

SOUTH AFRICA / JUDGMENT

Boonzaaier v S (A137/13) [2014] ZAWCHC 72 (13 May 2014)

[2014] ZAWCHC 72

COURT

Western Cape High Court, Cape Town

BEFORE

Baartman, Rogers

CASE / FILE NUMBER

A137/13

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THE HIGH COURT
OF SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)

Case

No: A137/13

DATE:

13 MAY 2014
District
Case 24/1034/2010
In the matter

between:

ROZIER J
D'OLIVEIRA
BOONZAAIER.....APPELLANT
And
THE
STATE.....RESPONDENT
Coram: BAARTMAN &
ROGERS JJ
Heard: 9 MAY 2014
Delivered: 13 MAY
2014

JUDGMENT**ROGERS J:****Introduction**

- [1] The appellant was charged in the court below on one count of culpable homicide and one count of contravening s 65(1) of the National Road Traffic Act 93 of 1996 by driving a vehicle while under the influence of intoxicating liquor. The accused was represented at his trial, as he was on appeal, by Mr B Mathewson. The court a quo convicted the appellant on both counts. On the charge of culpable homicide he was sentenced to three years' imprisonment suspended for five years on appropriate conditions as well as 24 months' correctional supervision; and on the drunken driving charge he was sentenced to a fine of R20 000 or one year's imprisonment, half of which was suspended for five years on appropriate conditions. The appellant appeals only against the convictions. The magistrate refused leave to appeal, but leave was granted on petition.
- [2] Regrettably the magistrate's judgment is not of much assistance. It does not contain a coherent analysis of the evidence. Matters are complicated by the fact that the magistrate delivered an oral judgment, the transcription of which forms part of the record, indicating that he would also hand down the judgment in written form. The written judgment is also part of the record. I have not compared the two versions minutely. Their substance may well be the same but they are by no means identical. This is a most unsatisfactory procedure. A judicial officer should deliver only one judgment. If he or she gives the judgment orally, it is that judgment which is the official judgment, subject only to editorial corrections which do not affect the substance of the

judgment.

- [3] The record is also unsatisfactory in another respect. The state's accident reconstruction expert, Mr Daniel Poolman, testified with reference to photographs which were apparently marked "A" to "CC". There is a colour set of photographs which appear in the event to be the photographs to which Poolman was referring but they have not been marked. This resulted in this court having to spend more time in preparing for the appeal. Judicial officers and legal representatives in a trial should take care to ensure that exhibits are properly identified in a way which will facilitate reference in the event of an appeal.

The collision

- [4] The charges arose out of a collision which occurred on the Otto du Plessis Highway (the R27) at about 06h05 on the morning of Friday 23 January

2009. The road carried two lanes of traffic in each direction (north and south), separated by a ditch with bushes and grass in it. In each direction the road had a tarred shoulder on the left, separated from the left-hand traffic lane by a yellow line. The ground (gravel) then fell away slightly into the veld. To judge by the photographic evidence, the width of the centre ditch was more or less the same as the tarred surface in each direction. The road surface was good and the weather fine.
- [5] The accused was driving in a northerly direction in a silver Isuzu 4x4 double-cab bakkie. The deceased, Eugene Paddock, was driving in a southerly direction in a black Audi. The Isuzu veered across the road and the central ditch, colliding with the oncoming Audi, which was travelling in the right lane of the southerly road. The deceased died instantly from catastrophic injuries. The Audi was very badly damaged and sheered in half. The Isuzu rolled, landing upside down about 25 metres into the veld on the left-side of the southerly road. The photographic evidence indicates quite severe damage to the bonnet and front wheels of the Isuzu but the cab not crumple.
- [6] There were two eyewitnesses, a motorist (Servia Champi) and a cyclist (Daniel Kotze), who were travelling in a southerly direction behind the Audi. They were not able to say what happened to the Isuzu while it was driving on the northerly road but they both testified having seen the Isuzu hurtling across the ditch and hitting the Audi in the fast lane of the southerly road. Champi said the Isuzu had become airborne as it hurtled across the ditch.
- [7] The accused, who was the only witness for the defence, testified that he could not recall what happened. He is a mechanic. His work quite often required him to go to the airport to work on vehicles there. He had been called out during the night of 22/23 January 2009 to repair a meal-loading vehicle at the airport. He remembers leaving the airport to return home. He also remembers stopping at the traffic lights on Otto du Plessis highway near the Engen garage. When the lights turned green, he pulled away. That is the last he remembers until waking up in the Milnerton Mediclinic hospital with his family around his bed. He recalled Dr Moodley and the removal of the head blocks which the paramedics had used to stabilise his head. The nursing record indicates that the doctor discussed the x-rays with the appellant at 09h45 and that the head blocks were removed at 10h00. The collision occurred about 900 metres to the north of the traffic lights.

Poolman's expert evidence

- [8] Poolman was called by the state as an expert to give an opinion as to how the collision came about. Poolman had 18 years of experience at the Forensics Science Laboratory in Pretoria and had been head of the laboratory since April 2002. He has a B Engineering Metallurgy degree, is registered as an engineer with the Engineering Council of South Africa and also registered with the South African Council for Natural Scientific Professions in the metallurgy category. He is an associate member of the Institute of Tacograph Chart Analysts and Related Vehicle Recording Equipment. Poolman formed his opinion primarily on the basis of extensive photographic evidence. He did not examine the actual accident scene; he

was only briefed in July 2011.

- [9] Based on the photographic evidence (see, in particular, photographs 2-13, 16-26, 75 and 76 of the 'at-the-scene' file on the compact disc, exhibit "D"), Poolman's opinion was that the Isuzu (probably at that stage driving in the slow lane) had initially drifted off the hard shoulder of the road to the left. Only the left-side wheels went onto the gravel. The driver then brought the Isuzu back onto the road but must have over-steered to the right, causing the wheels to yaw. The yaw marks (not skid marks) from three tyres were visible on the northerly road. The absence of a yaw mark from a fourth tyre was typical, because the manoeuvre would have caused the right-rear tyre to lift off the surface of the road.
- [10] The vehicle then went across the ditch. (The photographic evidence mentioned in the preceding paragraph, including the photographs referenced by Poolman as F2 and G1, show what appear to be tyre tracks in the soil of the easterly half of the ditch, ie the half of the ditch closest to the Audi's line of travel.) The closing angle between the Isuzu and Audi at the point of impact was about 30 degrees. The point of impact was in the fast lane of the southerly road towards the centre. The gouge marks in the southerly road were caused by the impact and reflected that the Isuzu had struck the Audi from an elevated angle. After the impact the Isuzu began to roll and landed up in the ditch to the left of the southerly road. The damage visible on the Isuzu was, in Poolman's opinion, all caused by the impact.
- [11] Poolman's conclusion was that the primary cause of the collision was that the Isuzu initially veered off the left shoulder of the northerly road. Although the ensuing over-steer to the right caused the driver to lose control and career across the ditch, I did not understand Poolman to say that the attempt the driver made to correct for the drift to the left by steering to the right was itself to be criticised; it was the sort of thing a driver might do if he got a fright. In the nature of things, Poolman could not say what caused the Isuzu initially to drift to the left. However, he excluded, as a possible cause, a tyre burst, wheel rim failure, a seizing of the wheel bearings or a malfunction of the steering column.
- [12] Because Mr Mathewson's instructions from the accused were that he could not remember the collision, he could not positively put to Poolman that the appellant had lost control of the Isuzu due to some sudden mechanical failure. He did, though, explore with Poolman in cross-examination why the latter excluded the various forms of mechanical problems I have just mentioned. In my view, Poolman, whose evidence reads very well, convincingly motivated his opinion on these matters. He explained that, if one of these types of failures had occurred, one would not have seen (as one clearly can in the photographs) a drift to the left, a correcting manoeuvre to the right and resultant tyre yaw marks on the road. If a sudden mechanical failure had caused the vehicle to drift to the left, that is the direction in which it would have continued to go, particularly given the slight decline to the left of the shoulder of the road. The correcting turn to the right indicated that the steering column was working and that the tyres and rims were reacting normally to the rightward move of the steering wheel. The tyres of the Isuzu after the collision did not indicate a burst nor did any of the rims show damage caused by rotational friction with the road. All the observable

damage on the Isuzu's tyres and rims was impact damage.

- [13] In his submissions on sudden mechanical defect, Mr Mathewson referred to Kotze's evidence of having heard a 'strange noise'. In the context of his evidence as a whole, I am satisfied that Kotze was not referring to the noise of a mechanical fault but the out-of-the-ordinary sound made by the Isuzu as it left the northerly road and crashed through the dividing ditch. He said that he heard the noise, immediately looked up from his bicycle and saw the Isuzu already halfway across the ditch. There was no evidence from the appellant that, prior to the couple of minutes of alleged amnesia preceding the collision, he noticed anything wrong with his vehicle or heard odd mechanical sounds. Poolman's evidence was to the effect that, if wheel bearings were 'becoming bad' (ie through wear and tear), the driver would hear a progressively prominent grating sound; it would not have sudden catastrophic effect. (Poolman's evidence also convincingly discounted the notion of a sudden seizing of the wheel bearings.)
- [14] Mr Mathewson referred us to a passage in Engelbrecht's evidence where the latter responded to a question as to whether he had considered the possibility that a wheel broke. Engelbrecht replied that this had happened to him, his wheel had once broken at a speed of less than 100 kms. This anecdotal remark is of no assistance to the appellant. Poolman explained why, if one of the Isuzu's wheels had broken, one would not have seen the track and yaw marks depicted in the photographs. Poolman's evidence was supported in that regard by what Engelbrecht himself said, namely that when his wheel broke the vehicle overturned, started rolling and became airborne. That is not what happened to the Isuzu when it drifted off the road to the left or when initially it was steered back onto the road towards the right.
- [15] Mr Mathewson said that Poolman's evidence was fatally tarnished by the fact that he did not examine the wreck the Isuzu and worked only off photographs. Poolman himself is not to be criticised for that; he only received his brief in July 2011. I agree that it would have been preferable for Poolman or a similar expert to have been engaged immediately after the collision in order to examine the vehicle itself. In the event, though, there was very extensive photographic evidence of the Isuzu from all conceivable angles, photographs taken both at the scene and subsequently at the scrapyard. Poolman was confident of the conclusions he could draw from the photographic evidence.
- [16] In my view, the evidence of the eye-witnesses coupled with Poolman's expert testimony justifies the conclusion beyond reasonable doubt that the collision occurred in the manner Poolman opined and that sudden mechanical failure was not the cause.

Drunken driving

[17] I have not yet addressed the question whether the appellant was negligent in the way he drove the Isuzu. It is convenient, before doing so, to consider the charge of drunken driving. If it was proved beyond reasonable doubt that the appellant was under the influence of alcohol at the time of the collision, it would not be difficult to reach the further conclusion that the resultant impairment of his concentration and abilities caused him to drift off the left of the tarred shoulder.

[18] An accused may be considered to be under the influence of intoxicating liquor if it is proved that the skill and judgment normally required in the manipulation of a motor car is diminished or impaired as a direct result of the consumption of alcohol (R v Lloyd 1929 EDL 270 at 274). In R v Spicer 1945 AD 433 at 435-6 Greenberg JA disapproved the statement in Lloyd that the diminution or impairment had to be 'obvious' in the sense of requiring that the driver showed obvious signs of intoxication (though, of course, the state must nevertheless prove the requisite diminution or impairment beyond reasonable doubt - S v Piccione 1967 (2) SA 334 (N) at 336C-E). The learned judge of appeal also accepted the statement in R v Magula 1939 EDL 207 at 211 that it was sufficient for the diminution or impairment to be only 'in slight degree', provided that phrase was not interpreted to include effects of alcohol which did not impair the skill and judgment of the driver. A diminution or impairment may be present where alcohol has dulled the driver's vision or blunted his judgement or made his muscular reactions to communications from the brain sluggish. Greenberg JA agreed with the trial judge that 'under the influence' would also

'cover the case of a driver on whom intoxicating liquor has induced an exuberant or over-optimistic frame of mind which causes him to take risks (eg to drive at an excessive speed or to assume that others will give him the right of way) which he would not have taken but for the liquor he has consumed'.

See also S v Grobler 1972 (4) SA 559 (O) at 561D-E; S v Mhetoa 1968 (2) SA 773 (O) at 774D-F; S v Engelbrecht 2001 (2) SACR 38 (C) at 44i, 46a-d.

[19] It is insufficient for the prosecution to prove mere consumption of intoxicating liquor (Cooper Motor Law Vol 1 at 554). The state must prove something more than that the driver has had a few drinks or that his breath smells of liquor (see R v Donian 1935 TPD 5 at 9; R v Tathiah 1938 NPD 387 at 391-392; S v Scheepers 2012 JDR 2063 (ECG) paras 10-11; S v McBride 2013 JDR 0702 109 para 81). In S v Adams 1983

(2) SA 577 (A) Hoexter JA emphasised that the correctness of a conviction for driving under the influence of alcohol requires the evidence to be assessed cumulatively. The mere fact that a person who has used strong liquor is involved in an accident does not in itself

prove that he drove under the influence. The question as to what inference may be drawn from the fact of the accident depends on the particular circumstances of the case. Where the driver does not behave in a manifestly intoxicated fashion ('nie ooglopend

onder die invloed van sterk drank verkeer nie'), evidence about the manner in which he drove the vehicle prior to the accident will come to the fore. In short, the higher the degree of manifest intoxication ('uiterlik sigbare besopenheid'), the less important is evidence about the manner of driving, and vice versa (at 586G-587A).

- [20] The manner in which the police investigated the present case leaves much to be desired. The fact that a life was lost, that the appellant's vehicle was on the wrong side of the road at the point of impact and that he claimed at the scene not to remember what happened justified the prompt taking of a blood sample for alcohol testing. Certain things (whether true or not) were said at the accident scene which fortified the need for such investigation. The appellant did not suffer severe injuries and there was no urgent medical treatment which prevented the early taking of a sample.
- [21] In the event, and although the police were on the scene very shortly after 06h05 and the appellant was admitted to the hospital shortly before 07h00, a police officer (Warrant Officer Engelbrecht) only called at the hospital to request a blood sample some time after 10h00. According to the nursing record, blood was drawn at 10h15, though the prescribed form completed by Dr Moodley (Form GW7/54 headed 'Medical examination of a person alleged to be under the influence of alcohol or any other drug, having a narcotic effect') records the time as 10h35. Either way, it was more than four hours after the collision. The police officials were no doubt aware (though it relates to a different statutory offence) of the presumption created by s 65(3) of the National Road Traffic Act in relation to the alcohol concentration of blood drawn within two hours of the alleged contravention. The longer the period between the incident and the taking of the blood, the more difficult it becomes accurately to determine the alcohol concentration at the relevant time.
- [22] The analysis of the blood sample taken from the appellant showed that the concentration of alcohol in his blood as at 10h15/10h35 was 0,04 gr/100 ml. This is just below the level of 0,05 gr/100 ml specified in the offence created by s 65(2).
- [23] The eye-witness testimony on the question whether the accused was intoxicated at the time of the collision was not consistent. The two eye-witnesses who observed the collision itself (Champi and Kotze) did not get close to the accident scene or approach the appellant, so they could not say anything on the question of intoxication.
- [24] A security guard who worked in the area, Mogamat Hendricks, was on the scene very shortly after the collision. It appears that by that time there were already at least two tow-truckers in attendance (neither of whom testified). They assisted the appellant to walk away from the Isuzu. Hendricks testified that, as the appellant walked past him, he smelt very strongly of alcohol. Hendricks thought he was drunk. He overheard the appellant say, 'Ek het opgefok, kry my 'n prokureur, ek het opgefok'. Hendricks also went to look at the overturned Isuzu and saw some beer bottles and cans in the vehicle (more than six). He admitted in cross-examination that he had not told this to the police on the scene. He was only approached many months later for a statement.

- [25] Among the many photographs handed in by agreement were a number of the front and rear compartments of the cab (see particularly photos 16, 45-47, 50, 52, 129, 151, 155 and 160 of the 'vehicle A' file forming part of the compact disc, exhibit "D"). The photographs of the Isuzu in exhibit "D" appear to have been taken at a scrapyards after the Isuzu had been towed out of the veld and removed on a flatbed truck. The evidence was that, upon towing, the Isuzu had broken into three or four parts. The photographs of the cab do not show any bottles or cans. If Roboko's testimony on this score was accurate, the vehicle must have been tampered with (which, regrettably, is a possibility one cannot altogether exclude).
- [26] A member of the public had contacted ER24. It seems that the ambulance got to the scene before the investigating officer, Const Hydra Suyster, who said she arrived about 20 minutes after the collision. The state called one of the paramedics, Vincent Roboko, who said ER24 got the emergency call at about 06h10. On his arrival he saw the two two-truckers walking with the appellant. The appellant was coherent but said he did not know what happened. At some stage after Suyster's arrival, he overheard her saying to the appellant, 'You're drunk' which the appellant denied. Roboko himself said that he did not smell any alcohol on the appellant.
- [27] Suyster arrived about 20 minutes after the accident. One of her colleagues, who had got there a little earlier and who did not testify, left upon her arrival. The ER24 paramedics were attending to the appellant (they had already established that Paddock was dead). She asked the appellant whether he had been drinking, which he denied. He looked confused but did not smell of alcohol and she did not observe any signs of drunkenness. She did not consider herself at that stage to have any reason to arrest the appellant. Suyster, who testified before Roboko, was not asked whether (as Roboko later claimed) she had said to the appellant that he was drunk. On her version, she enquired whether he was drunk and he denied it.
- [28] Daleen de Kok was the nursing sister who attended to the appellant on his arrival at the hospital at 06h56 until his discharge at 10h50. De Kok's record was that on arrival the appellant complained of pain over his left clavicle (collar bone). There was no loss of consciousness. Her note recorded that the appellant's breath smelt like alcohol, that he said he could not remember the accident but denied having taken any alcohol. She was adamant in oral evidence that she would not have recorded this unless it were true. This observation would have been made at about 07h00. The appellant was then x-rayed but the x-rays did not reveal any injuries. At about 10h20 abrasions on his left lower leg and left lower arm were cleaned and treated and a plaster was applied to a small cut on his left ear. He was discharged a short while later.
- [29] When the appellant arrived at the hospital he was initially seen by another doctor. Moodley saw the appellant after the x-rays were taken. From the time-line in the nursing record, this would seem to have been at about 09h45 ('doctor discusses x-rays with patient'). The nursing record reflects that the head blocks and hard collar were removed at 10h00. As noted, blood was drawn for alcohol testing at 10h15/10h35. In the GW7/54 form Moodley noted that the appellant said he had consumed no alcohol within the last 24 hours and that his last meal

had been at 16h30 the previous day. All the clinical observations of possible relevance to intoxication (ie as at 09h45 or later) were normal (speech, walking gait, gait on turning, coordination and the Rhomberg finger/nose test). It was also recorded that there was no smell of alcohol (the range offered in the form was 'strong', 'moderate', 'faint' and 'none' – Moodley ticked 'none'). The conjunctivae (eyes) were 'normal', not 'congested'. Moodley failed to complete the 'Conclusions' section of the form to indicate whether the appellant at the time of examination was 'strong/moderately/likely/not under the influence' [sic] of alcohol and whether the appellant at the time of the occurrence was 'probable/possible/unlikely' [sic] to have been under the influence. His oral evidence was that he found no signs of intoxication upon examination. He also testified that the appellant was alert and awake, and he (the doctor) had no concerns about concussion.

- [30] He did testify, however, that Sister de Kok had mentioned to him that morning that the appellant smelt of alcohol. He opined that the smell of alcohol could have dissipated between when the nurse saw and he examined the appellant. He said that the level of alcohol could have become diluted if the paramedics had applied a drip (there was no evidence that they had done so) or if the appellant had urinated. The nursing record indicated that at 07h08 the appellant was given some water with the doctor's permission (this was probably not Moodley, who only saw him later) and that the appellant went to the bathroom to pass urine at 10h00 after the removal of the head blocks and hard collar.
- [31] Warrant Officer Engelbrecht saw the appellant at the hospital, shortly after 10h00 as far as I can deduce. He testified that he was asked by the investigating officer, Suyster, to arrange for a blood sample from the appellant because of the possible influence of alcohol. Suyster told him that somebody at the scene had said the appellant was probably under the influence. When he saw the appellant after 10h00, the latter's eyes were bloodshot but Engelbrecht could not smell alcohol despite getting quite close to him. The appellant was cooperative and talking normally. (Engelbrecht's observation that the appellant's eyes were bloodshot differs from that of Moodley, whose examination would have been at around the same time.)
- [32] The state called a very experienced district surgeon, Dr Paul Theron, to offer an expert opinion on whether the appellant was under the influence of alcohol at the time of the collision. Theron had regard, among other things, to statements in the docket from witnesses who said they smelt alcohol or thought the appellant was under the influence. Of those witnesses, only Hendricks and De Kok were called. Theron did not consider his conclusions to be significantly affected by statements of other witnesses who had not smelt alcohol (such as Roboko, Suyster and Engelbrecht). He regarded Moodley as 'a complete amateur' when it came to forensic examination. He expressed the view that the absence of proper investigation and the failure promptly to draw a blood sample pointed to a police cover-up.
- [33] He gave evidence concerning the rate of elimination of alcohol from the bloodstream. Using tables of which he had considerable experience, he provided an approximation of the alcohol concentration in the blood of a 100 kg male who had consumed varying quantities of

beer (four, six, eight and ten cans of 375 ml Castle) at 05h30. The approximate concentrations were stated for the time of consumption (05h30) and for five hours later (10h30). He did not claim that these figures were precise – there were too many variables; but he nevertheless considered that they provided a fair approximation. Such a person who had consumed six beers at 05h30 would have had an alcohol/blood concentration of 0,132 at 05h30, falling to 0,057 by 10h30 (slightly higher than the appellant's concentration of 0,04 at about 10h30). For eight beers, the contrasting figures increased to 0,22 (05h30) and 0,101 (10h30). These figures suggested that the appellant had taken six cans of Castle prior to the incident. However, he thought the appellant's intake had probably been closer to eight cans, because of the diluting effect of the water drunk by the appellant at the hospital. (As noted, there was no evidence that the paramedics applied a drip. And although the nursing note mentions that the patient was allowed to have some water shortly after 07h00, there was no evidence as to how much water he drank.)

- [34] Theron concluded that at the time of the accident the appellant's blood level had probably been in the range 0,132 to 0,22. He quoted the standardised clinical picture of the 'average intoxicated person' with alcohol concentration levels of 0,10 – 0,15 and 0,15 – 0,25 respectively. Both clinical pictures would indicate, if applicable to the appellant, a sufficient alcohol-induced impairment of judgment and abilities to warrant a finding that he was 'under the influence' of alcohol within the meaning of s 65(1).
- [35] Even without Theron's evidence, ordinary human experience and common sense tells one that, if the appellant had an alcohol/blood concentration of 0,04 as at about 10h30, he must have consumed some alcohol the previous night. His evidence that he consumed no alcohol on the night of 22/23 January 2009 and that he last drank on the previous weekend cannot reasonably possibly be true. He did not claim in evidence that he might have consumed alcohol the previous night but have forgotten it. He was able to remember going to the airport, working on the meal-loading vehicle, leaving the airport and arriving at the traffic lights 900 metres south of the accident site. I am thus satisfied that his evidence on this aspect was knowingly untrue. During the hearing of the appeal Mr Mathewson accepted, at least for purposes of argument, that his client's evidence on this aspect could be rejected as false.
- [36] However, the fact that the appellant was shown beyond reasonable doubt to have consumed some alcohol in the hours before the collision does not without more mean that he was under the influence of alcohol at the time of the collision. Theron's approximations may have been the best that could be done under the circumstances but he did not claim that they were accurate. Furthermore, his hypothetical driver had a weight of 100 kgs whereas the appellant, according to Moodley's report, weighed 118,6 kgs at the time of the accident. He attempted to estimate an alcohol concentration level as at 05h30 (an assumed time of consumption of the alcohol) whereas the accident happened at 06h05. Although I am satisfied that the appellant did consume alcohol during the course of the night, one cannot say when that happened.

- [37] Theron conceded in cross-examination that even if the appellant, at the time of the collision, had an alcohol concentration level of 0,132 grams/100 ml, one could not say without more that the appellant was under the influence of alcohol. He conceded that, according to the so-called Midmark tables, only 36% of people with an alcohol concentration level of 0,13 grams/100 ml could be described as 'intoxicated'. In the present case, it was not proved beyond reasonable doubt that the appellant's alcohol concentration level as at 06h05 was even as high as 0,13 grams.
- [38] As I have mentioned, the evidence of those who observed the appellant after the collision is not consistent. If the appellant smelt strongly of alcohol, it is surprising that this was not noticed by Suyster or Roboko, both of whom spoke with him quite shortly after the accident. I do not find convincing the submission by Ms Galloway on behalf of the state that Suyster and Roboko did not have the same opportunity as the other witnesses of observing the appellant's condition. There is no ground to disbelieve that Hendricks and De Kok smelt alcohol on the appellant's breath. Hendricks had no reason to lie about this and De Kok's evidence was based on a contemporaneous nursing note which she had no cause to fabricate. Since I think it was proved beyond reasonable doubt that the appellant consumed some alcohol the previous night, it is possible that some observers after the accident would have smelt alcohol on him. However, the fact that the alcohol the appellant had consumed was noticed by two people who got close to him within an hour of the collision does not mean that he was under the influence of alcohol. In the light of the evidence of Suyster and Roboko, it cannot be said that immediately after the collision the appellant was in a manifestly intoxicated state (cf Adams supra).
- [39] It is true that the appellant lost control of his vehicle and that one of the obvious explanations for this is that he was under the influence. However, and as I shall briefly explain when dealing with the charge of culpable homicide, this is not the only possible explanation. The state was not able to call any witnesses who observed the manner in which the appellant drove on his side of the road prior to drifting off to the left. There was thus not evidence of the zigzagging or other sustained erratic behaviour which would be typical of drunken driving.
- [40] Given the absence of evidence about how the appellant drove the Isuzu immediately prior to the collision (cf Adams supra) and the absence of more precise medical evidence as to the appellant's alcohol concentration level at the time of the collision (this is no criticism of Theron – I think he did the best he could with the available information), and given the further fact that two of the state witnesses who dealt with the appellant shortly after the collision did not notice a smell of alcohol nor form the view that the appellant was intoxicated, I think the appellant was entitled to the benefit of the doubt. I would thus set aside the conviction on the charge of drunken driving.

Culpable homicide

- [41] I have already expressed my conclusion as to what happened with the Isuzu immediately prior to the collision with the Audi. The critical question is whether the state proved beyond reasonable doubt that the appellant negligently allowed his vehicle to drift off the road to the left, thus requiring him to make a correction to the right. In order to discharge the onus it was not necessary for the state to prove exactly why the Isuzu drifted to the left; it was sufficient that each of the reasonably possible explanations point to negligence on the appellant's part.
- [42] For the reasons I have given, I reject Mr Mathewson's submission that sudden mechanical failure is one of the possible explanations. Poolman's evidence was, in the absence of any rebuttal from the appellant (who claimed not to be able to remember what happened), and in the absence of any expert evidence on the part of the defence, sufficient to exclude sudden mechanical failure as a reasonably possible explanation for what occurred.
- [43] Although the appellant in his evidence referred to the fact that the new replacement Isuzu he got a couple of months after the collision was recalled by the manufacturer because of something to do with wheel bearings, Poolman's evidence refuted the notion that the original Isuzu had a wheel bearings failure. I note in this regard that the original Isuzu was a newish vehicle and had done only about 1 800 kms. The replacement Isuzu was recalled after it had done 4000 to 5000 kms. The appellant testified that before the recall of the vehicle he had begun to hear a noise from the wheels. He did not claim to have heard any such noise from the original Isuzu in the hours or days before the accident.
- [44] It was not argued that the appellant might have suffered some medical emergency at the wheel. Nothing to indicate this was observed at the accident site immediately after the collision nor did the doctors who treated the appellant detect anything amiss apart from a few minor cuts and abrasions caused by the collision itself. Also relevant in this regard is Poolman's evidence, which I accept, that the tyre marks on the gravel and the tarred road indicate that, after the vehicle drifted to the left, the appellant must have consciously steered it to the right to correct for the leftward drift. This is not the conduct of a person who has suffered a blackout.
- [45] One possible explanation for what occurred is that the appellant's concentration and abilities were impaired by alcohol. Indeed, I regard this as the most probable explanation. It was not proved beyond reasonable doubt that the appellant was under the influence. Nevertheless, one can accept that if this was the cause, the appellant was negligent in driving the vehicle after consuming alcohol.
- [46] Another possibility is that the appellant fell asleep at the wheel. This would be consistent with a gradual drift off the road to the left and an over-correction to the right as the appellant woke up. At the hospital, the appellant told Engelbrecht that he must have fallen asleep at the wheel. Because the appellant claimed to have suffered amnesia, there was no direct challenge to Engelbrecht's testimony on this aspect. It was not put to Engelbrecht that he was fabricating. It does not seem likely that Engelbrecht was attempting falsely to

incriminate the appellant. On the contrary, Engelbrecht stated that he detected no signs of intoxication.

- [47] If the appellant fell asleep at the wheel, alcohol might have contributed; or he may, as can happen even with sober people, have begun to doze off through tiredness brought on by having been awake for a large part of the night. To fall asleep at the wheel because of the effects of alcohol or lack of sleep (or both) is a departure from the standard of the reasonable person. A person does not suddenly fall asleep; tiredness develops over time. The reasonable person, perceiving weariness, will stop and take a short rest before proceeding.
- [48] Another possibility is that the appellant was driving too fast. The eye-witnesses did not see the Isuzu on the northerly road and could thus not positively state that the appellant was speeding at that stage though Champi said the Isuzu ‘shot through’ the bushes in the dividing ditch, became airborne and landed on top of the Audi. Poolman did not have sufficient data to calculate a pre-accident speed though he did testify that the Isuzu struck the Audi from above, lending support to the other evidence that the Isuzu had at some stage been airborne. If the appellant was speeding (I refer not to exceeding the speed limit as such, which appears to have been 80 kph, but travelling at a sufficiently high speed to cause him to lose control of his vehicle), he was obviously negligent.
- [49] The remaining possibility is a simple failure on the appellant’s part to concentrate and keep a proper lookout. We know that this features very commonly as a ground of negligence in relation to the driving of vehicles. To some extent, this ground of negligence can be regarded as an instance of the maxim *res ipsa loquitur*. If a vehicle has performed an unlawful and dangerous manoeuvre, one which a reasonable driver would not perform, and if there is no other explanation for what took place (such as sudden mechanical or medical emergency, drunkenness or sleep), one concludes that, for whatever reason, the driver failed to maintain proper control of his vehicle (cf *S v Von Biljon* [2012] ZAKZPHC 60 para 11).
- [50] I should mention that during oral argument Mr Mathewson suggested that the appellant might have been faced by a sudden emergency caused by a dog or child running across the road. Of this there was absolutely no evidence nor does it appear to have been even suggested prior to the hearing of the appeal. The two eyewitnesses who were travelling behind the Audi did not say that they saw a dog or child running in either direction across the road and were not asked this in cross-examination. The physical environment to the left of the northerly road appears from the photographs to have been veld, beyond which was a walled estate; and to the left of the southerly road was veld, beyond which was a large vlei. It was not an environment in which one would naturally expect children or dogs to be crossing the road. Poolman was not invited to consider whether the photographic evidence could be explained by such a sudden emergency. It is nevertheless apparent from his evidence that there were no marks on the road of sudden braking by the Isuzu. Furthermore, the track marks on the gravel to the left of the northerly road cover some distance and indicate a

gradual drift rather than a swerving manoeuvre. The subsequent steering (or over-steering) to the right could be regarded as a swerve but this was clearly a correcting reaction to the leftwards drift and not due to the sudden appearance of a dog or child.

- [51] I make one concluding remark, regarding the appellant's claim of amnesia in respect of the moments immediately prior to and after the collision. Even if that claim were true, the post-accident amnesia would not mean that he was not in fact conscious and in control of himself at the crucial time; it would not be a defence – it would mean only that he could not afterwards remember what happened (see Von Biljon *supra* para 11). However, I reject as false the appellant's assertion of amnesia. It is peculiar that he was able to remember the work he did that night, leaving the airport, and even pulling away from the traffic lights 900 metres south of the collision, yet was unable to recall anything about the seconds before the collision. He did not suffer any serious injuries in the collision which might have caused amnesia. On the scene he was coherent and able to answer questions. He was also able to answer questions during the period at the hospital when he claimed subsequently still to be suffering from amnesia. The appellant lied about having not drunk any alcohol the previous night which casts a serious shadow across his credibility.
- [52] In my view, the conclusion was justified beyond reasonable doubt that the appellant claimed amnesia because he wished to suppress an incriminating explanation and was unable to think of any convincing exculpatory one. Immediately after the accident he was overheard by Hendricks to say that he had messed up and needed a lawyer. A couple of hours later at the hospital he told Engelbrecht that he must have fallen asleep at the wheel. Although he may have fallen asleep as he drifted to the left, he must have woken up before his vehicle completely left the road. He then steered (or over-steered) to the right. As Poolman testified, that was a conscious manoeuvre, and I do not believe that the appellant did not remember it.
- [53] For all these reasons, I consider that the conviction on the charge of culpable homicide was justified.

BAARTMAN J:

[54] I concur:

[a] In respect of count 2, the charge of contravening s 65(1) of the National Road Traffic Act 93 of 1996, the appeal succeeds. The conviction on that count and the sentence imposed on the appellant in respect thereof are set aside and there is substituted for such conviction an acquittal.

[b] In respect of count 1, the charge of culpable homicide, the appeal fails. The conviction on that count and the sentence imposed on the appellant in respect thereof are confirmed.

BAARTMAN J

ROGERS J

APPEARANCES

For Appellant: Mr B Mathewson

Mathewson Gess Inc

9th floor, Vunani Chambers

33 Church Street

Cape Town

For Respondent: Ms SM Galloway

Office of the DPP

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