

SOUTH AFRICA / JUDGMENT

Coetzee v S - Appeal (A249/2021) [2023] ZAWCHC 273 (1 November 2023)

[2023] ZAWCHC 273

COURT

Western Cape High Court, Cape Town

BEFORE

Mangcu-Lockwood, P.A.L. Gamble

CASE / FILE NUMBER

A249/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: A249/2021

In

the matter between:

DONALD
MARC COETZEE
Appellant
and
THE
STATE
Respondent

JUDGMENT

DELIVERED ON 01 NOVEMBER 2023

MANGCU-LOCKWOOD, J

A.

INTRODUCTION

[1] This is an appeal against the appellant's conviction in the Vredenburg Magistrate's Court for culpable homicide arising out of a motor vehicle collision, for which he was granted a suspended sentence of 24 months' imprisonment which includes some correctional supervision, and his driving licence was suspended for a year. The appeal is only against his conviction.

[2] The appeal was brought some 16 months after leave to appeal was granted, in contravention of the Uniform Rules. The appellant seeks condonation in this regard, and also seeks condonation in respect of the late filing of the heads argument which apparently arose from the late filing of the appeal. The appellant has set out a detailed explanation for the lateness, which amounts to a delay on the part of the clerk of the Magistrate's Court in providing the record despite repeated promises to make it available

to the appellant's legal representatives.

[3] Although the prosecution confirms that it was at its intervention that the said clerk provided the record to the appellant, it nevertheless

points out firstly that it is not in a position to dispute the detailed facts set out regarding the efforts of the appellant's

legal representatives to contact the Magistrate's Court clerk in its attempts to obtain the record. Secondly, and in any event, the State opposes the application on the basis that there are no reasonable prospects of success in the appeal, and that accordingly it is not in the interests of justice to grant condonation. Indeed, given that the delay was excessive, although comprehensively

explained, a lack of reasonable prospects of success in the appeal may be the basis for dismissing the application for condonation[1], and accordingly, the merits of the appeal require examination.

B. THE FACTS

[4] The events which led to the appellant's conviction occurred on 18 July 2009. The appellant was driving a Ford Fiesta ("the Fiesta"), with his wife as the only passenger, when his car collided with a white Isuzu bakkie ("the bakkie") driven by Mr Johan Titus in the district of Vredenburg. Mr Titus succumbed to the injuries sustained from the collision six days

later.

[5] The appellant and his wife, Mrs Yolandi Coetzee were travelling from St Helena Bay along a public road known as St Helena Bay Road towards the R27, another public road which is sometimes referred to as the West Coast Road. Before reaching the R27, the St Helena Bay Road intersects with the R399, which is the public road that the deceased was driving in, travelling from the direction Velddrif towards Vredenburg.

[6] Some ten years had elapsed between the collision and the trial, and it is common cause that many changes had been effected in the area of the intersection by then. However, the common cause evidence is that at the time of the collision, vehicles moving along the R399 were permitted to drive through the intersection at 120 kilometers per hour, without an intervening stop street. On the other hand, vehicles travelling from both the direction of St Helena Bay and from the R27 side were regulated by means of stop streets at the point of the intersection. Furthermore, at the time the St Helena Bay Road was a single lane which split, just before the intersection, into three lanes to create a slipway for cars turning left, a lane for cars turning right whilst cars

going straight had the use of the middle lane.

[7] The collision occurred at approximately 19h40 during winter and it was already dark, although it was a clear night, with no fog, mist or rain. There were no street lights in and around the area where the St Helena Bay Road intersects with the R399. There were also no obstructions in the road, and the area is a fairly flat stretch of road, and traffic from any of the four sides joining the intersection is plainly visible.

[8] The collision occurred when the appellant failed to stop his vehicle at the intersection, and the two vehicles collided in the middle of the intersection. The appellant's defence was that the road markings were inadequate to properly warn him that he had arrived at an intersection and ought to stop, and that the physical location of the stop sign was too far from where it should have been.

C. THE APPEAL

[9] The grounds of appeal are many and varied and seek to attack the Magistrate's evaluation of the evidence as well as findings of fact. The appellant argues that the Magistrate's evaluation and assessment of the evidence was incorrect and amounted to an incorrect application of the law. This Court has found no basis for these complaints. As the prosecution point out, the appellant's grounds of appeal seek to rehash every argument raised by the appellant in the trial court. In fact, most of the complaints regarding the Magistrate's evaluation and assessment of the evidence relate to areas in respect of which the Magistrate assumed in favour of the appellant, and from a reading of the appeal grounds, what the appellant is advancing are preferences of the manner in which the trial court should rather have assessed the evidence.

[10] It is trite that the powers of an appeal court to interfere with the findings of fact of a trial court are limited. It must be shown that the trial court misdirected itself, and in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[2] Similar considerations apply in respect of an appeal's court's powers to interfere with a trial court's evaluation of oral evidence. It will be only be entitled to do so in exceptional cases.[3]

- [11] There are otherwise few areas of dispute arising between the parties, and the question for determination remains whether or not the appellant drove negligently. The negligence required to establish liability is determined by a simple test, namely the standard of care and skill which would be observed by the reasonable person.[4] To put it in the language of the classic case, *Kruger v Coetzee*[5]: “For the purposes of liability culpa arises if a diligens paterfamilias in the position of the defendant would foresee the reasonable possibility of his [or her] conduct injuring another in his [or her] person or property and causing him [or her] patrimonial loss; and would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps.”
- [12] In reaching the conclusion that the appellant acted negligently, the Magistrate first took into account the fact that the vehicle lights of the appellant were in working order and were switched on at all relevant times. In other words, that there was no reason for him not to see what was clearly visible by using his car headlights, even though the night was dark. In fact, his evidence showed that he did identify a number of road signs, including some across the intersection, regarding which both he and his wife testified.
- [13] For the most part, the Magistrate had regard to what the appellant did observe. The appellant and his wife testified that whilst driving along the St Helena Bay Road - a road with which they were not familiar - they noticed a sign indicating that the maximum driving speed was 100 km per hour and the appellant ensured that his speed was below that, driving at approximately 80 km per hour.
- [14] The next relevant sign they encountered was an intersection road sign, coupled with a distance warning of 350 metres. The actual intersection sign was the usual cross, which, in this instance depicted the R399 with a broader line than St Helena Bay Road, indicating that the former had the right of way at the intersection. The appellant admitted seeing this warning, but stated that he did not see the accompanying distance of 350 metres. His wife, however, who testified that she was for all intents and purposes navigating, admits to having seen both the intersection and the 350 metre signs. They also both admitted that the meaning of these signs was that an intersection was approaching within 350 metres, and it gave right of way to cars travelling along the R399.
- [15] Next along their way was a warning sign that a stop street was ahead within 250 metres. The appellant and his wife admit to seeing this sign. Immediately thereafter was a big green board indicating three different directions, namely Cape Town ahead, Vredenburg to the right and Velddrif to the left. The appellant and his wife admit to seeing this board too.
- [16] Immediately after seeing the 250m warning sign, the appellant and his wife testified that they saw a car which was travelling in front of them, and which indicated that it was about to turn right. The car was driven by Mr. Dean Kammies (“Kammies”), the only witness to the collision. There was a dispute regarding whether the appellant overtook Kammies on the right despite the latter indicating that he was about to turn right. The Magistrate assumed, in favour of the appellant, that he entered the intersection whilst travelling in the middle lane

and did not overtake Kammies on the right. The appellant and his wife testified that after passing the 250m warning sign, they searched for a stop sign and did not see one, until they found themselves in a stretch of a road which turned out to be the intersection.

- [17] It is common cause that, at the point of entering the intersection, the word “STOP” was written on the lane in which the appellant was travelling and there was a solid line in the front, indicating that motor vehicles should stop. The appellant complains that these road markings were unclear. Although Kammies did not agree that the road markings were unclear, Sergeant Carolissen and Sergeant Meyi, who testified in support of the State’s case, conceded that the road markings were indeed barely visible.
- [18] From the photographs handed in as exhibits, it is evident to this Court that the road markings were partially faded and therefore unclear, and would have been difficult to see at night, although there is not sufficient evidence to conclude that the markings were completely undetectable. I say this because there was evidence that the lighting used by the appellant to take the photographs was not from his car lights, but was from his torch light, which he admitted was of inferior quality. But, in any event, the Magistrate assumed this issue of the visibility of the road markings in favour of the appellant.
- [19] As regards the physical stop sign positioned at the intersection, the appellant complained that it was too far away from the shoulder of the road such that it could not be connected to his pathway, and that in any event, he did not see it. Both Sergeants Meyi and Carolissen admitted that the stop sign was positioned at an angle at the time of the collision, as depicted in photographs that were part of the evidence. However, neither they nor Kammies admitted that the position of the stop sign was too far away from the actual stopping point at the intersection.
- [20] An inspection in loco was undertaken during the trial, and the Magistrate observed, with the concurrence of both parties’ legal representatives, that the stop sign was indeed previously positioned at an angle at the time of the collision, and that it now faces the oncoming traffic in the direction that the appellant was traveling in and is no longer positioned at an angle. Further, the Magistrate observed that since the collision the stop sign has now been brought nearer to the corner of the intersection.
- [21] The appellant sought to make much of these changes, both in the trial court and before us, and argued that they amount to a concession to his case and vindicate his version that the stop sign was positioned too far away. However, as the Magistrate correctly pointed out, there was no evidence regarding the reason for the changes to the road. As I have already mentioned, the trial took place some 10 years after the collision, and a variety of reasons may provide the basis for the changes made to the intersection.
- [22] The Magistrate also took into account the fact that the appellant entered the intersection despite seeing Kammies’ car indicating to turn right. In this regard, Mrs Coetzee testified that she saw Kammies’ car not only indicating to turn right but also moving over to the lane for turning right. It was at about this time that the appellant and his wife testified that the

headlights of their car picked up something that looked like a sign from across the road. There was no evidence regarding what sign this was, but this evidence shows that they were at the intersection at that point already.

- [23] It remains baffling that the appellant, having been warned that a stop sign and an intersection was approaching, and specifically that a stop sign was to be expected in 250 metres, did not suspect that Kammies' car may have been indicating to turn at the intersection. The appellant's version is particularly wanting because, according to him and his wife, at the time that they saw Kammies' car, they were searching for the stop street. The obvious question then is why did Kammies' car, which was indicating to turn right, not signal to them (or specifically, the appellant) that they had reached the stop street? This was never explained satisfactorily in the appellant's evidence.
- [24] The appellant's version on this score was that he thought Kammies' car had stopped in order to turn into a side road or a farm. This part of his evidence did not make any sense whatsoever and was not believable when viewed in the light of his version that he and his wife were actively looking for the intersection. It also indicates recklessness on the part of the appellant, because despite his evidence that he could not see a stop sign, he nevertheless continued to drive into what was for him a totally unseen stretch of road upon which an obstruction, whether lighted or unlighted, might well be present. The odds of oncoming traffic being present in his pathway in the intersection, if he were to reach it, were considerably high. Those odds required him to guard against any possible obstruction,
- including any oncoming traffic.[6] In those circumstances, a reasonably prudent driver would not have taken a chance in the way that the appellant did.
- [25] Rather, a reasonable driver, driving at night in an unfamiliar road as he was, would have taken note of Kammies' car turning right and applied reasonable caution, including stopping his car with the thought that he might have reached the intersection. Instead, he continued driving in circumstances which he described as a dark, 'open stretch of a road' which he only later discovered was the intersection. It is no wonder that the Magistrate held that he drove into the intersection when it was not safe to do so.
- [26] Furthermore, according to the appellant, by the time he entered the intersection, he was driving at about 60 km per hour. But on his version, by then he had already passed the 250m warning of a stop sign and passed Kammies' car which was indicating to turn right. In my view, driving at that speed while looking for a stop street was reckless in the circumstances, and was not conduct that was consistent with a reasonable driver in his circumstances. It is not unduly onerous to have expected a

reasonable driver in the position of the appellant to have slowed down or stopped if he was not sure where he was, especially when

taking into account that he could not find the stop sign. The Magistrate can therefore not be faulted for holding that the appellant ought to have known that proceeding with his journey under the circumstances would most likely result in a collision.

[27] I make these observations without even taking into account Kammies' version that the appellant's vehicle accelerated as he reached the intersection. The Magistrate did not base her decision on Kammies' version on this score, and was alive to the fact that Kammies' evidence in this regard was disputed by the appellant and his wife, both of whom speculated that Kammies must have thought they had accelerated because he was slowing down.

[28] Still, the appellant's own evidence was that he was driving at approximately 60km per hour which, as I have observed, was excessive in the circumstances. There was no evidence that he took any evasive action once he became aware of the bakkie, including applying his brakes or swerving. The evidence was rather that he only became aware of the bakkie at the moment of impact between the two vehicles, which is consistent with the high speed at which he was driving. By contrast, there was evidence that

the bakkie applied its brakes before the impact, which was evidenced by the brake marks visible on the road from behind the bakkie and a lack of similar road marks behind the Fiesta. Given the appellant's apprehension about his surroundings, he should have slowed right down or even stopped in order to ascertain where he was or where he was headed.

[29] It has repeatedly been held[7] that there is an obvious relationship between speed and visibility, and, in appropriate cases, a driver's failure to regulate his speed so as to be able to pull up within the range of his vision may establish negligence on the driver's part.[8]A motorist must only travel at night at a speed which will enable him or her to see in time to avoid any person or object lawfully upon the road.[9] In circumstances where the driver of the vehicle should have foreseen the possibility of unlighted obstructions in the road, (s)he might be held to be negligent if (s)he does not apply his or her brakes and slow down if the facts establish negligence on his or her part. [10]

[30] There is a further death knell presented by the appellant's own version. He admitted during cross examination that he failed to look to the left and to his right when approaching the intersection crossing as required in terms of the driving rules in South Africa (referred to by the prosecutor as the K53 rules) and also admitted that in this respect he made a mistake. He explained his conduct by stating that he was looking for the crossing and was focused on what was ahead of him instead of looking to the left and to the right.

[31] The result of this admitted mistake was fatal, because the appellant failed to see the bakkie which was approaching from his left side. At one point the appellant admitted that he saw one headlight approaching from his left, but this was only at the point of impact. Needless to say, even one headlight could be a vehicle, and would require the same standard of reasonableness on his part. In fact, the appellant could not dispute the evidence of Kammies that there was oncoming traffic from the direction of Velddrif going through the intersection on that evening. In this regard the appellant could only retort that Kammies had more time

to observe the oncoming traffic because he had stopped to turn right. But every driver is required to make reasonable observations in the road. No driver is absolved from making reasonable observations, and especially those in the position of the appellant who was approaching a big intersection.

- [32] The appellant's admission that he failed to sufficiently scan the road to his left and to his right means that he failed to keep a proper lookout for other road users at about the point when he reached the intersection. That, on its own, is enough to establish negligence on his part. The Magistrate was therefore correct to conclude that the appellant failed to exercise the requisite reasonable care and caution. The causal relationship between the failure to adequately scan the road and the death of the deceased was duly established and was not seriously contested.
- [33] There is otherwise no appealable irregularity in the Magistrate's judgment. In the circumstances, there are no reasonable prospects of success on appeal and the application for condonation for the late filing of the record is dismissed.

N. MANGCU-LOCKWOOD

Judge of the High Court

I agree, and it is so ordered.

P.A.L. GAMBLE

APPEARANCES For the appellant Adv Instructed by Adv L. Gabriel For the respondent Adv M. Galloway D.P.P. Cape Town

- [1] Mathibela v The State [2017] ZASCA 162 (27 November 2017) paras 5-6.
- [2] S v Hadebe and Others 1997
- (2) SACR 641 (SCA) at 645E - F.
- [3] See S v Monyane and Others 2008
- (1) SACR 543 (SCA) para 15.
- [4] Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another 2000
- (1) SA 827 (SCA) para 21.
- [5] Kruger v Coetzee 1966
- (2) SA 428 (A) 430E-G.
- [6] See S v Van Deventer 1963
- (2) 475 (A) at 481D-F.

- [7] S v Van Deventer 1963
- (2) 475 (A) at 481D-F.
- [8] See R v Wells, 1949
- (3) SA 83 (AD) at
- p. 88; Manderson v Century Insurance Co Ltd 1951
- (1) SA 533 (A) at 537H-538A; Flanders And Another v Trans Zambezi Express (Pty) Ltd And Another 2009
- (4) SA 192 (SCA) at para 14.
- [9] S.A.R. & H. v Estate Saunders, 1931 AD 276 at p 289.
- [10] Seemane v AA Mutual Insurance Association Ltd 1975
- (4) SA 767 (A) at 772G.
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