IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case No. 017/2006

In the matter between:

NYAMBENI MADZUNYE **First Appellant**
THUSO PRUDENCE RAMALIBA **Second Appellant**

and

ROAD ACCIDENT FUND **Respondent**

CORAM: **BRAND, MAYA JJA et COMBRINCK AJA**

HEARD: **1 SEPTEMBER 2006**

DELIVERED: **20 SEPTEMBER 2006**

Summary: Motor vehicle accident – Claim for compensation in terms of s 17 of Road Accident Act 56 of 1996 – Causal negligence of driver of vehicle turning right at robot-controlled intersection at inopportune moment in face of oncoming traffic thus causing an oncoming vehicle to swerve and consequently collide with another vehicle – Respondent's opposition to the appeal unjustified where court *a quo* clearly misconstrued the issues – On appeal attorney-client costs against it warranted.

Neutral citation: This case may be cited as Madzunye v Road Accident Fund [2006] SCA 103 (RSA).

JUDGMENT

MAYA JA

[1] This appeal is with the leave of this court against the judgment of Hetisani J (Venda High Court), dismissing the appellants' claims against the respondent for damages arising from personal injuries sustained in a motor vehicle accident.

[2] On the morning 2 May 1998, at the Shayandima intersection on the Tshilidzini-Thohoyandou Punda Maria public road, a collision occurred between an Audi driven by Mr Kingly Rampa, the second appellant's husband, and a vehicle which the parties merely described as a taxi, driven by Mr Phungo Mudau. The appellants were both passengers in the Audi, which was travelling from east to west while the taxi was travelling in the opposite direction.

[3] Where the collision occurred the road consists of a double carriageway with two lanes both to the east and the west. The Shayandima intersection is robot-controlled. Immediately prior to the collision the robots were green for both the taxi and the Audi. The taxi was travelling in the southern most lane directly behind a yellow Toyota Hilux bakkie. The bakkie's intention was to turn right, ie south, at the intersection. The taxi did not enter the intersection as the robots turned amber on its approach. The bakkie had, however, already entered the intersection and continued to execute its right turn across the path of the oncoming Audi. The Audi seemingly never reduced speed, but instead tried to avoid the bakkie by swerving to its right. In consequence it collided with the taxi which had come to a virtual standstill on its correct side of the road. On impact both the Audi and the taxi burst into flames.

Neither of them had come into physical contact with the bakkie. The weather was clear and the drivers had an unobstructed view of one another for a distance of approximately 50 metres. Both appellants sustained serious bodily injuries.

[4] At the Uniform rule 37 conference, the respondent conceded liability in respect of Rampa and also admitted that the bakkie – which had been identified with reference to both its registration number and its driver - was involved in the accident. The parties further agreed that the matter would proceed on the question of liability only and that, in view of the fact that the appellants had instituted separate claims, the court *a quo*'s judgment in the first appellant's case would similarly be decisive of the second appellant's claim.

[5] Thus, the only outstanding issue before the court *a quo* was whether or not the drivers of the taxi and the bakkie were causally negligent. The importance of this issue was of course that by virtue of s 18(1)(a) of the Road Accident Fund Act 56 of 1996 (the Act), the appellants' claims would be limited to R25 000, 00 each unless at least one of the other drivers was also to blame.

[6] At the trial, the appellants both testified on their own behalf while the taxi driver, Mudau, and the police officer who attended the accident scene, Inspector Lumadi, were called by the respondent. For reasons not disclosed, neither Rampa, nor the driver of the bakkie were called as witnesses. Since eventually the evidence adduced by the parties did not differ materially, no further details are necessary.

[7] In dismissing the appellants' claims, the court *a quo* criticised the appellants' failure to call Rampa and the driver of the bakkie. Ultimately it held that Mudau had not been negligent at all and that the collision had been caused solely by Rampa's negligence. These conclusions were based on its findings, firstly, that 'the Audi jumped a red robot' and, secondly, that 'two vehicles and not three or more were involved in the accident'. The driver of the bakkie was absolved on the following basis:

'As regards the vehicle which turned right there is nothing further to it which can assist this court as the said motor vehicle was not involved in the accident and it went away so whether its manner of turning right was correct or not, cannot be associated with the manner in which the Defendant and the Plaintiff collided and had in no way contributed to the Plaintiff's reckless driving'. It would appear, as the judge *a quo* himself explained in his judgment on leave to appeal, that he confused the drivers of the Audi and the taxi with the parties in the case.

[8] I agree with the court *a quo*'s finding on the evidence that no blame can be attributed to Mudau for the collision. The appellant's counsel fairly conceded this at the outset of the hearing of this appeal. Apart from the fact that his vehicle had been stationary on its correct side of the road, it is clear from all the evidence that the collision occurred so quickly that there was nothing he could have done to avoid it. Nor did Mudau have any reason to anticipate that the Audi would suddenly swerve towards him and leave its path of travel. As was held in *Milton v Vacuum Oil Co of SA Ltd* 1932 AD 19 at 205:

'[W]here there are two streams of traffic in a road in opposite directions, a person in a vehicle proceeding in one direction is entitled to assume that those who are travelling in the opposite direction will continue in their course and that they will not suddenly and inopportunely turn across the line of traffic. A person travelling in one direction can assume that one travelling in the opposite direction will continue his course, but he may only assume that until he is shown a clear intention to the contrary. When a

clear and undoubted warning is given, then there is no longer any room for the assumption that the other person will continue in his former course'.

See also *Sierborger v South African Railways & Harbours* 1961 (1) SA 498 (A) at 504A-G.

[9] I cannot, however, agree with the rest of the court *a quo*'s findings. First, none of the witnesses testified that the Audi had 'jumped a red robot' as the learned judge found. On the contrary, as I have previously indicated, the evidence on both sides indicated that the traffic lights gave the Audi the right of way. Nevertheless, this misdirection on the court *a quo*'s part is not material since Rampa's driving was, in any event, negligent for both his lack of vigilance and his failure to reduce speed in the face of an imminent collision. *De Maayer v Serebro; Serebro v Road Accident Fund* 2005 (5) SA 588 (SCA) para 13.

[10] Second, whilst the appellants bore the onus to prove on a balance of probabilities that the drivers of the insured vehicles had driven negligently and that their driving had caused or contributed to the collision, they had no duty to call them as witnesses. The evidence adduced by the appellants and the respondent's own witness, Mudau, served to establish facts from which an inference adverse to the driver of the bakkie had to be drawn. The court *a quo* instead drew an adverse inference against the appellants for this omission. This was yet another misdirection on its part.

[11] Third, and most significantly, the fact that neither the Audi nor the taxi came into physical contact with the bakkie is of no consequence whatsoever. Section 17(1) of the Act renders the respondent liable for any loss or damage caused by or arising from the negligent driving of a motor

vehicle. Physical contact with that vehicle is not required. At one stage regulations under the Act did require physical contact for the respondent's liability in claims under s 17(1)(b) of the Act, ie in so-called 'hit and run' cases where the identity of neither the owner or the driver is identified. These regulations have since been declared *ultra vires* and thus invalid. (See *Padongelukkefonds v Prinsloo* 1999 (3) SA 569 (SCA); *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 (SCA) para 11). But, be that as it may, this is not a so-called 'hit and run' case. As I have said, it was common cause that the bakkie had been properly identified both with reference to its registration number and its driver.

[12] The court *a quo*'s finding excluding the bakkie driver's liability merely because he fortuitously got away unscathed was, therefore, wrong. So was the finding that it could not decide the negligence of the bakkie's driver in the absence of Rampa's testimony. In the light of the evidence that the bakkie's manoeuvre was executed in the face of oncoming traffic, which had the right of way, its driver was clearly negligent. To execute a right turn across the line of oncoming or following traffic is an inherently dangerous manoeuvre and there is a stringent duty upon a driver who intends executing such a manoeuvre to do so by properly satisfying himself that it is safe and opportune to do so. *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A) at 52F; *Sierborger* (supra) at 505A-D. The only inference that can be drawn from the evidence in this case is that the driver of the bakkie executed his right turn when it was unsafe and inopportune to do so thereby creating a dangerous situation for Rampa. There can, therefore, be no doubt in all the circumstances that he was negligent and that his negligence was causally connected with the accident.

[13] At the commencement of this hearing the appellants' application for the reinstatement of the appeal, which had lapsed, and for condonation of their late filing of the record, was granted. With reference to the application, the appellants however sought a punitive costs order on the attorney and own client scale, alternatively on the attorney and client scale against the respondent on the ground that it was responsible for the delay. The respondent did not oppose the application and challenged only the costs order sought. It was contended on its behalf that the parties should each pay their own costs as the appellants had also been dilatory in their arrangements to have the record of the proceedings transcribed.

[14] SCA rule 8(1) requires an appellant 'within three months of the lodging of the notice of appeal with the registrar [to] lodge six copies of the record of proceedings of the court *a quo*'. The appellants lodged their notice of appeal on 29 April 2005. This, therefore, gave them until about 30 July 2005 to file the record. On their own version, however, their attorneys approached the transcribers to prepare the record only on 30 May 2005. It was only on 20 July 2005 that the transcribers confirmed their instructions to transcribe the record upon payment of a deposit. Realising that such record would not be ready in time for the looming deadline, the appellants' attorney sought advice from counsel which he received only on 27 July 2005 - to request the respondent to consent to a two-month extension of the time limit for the lodging of the record in terms of SCA rule 8(2) and thus obviate the need for a condonation application. Such request was made to the respondent's attorneys, in writing, on 28 July 2005 followed by a spate of follow-up correspondence and telephone calls from the appellants' attorneys. These communications all went unanswered until the appellants' attorney received notification from the registrar that the appeal had lapsed. It appeared that the

respondent's attorneys had been unable to give an answer because the respondent's claims handler who could deal with the request had been engaged in another matter in which 'a bigger claim' had been instituted.

[15] There is no doubt that the respondent's delay in responding to the appellants' request was unreasonable. Ordinarily, if a respondent withholds its consent unreasonably it runs the risk of paying the costs of the condonation application. *A.A. Mutual Insurance Association Ltd v Van Jaarsveld* 1974 (4) SA 729 (A) at 731E. What appears from the facts in this matter, however, as was properly conceded by the appellants' counsel, is that even a timeous response from the respondent between 28 and 30 July 2005 would not have assisted the appellants because, as a fact, the record only became available in October 2005. An application for condonation was, therefore, inevitable in any event, even if the respondent had agreed to a two-month extension (until the end of September 2005). It, therefore, does not seem warranted in the circumstances to mulct the respondent with a costs order, let alone a punitive one, which the appellants' counsel, despite his earlier concession, persisted should be awarded against it. An appropriate costs order, in my view, would be the one suggested by the respondent's counsel that each party should bear its own costs.

[16] Regarding the costs of the appeal, it was submitted on the appellants' behalf that the court *a quo*'s judgment was so clearly wrong that the respondent should never have opposed the appeal. It was accordingly argued that as the respondent had acted unreasonably and irresponsibly by opposing the appeal, particularly considering its special status, it should bear the costs of the appeal on the scale as between attorney and own client scale, alternatively on the attorney and client

scale. Mindful of this court's general disinclination to use hindsight in assessing a party's conduct in considering punitive costs awards (*AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) para 20) I am, however, inclined to agree with the appellants' sentiment.

[17] In an unreported judgment of this court, *Road Accident Fund v Roman Klisiewicz*, Case No. 192/2001, handed down on 29 May 2002, Howie JA set out the extent of the respondent's responsibilities saying at para 42:

'The [Road Accident Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed.'

[18] I find it almost impossible to believe that the respondent would ever have been in doubt that the court *a quo*'s findings regarding the bakkie's involvement in the collision were wrong. By persisting with its opposition of the appeal on the basis of a judgment in which the court *a quo* had so palpably misconstrued the issues, the respondent, which relies on the public purse for its existence and does not, therefore, have unlimited financial resources, conducted itself in a manner which cannot be reconciled with the requirements set out in the *Klisiewicz* case. This is particularly so having regard to the fact that the intention of the Act, in terms of which the respondent functions, is to give the greatest possible protection to victims of negligent driving of motor vehicles. The fact that there may have been merit in opposing the appeal in respect of the taxi cannot detract from its ill-considered decision. In the circumstances, a

costs order on the attorney and client scale against the respondent is, in my view, justified. I, however, take no issue with its defence at trial stage and shall not accede to the appellants' request in this regard.

[19] For these reasons the appeal succeeds with costs on the attorney and client scale. Each party shall pay its own costs for the condonation application. The order of the court *a quo* is set aside and replaced with the following:

'1. The collision was caused by the joint negligence of the drivers of the Audi sedan and Toyota Hilux bakkie with registration letters and numbers DCM025N and BCT657N, respectively.

2. The defendant is ordered to pay the costs of the action.'

MML MAYA
JUDGE OF APPEAL

CONCUR:

BRAND JA
COMBRINCK AJA