that the train could have passed in safety but he was not sure that this was so.

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The judge a quo made no finding on the question as to whether the digger arm swung in front of the train save to draw attention to the fact that it was admitted that the engine of the loader was running at the time of the collision. In my view the trial judge should have considered the evidence on this issue and if he had done so would have come to the conclusion that Nance's evidence was not worthy of credence. I say this for the following reasons:

In the first place Swartz who was in as good, if not a better position than Nance to see what was happening, at no stage, either in his report to the Harbour Master or to the Railway Police or in the witness box, said that the arm moved. If it had swung three feet towards the track, as Nance claimed, Swartz could not have failed to observe the movement. Roberts admitted in the witness box that he had told the police that the arm could move but that the move would have been fractional so that you would not notice it with the eye. He did not see it move. Morgan who was also a qualified fitter but was not present when the collision

/ occurred....

occurred, gave similar evidence; he said someone would have had to work the lever to move the arm. The only evidence that there was an operator on the machine was given by Swartz and his evidence was unconvincing since he made no mention of this fact in his statement to the Harbour Master or the Railway Police. In any event, as Morgan explained, even if there had been an operator on the machine it was unlikely that he would have activated the incorrect lever since he would have had to swing round in his seat in order to operate the controls for the digging arm.

In short, the only direct evidence that the arm moved was the evidence given by Nance. There was no suggestion by him of a fractional movement -

> "So drie 'bogies' voor die botsing het ek gesien die arm het geswaai".

Questioned by the trial judge he insisted that the real cause of the collision was the fact that the arm swung out in front of the train. He could not explain, however, why he made no mention of this alleged "real cause of the collision" in his report to the Harbour Master. Another unsatisfactory

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feature in his evidence was that Nance stated that the arm moved when the train was approximately three bogie lengths away from the loader, whereas in a statement made to the Railway Police he said that he noticed the arm moving when the leading truck was approximately three bogie lengths from a crossing which was 100 yards from the point of impact. Moreover he was forced to concede that if the statement made to the police was correct there was adequate time to bring the train to a stop before it collided with the arm.

I am accordingly of the opinion that no satisfactory explanation was given by either of the shunters for the delay in warning the engine driver of danger before the collision.

Counsel for the defendant referred to the words of WESSELS CJ (as reported in South African Railways v

/ Bardeleben.....

Bardeleben, 1934 AD 473, at p 480):

> "The Court must not in any way be affected by the tragic consequences of the accident, nor, on the other hand, must it excuse any carelessness on the part of engine drivers. It must not expect superhuman powers of observation or an impeccable discretion on the part of engine drivers, nor must it say to him after the event — 'if you had done this or that more quickly or more accurately', or 'if you had perceived this or that more readily, you might possibly have avoided the accident'. It is so easy to be wise after the event."

I am prepared to accept that these words are as applicable to a shunter in charge of a train as they are to an engine driver, but it does not seem to me that they assist the defendant in this case. Swartz did not suggest that the situation called for any unusual powers of observation or for a hurried exercise of discretion. He saw the loader at 150 yards with people working round it; he conceded that the curve on the line was deceptive (bedrieglik), that it was difficult to judge if the clearance was sufficient and that he made a guess which was faulty.

/ "Wel.....

"Wel, ek stel dit aan u, u het om die draai gekom toe sien u 'n masjien wat daar staan, is dit reg?— Dis korrek, ja.

En u het aangeneem dit is ruim van die spoorlyn af want daar het niemand daar gestaan met 'n rooi vlag wat die pad beskerm het nie?— Korrek, ja.

En dit is nou u skatting wat u destyds gemaak het?— Ja, dis reg.

En toe het die trein aangekom teen dieselfde stadige spoed en toe u omtrent van waar u staan tot daardie muur min of meer, dit is omtrent tien tree..... — Ja?

Toe sien u dat hy staan nie ruim nie?— Hy is té na aan die spoor.

Ja. So, al wat ek aan u stel is dat u het eers 'n skatting gemaak en u skatting was verkeerd?— Dit is korrek, want jy kan nie om die draai sien of hy ruim is of nie".

The evidence which Nance gave was even more revealing of the casual attitude adopted. Nobody, he said, had given him instructions that there were people working next to the tracks. There were no red flags, and so, despite the fact that, having passed and repassed the site during the morning, he must have been fully aware that work was in progress, he pressed on with more optimism than wisdom.

/ "As.....

"As jy instruksies gekry het. -- Ons sal stilgehou het en eers sekergemaak het dat hulle weg is.

Ek sien. Is dit wat julle..... as jy instruksies gekry het dan..... onmiddellik toe jy die laaigraaf daar gesien het, dan sou jy stilgehou het. Is dit reg?-- Ja.

Ja, dankie. Nou maar jy het nie instruksies gekry nie?-- Ons het geen instruksies gekry dat hulle daardie betrokke dag daar gewerk het nie.

En daarom het u nie gedink om stil te hou nie?-- Nee.

En julle het net vorentoe beweeg?-- Ons het net beweeg.

Ja, en n kans geneem dat miskien sal.... staan dit ruim of miskien staan dit nie ruim nie?-- Ja.

Ja, jy het daardie kans gevat en die kans het nie afgekom nie, is dit reg?-- Ja."

Counsel for the defendant contended further that even though the two shunters were able to see the loading machine and the persons working next to it at a considerable distance, they were entitled to assume that persons in the harbour would take precautions for their own safety and not encroach on the railway track and that they would not recklessly expose themselves or their property to danger.

/ I.....

I have no fault to find with this submission which is based on a statement made by ETTLINGER AJ in Sand and Co. v S.A. Railways and Harbours, 1948 (1) SA 230 at 241 (W), but the qualification to the statement must not be lost sight of:

> "Of course, a shunter must keep a proper lookout and if he actually sees an obstruction on the track, or about to cross the track, he must do what he can to avoid an accident.....".

Both the shunters claimed to have kept a proper lookout. There was no reason why they should not have done so; they were standing in an elevated position on top of the ore truck and their line of vision was unobstructed; they carried two-way radios so that they could act as the eyes - and ears - of the engine driver. They were at an early stage in doubt as to whether the loader was standing clear of the line. Once they were alerted to the possibility of danger they should have taken steps to caution the driver; at the least they should have called on him to reduce speed

/ until.....

until they could see more clearly whether or not there was room for the train to pass the obstruction. Had they taken even such moderate precautions a collision would have been avoided. They did nothing until it was too late. There can be no doubt that this conduct was negligent and that such negligence contributed to the collision.

The next question to be considered is the assessment of the degree in which the defendant was at fault in relation to the loss. How should the damage be apportioned between the parties? In my view the brunt of the blame falls on the plaintiff. The work party must have been aware that the track was in constant use and that to place a heavy piece of equipment close to the rails was to court disaster. Such conduct, combined with the failure to give any warning to the oncoming ore train constituted gross negligence - negligence which was in my opinion responsible for two thirds of the damage caused by the collision. The defendant will in consequence be ordered to pay one third of the damage.

/ The.....

The appeal is allowed and the order made in the court *a quo* is amended to read as follows:

"Defendant is ordered to pay the sum of R1 161,70 by way of damages to Plaintiff. Defendant is further ordered to pay the costs including, by agreement, the costs of one pre-trial inspection *in loco*".

The defendant must pay the costs of appeal.

M.A. DIEMONT.

RABIE, JA)
CORBETT, JA)
MILLER, JA) Concur.
VILJOEN, AJA)