

SOUTH AFRICA / JUDGMENT

Van As v Road Accident Fund (346/10) [2011] ZASCA 124; 2012 (1) SA 387 (SCA) (7 September 2011) [2011] ZASCA 124

COURT

Supreme Court of Appeal

BEFORE

Cloete, Van Heerden, Bosielo, Seriti, Meer

CASE / FILE NUMBER

346/10

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 346/10

In the matter between:

MATTHYS JOHANNES VAN ASAppellant

and

ROAD ACCIDENT FUNDRespondent

Neutral citation: Van As v Road Accident Fund (346/10) [2011] ZASCA 124 (7 September 2011)

Coram: Cloete, Van Heerden, Bosielo and Seriti JJA and Meer AJA

Heard: 17 August 2011

Delivered: 7 September 2011

Summary: Negligence – motor vehicle collision – whether the appellant’s conduct prior to the collision constituted a potentially dangerous situation and whether the insured driver ought in the circumstances to have taken steps to avoid a collision – no grounds for interference with trial court’s findings.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Allie J sitting as court of first instance):

The appeal is dismissed with costs.

MEER AJA (CLOETE, VAN HEERDEN, BOSIELO and SERITI JJA concurring)

[1] This is an appeal against a judgment of Allie J, sitting as court of first instance in the Western Cape High Court, Cape Town, in terms whereof it was held that the appellant's negligence was the sole cause of a motor vehicle collision. Leave to appeal to this court was granted by the court a quo.

[2] The appellant claimed damages resulting from injuries he sustained in a motor collision which occurred on 24 February 2004 at 06h45. The appellant was driving a Mazda motor vehicle, on the N2 highway between Heidelberg and Riversdale in the Western Cape, in the direction of Riversdale, when he collided with a truck and tanker combination ('the truck'), which was being driven in the opposite direction towards Heidelberg by the insured driver, Mr Cornelius Wentzel. The collision occurred on the appellant's incorrect side of the road and on the insured driver's correct side. It is common cause that the appellant

was negligent.

[3] The appellant alleged that the insured driver had been negligent in not taking steps to avoid the collision. The trial proceeded on the issue of liability only, the extent of the appellant's damages standing over for later determination.

[4] The issue on appeal is whether there was any negligence on the part of the insured driver. In this regard, the first enquiry is whether the reasonable person in the insured driver's position would have considered that the appellant's conduct prior to the collision constituted a potentially dangerous situation, would have foreseen the possibility of a collision and would have taken steps to guard against such occurrence.

[5] The only eye witness who was able to testify about the potential danger presented by the appellant's conduct, and about the subsequent collision, was the insured driver. The appellant had sustained severe head injuries in the collision and was unable to testify. Two accident reconstruction experts also testified, Professor Dreyer, for the appellant, and Mr Craig, for the respondent. The trial court accepted the insured driver's evidence and I am not persuaded that it erred in doing so.

[6] The insured driver testified that he was an experienced driver of heavy vehicles. At the time of the collision he was aged 58 and had held a heavy duty driver's license for approximately 35 years. He also had a certificate to transport dangerous goods. The truck he was driving on the day in question was empty but had transported aircraft fuel, the vapour whereof could be prone to explosion when transported. According to a tachograph fitted to the truck, he was travelling at approximately 70 km per hour when the vehicles collided.

[7] Wentzel described the events leading up to the collision as follows. He had driven over the crest of a hill and was travelling downhill, the road curving gradually to the right. Visibility was good and he could see ahead for a distance of two to three kilometres. The truck lights

were on dim. When he first saw the Mazda it was approximately a kilometre away. The appellant was driving at a reasonably fast speed in his correct lane. As the Mazda came closer Wentzel observed that the appellant was fidgeting behind him and whilst he did so he looked backwards and forwards intermittently in quick succession. The relevant excerpt from the evidence in chief about this activity reads as follows:

‘[H]y het agter iets gedoen...dit het gelyk of hy daar gekrap het.

...En toe het hy vorentoe gekyk, asof hy nou wou kyk of hy nog in die regte rigting beweeg. Toe het hy weer agtertoe gekyk en weer vorentoe.

...Hy het skuins gesit met sy arm...dwarsoor die stuurwiel...en die linkerarm was hier agter tussen die sitplekke gewees.

...En terwyl hy dit doen, hoe het sy kar gery? Het hy na u toe gekom of het hy reguit gery...

Nee, hy het reguit gery, hy is in sy baan gewees....’

[8] Wentzel could not estimate the distance between the two vehicles when he observed the appellant’s conduct described above. He emphasised that, notwithstanding these activities, the appellant kept the Mazda in its correct lane of travel and there was no indication that he would move into Wentzel’s lane. Wentzel assumed that the appellant had seen his large vehicle with its lights on and that the appellant would pass him safely.

[9] Then, according to Wentzel, due to the fact that he was sitting approximately three metres high in the truck, he lost sight of the Mazda as it entered what he termed his ‘blind spot’. Suddenly, he felt the impact of the Mazda against his truck. It collided with the right front and side of the truck. The entire incident, he said, happened in a matter of a split second, and

so suddenly that there was no time for him to do anything, either hoot, apply brakes or flick his lights. Wentzel added that as the situation prior to the collision had not appeared dangerous, there would have been no reason for him to have taken such measures. He estimated that the Mazda was 10 to 20 metres away when it crossed into his lane and that the collision took place one metre into his lane.

[10] Counsel for the appellant, correctly, did not seek to argue that Wentzel had been negligent once the Mazda had crossed the middle line. The submission was that he had been negligent in not taking precautions when a potentially dangerous situation began

unfolding before him.

[11] During thorough and vigorous cross-examination, Wentzel was adamant that the appellant’s actions before the collision did not present a dangerous or potentially dangerous situation. He was also adamant that, notwithstanding the appellant’s

actions just before the collision, the appellant had the Mazda in proper control and there was no indication he would cross into the truck's lane. Hence Wentzel did not see the necessity for precautionary action. Wentzel said that as a driver who has travelled thousands of kilometres and encountered many drivers and situations on the road, he did not consider the appellant's behaviour to be unusual.

[12] From Wentzel's evidence it is clear that he became aware of the appellant's activities before the collision once the Mazda was sufficiently close for him to observe the detail of the appellant's movements. It is also so that the appellant's momentary backward glances were followed in quick succession with forward glances to check that he was on course. Under these circumstances I am of the opinion that it was safe for Wentzel to have assumed that the appellant had seen the truck with its lights on, and indeed there was no indication that he had not. The evidence also makes it clear that, during the time of Wentzel's observation, the appellant was in control of the Mazda, at all times in his correct lane and crucially, that he gave no indication that he would deviate into Wentzel's lane and collide with the truck. According to Wentzel, he saw a vehicle under proper control. In the

circumstances, I am not persuaded that what Wentzel observed was a potentially dangerous situation unfolding before him and that he ought to have foreseen the possibility of the appellant crossing into his lane and colliding with the truck. Nor, I believe, would the reasonable person have foreseen such a possibility.

[13] As was said by Corbett JA in *Santam Insurance Co Ltd v Nkosi* 1978 (2) SA 784 (A) at 792 B-C:

'...the law recognises that life's possibilities are infinite and in general concerns itself only with those possibilities of harm to others which are sufficiently real or immediate to cause the diligens paterfamilias to take precautions against their happening (see *Moubray v Syfret* 1935 AD 199 at 209-30; *Joffe & Co Ltd v Hoskins and Another* 1941 AD 431 at 451; *Kruger v Coetzee* 1966 (3) SA 428 (A) at 430E-F; and compare remarks of Lord Oaksey in *Bolton v Stone* [1951] UKHL 2; 1951 AC 850 at 863). And, in deciding whether precautionary action is warranted, the diligens paterfamilias might have to weigh the seriousness of the harm should it occur, against the chances of its happening.'

The diligens paterfamilias like Wentzel would not have read the situation as potentially dangerous with real possibilities of harm, warranting precautionary action¹. Wentzel's conduct thus did not fall short of what would have been expected of the reasonable person in the prevailing circumstances.

This being so, the situation was not one of potential danger. There can in the circumstances be no finding of negligence on the part of the insured driver. Given this finding it is not necessary for me to consider the expert evidence.

[14] The appeal is dismissed with costs.

Y S Meer

Acting Judge of Appeal

APPEARANCES:

For appellant: R D McClarty SC

Instructed by:

Heyns & Partners, Goodwood

Honey Attorneys, Bloemfontein

For respondent: R M Liddell

John Riley Attorneys, Wynberg

Robert Charles Inc, Cape Town

Horn & Van Rensburg, Bloemfontein

1See also: New Zealand Insurance Co Ltd v Karim 1963 (4) SA 872 (A) at 875F-H; Marine & Trade Insurance Ltd v Singh 1980 (1) SA 5 (A) at 9E-H, De Villiers v Minister of Post & Telegraphs 1978 (4) SA 334 (E) at 338B-D.

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