IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date: 2/8/2005
Case number A 348/2004

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

Bothd

In the case between:

A THEODORIDES **First Applicant**

W C BOTES **Second Appellant**

and

THE ROAD ACCIDENT FUND **Respondent**

JUDGMENT

BOTHA J :

This is an appeal against an order of absolution of the instance against the first appellant, who was the plaintiff in the court *a quo*. The second appellant was a third party who had been joined by the respondent, the Road Accident Fund. The claim was a third party claim arising out of a motor collision that took place on 8 April 2001 at about 02hOO on the road between Rustenburg and Pretoria, in the settlement called Kroondal, between a white Opel Monza with registration number BGN 939 NW, driven by Mrs Botes, the third party, and a red Nissan Sentra with registration number BDP 676 GP, driven by the insured driver, Mr Smit.

The court was only called upon to adjudicate on the merits of the matter, the quantification of the claim having been postponed.

The collision took place in an area that is depicted on a sketch that appears on p 395, volume 4, of the record. The insured driver was travelling from west to east, in the direction of Pretoria. The second appellant was the driver of the Opel Monza in which the first appellant was a passenger. They had been to a party in the restaurant shown on the sketch. The second appellant had parked the Opel next to the restaurant, off the gravel road which forms a T- junction with the Rustenburg Pretoria road, which is a tarred road. The two appellants got into the Opel, the lights were switched on, and the second appellant reversed out of her parking space. It was her intention to turn to the right into the main road as she wanted to return to her home in Rustenburg. There was a stop sign which can be seen on photograph 6 on p 314, photograph 17 on p 320, and photograph 7 on p 325 in volume 4. From the T-junction, in the direction of Rustenburg, the road was straight for 433 meters. The evidence was that the applicable speed limit on the road was 60 kilometers per hour. Whether the second appellant stopped at the stop sign or not, the fact is that she proceeded into the main road and that a collision occurred between the Nissan Sentra and the Opel.

The point of impact was in the southern half of the road, that is in the lane of traffic travelling towards Rustenburg, in other words on the incorrect side of the road of the insured vehicle. The right front side of the Nissan Sentra collided with the right hand side of the Opel, damaging both doors and the pillar between them. See photograph 2 on p 307 for the Opel and photograph 6 on p 309 for the Nissan Sentra.

The positions in which the vehicles came to a stop is depicted on the police plan. See p 341. The Opel came to a stop on the shoulder on the southern side of the road, facing in a south- westerly direction. The Nissan Sentra came to a stop partly on the southern side of the road, facing in a north-westerly direction.

In his particulars of claim the first appellant alleged that the Opel had been stationary next to the main road, facing south and waiting for an opportunity to enter the road when the insured vehicle came from a westerly direction, left the road and collided with it, pushing it some 32 meters away. It was alleged that the insured driver was negligent in several respects, such as driving too fast, not keeping a proper lookout, failing to avoid a collision and leaving the tarred surface of the road.

The defendant (respondent in the appeal) pleaded that the second appellant allowed her car to be stationary in the middle of the road, that it had no lights on, and that her car had formed an obstruction on the road.

The first appellant gave evidence himself and called the following witnesses: Mr S D Ross, who took photographs on the scene during the night; Sergeant M Makinita of the South African Police Service, who attended the scene and drew a plan showing the point of impact and the position of the vehicles; the second appellant; the daughter of the second appellant, Mrs Meyer, who also attended the party and who was in a vehicle behind the Opel; and Dr J Kok, an expert in the reconstruction of collisions.

The respondent closed its case without adducing any evidence.

The first appellant testified that he had no recollection of the collision. He can remember that the second appellant reversed out of her parking space. He could not remember whether her lights were on. He was intoxicated. He had made a statement to the effect that the Opel had been stationary next to the road, waiting to enter it, when a vehicle collided with it. He explained that this statement was based on what other persons had told him. He could not remember their names.

Sergeant Makinita testified that the insured driver pointed out the point of impact to him. At that place he could also see glass and other debris. He measured his distanced in paces, but wrote" feet" in the key to the plan. The lights of the Opel were not on. On the accident report he indicated that the road was slippery.

The second appellant testified that she did switch her lights on. She reversed out of her parking space and moved on towards the road. She stopped next to the road. That was the last she could remember. She marked with a cross on photograph 4 on p 323 where she had come to a stop. It was not raining. She had also made a statement in similar terms to the statement of the first appellant. It was based on what the first appellant and her daughter had told her. She could not remember whether vehicles parked in front of the restaurant off the main road had obscured her vision.

Mrs Meyer confirmed that her mother had switched on her lights. She saw her mother move forward. She saw nothing further because she had turned round to talk to her sister, who was sitting at the back of their vehicle. She also confirmed that it had not rained. She was sure of that because she had gone out of the restaurant during the night.

Dr Kok explained that the damage to the vehicles and the positions in which they came to a stop were irreconcilable with the versions of the appellants and the insured driver as contained in their statements. The statement of the insured driver is reflected in the plea and is to the effect that the Opel had no lights on and was stationary in the middle of the road.

According to him both vehicles spun away from the point of impact in a clock wise rotation. It was impossible for the Nissan Sentra to have been moved 32 meters in an easterly direction. If that had been the case, it would have had to be travelling at 140 kilometers per hour.

In his view the manoeuvre of the Opel must have prompted the insured driver to move to the right. He could not say whether the Opel had stopped before entering the road. It was physically impossible for the Opel to have been stationary in the middle of the road. The Opel was not entirely at right angles to the road. There must have been an angle between the two vehicles at the time of impact. If the Nissan Sentra had driven straight into the Opel, it would have ended up on the left hand side of the road.

If the insured driver had applied his brakes and steered straight, he would have avoided a collision because the Opel had virtually cleared the northern half of the road.

The insured driver should have seen the Opel moving at a distance of 50 meters in his lights if they were on dim. If they were on bright, he would have been able to see it at distance of 100 meters.

In his view the insured driver had failed to keep a proper lookout because he only saw the Opel for the first time when it was in the middle of the road, and then perceived it to be stationary.

He considered it natural for a driver like the insured driver to pull to the right, that is if the Opel had been close to him.

He had no idea of the speed of the Opel.

He agreed that the stop sign was not visible from the direction of Rustenburg.

He seemed to agree that the Opel could have been in front of the Nissan Sentra " in a blink." If the lights of the Nissan Sentra had been on dim, the insured driver would not have seen the Opel at the stop street.

He could not say how far the Nissan Sentra was away when the Opel entered the road. It must have been close because the Nissan Sentra pulled to the right.

He repeated that time and space would have allowed the Nissan Sentra to pass the Opel.

The insured driver should have been able to see the flicker light of the Opel.

The judge *a quo* pointed out that there was no evidence as to how far the insured vehicle was away when the second appellant switched on her indicator. He also pointed out that there was no indication of the speed at which the second appellant, entered the main road. In view of the fact that she did not observe the oncoming insured vehicle, especially where she said that her view had not been obscured by parked cars, he came to the conclusion that she had not kept a proper lookout. He concluded that she had entered the main road at a stage when it was inopportune to do so. He accepted the evidence of Dr Kok to the effect that the Nissan Sentra had swerved to its right and that the Opel had not been stationary on the gravel road when the collision occurred. He observed that the distance the Nissan Sentra was from the gravel road when the second appellant entered the main road was crucial in determining the negligence of the two drivers. He pointed out that there was no evidence whatsoever as to how far the Nissan Sentra was from the gravel road when the second appellant started her right hand turn. He remarked that neither party could explain the collision and that Dr Kok, who gave an *ex post facto* explanation, was of the view that the insured driver had done the natural thing to swerve to the right. Dr Kok's evidence was the only evidence before the court, yet he could not explain important aspects such as the speed of the Nissan Sentra and the distance it was from the gravel road when the Opel entered the main road. Accordingly he granted absolution from the instance.

The main thrust of the argument of Mr Fourie, who appeared for the appellants, was that the court should have drawn an adverse inference against the respondent for not calling the insured driver as a witness, applying the rule in **Galante v Dickenson**

1950 (2) SA 460 A at 465 and that the fact that the collision had occurred on the incorrect side of the road of the insured driver created a *res ipsa loquitur* situation.

He pointed out that the second appellant's vehicle was white, that it had its lights on and that its indicator light was flickering. There were warnings on the road, such as a pedestrian crossing, a sign board indicating a T- junction, and the parked cars outside the restaurant. He submitted that the car of the second appellant must have been visible to the insured driver. He submitted that it was probable that the insured driver had been travelling too fast if one bears in mind that in his statement he said that he had been travelling at 70 kilometers per hour. He also pointed out that the evidence of dr Kok was that the Opel had virtually completed its turn.

Mr Horak, who appeared for the respondent, argued that the appellants could not rely on the *res ipsa loquitur* rule where the evidence of Dr Kok was that it was natural for a driver in the position of the insured driver to swerve to the right. At worst, he submitted that it was a case of an error of judgment in an emergency, relying on Cooper v Armstrong 1939 OPD 140 at 148. He referred the court to several cases in which the rule in Galante v Dickenson supra was considered, such as Magagula v Senator Insurance Co Ltd 1980 (1) SA 717 N at 720H- 722F , Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 A, and an unreported judgment of the Supreme Court of Appeal in T de Maayer v T A Serebro and another, case number 322/03 delivered on 29 September 2004. He submitted that the Galante principle did not apply because there was an obvious explanation for the collision, namely the fact that the second appellant entered the road when it was inopportune to do so.

I agree that the *res ipsa loquitur* principle is not applicable to this case. It may have applicable if this had been a case where the insured vehicle had collided with a vehicle coming from the opposite direction. The Opel had not yet completed its turn. It was straddling the centre line. The evidence of Dr Kok was that although it was not at right angles to the road, it was at a sharp angle with it. That is why it was hit on the side. High speed was eliminated as a possible cause of the collision by the first appellant's own witness, Dr Kok. He has also ventured a plausible explanation for the fact that the collision occurred on the incorrect side of the road of the insured vehicle. In the circumstances no inference of negligence can be drawn from the mere fact that the point of impact was situated on the southern half of the road.

It is obvious that the second appellant did not enter the road at an opportune moment and that she could not have kept a proper lookout.

The question is whether the insured driver was also negligent. As Mr Fourie pointed out, the first appellant only had to prove the slightest degree of negligence on the part of the insured driver in order to succeed in his claim against the respondent.

It must not be forgotten that the first appellant has not proved the case that he has pleaded. He did not prove that the insured vehicle had left the road and collided with the Opel where it was waiting on the gravel road. He did not prove that the insured vehicle had been travelling at such a speed that it could push the Opel some 32 meters away. The first appellant can be fortunate that the attempt to present the case pleaded by him did not have a disastrous effect on his c~edibility f'nd that of the second appellant.

It was accepted by the respondent that the second appellant had come to a stop before entering the main road. It was argued that where the second appellant had come to a stop her vehicle must have been visible to the insured driver. I am not sure of that at all. If she had stopped at the stop sign, her vision could have been obscured by vehicles parked in front of the restaurant in the main road. The mere fact that she never saw the insured vehicle, makes it probable that she had stopped at a point where her vision was impaired. Whatever the case may be, if she had stopped at a point where she had a good view to her right, it is clear that she did not keep a proper lookout. The insured vehicle was approaching and one can only assume that she neve saw it. If she was stationary at a point where she had a proper view, with her lights on and her indicator flickering, all of that visible to the insured driver, the insured driver had every reason to assume that she would wait until he had passed.

The crucial question is whether, when the second appellant decided to embark on her right hand turn, there was enough time for the insured driver to take evasive action. The only evidence here is the evidence of Dr Kok, which is, in a sense, contradictory. On the one hand he says that the turn to the right was prompted by the sudden intrusion of the Opel, and that it was a natural reaction, and on the other hand he says that the insured driver could have avoided the collision by keeping straight and by applying his brakes. Dr Kok never explained why the insured driver could have avoided a collision. If one looks at the sketch on p 395 in volume 4, it is clear that the Opel must have covered at least some 7 meters from a stationary position to the point of impact. If, for argument's sake, Opel was travelling at an average speed of 10 kilometers per hour, and the Nissan Sentra was travelling at 70 kilometers per hour, the Nissan Sentra must have been 49 meters away when the Opel started its

manoeuvre. If one takes into account reaction time, it is not at all clear to me that there was enough time to take evasive action. There was no evidence as to braking distances. The calculation I have done above, is just one of several one can make . . Such calculations, the whole gamut of them in fact, could have given the court an idea of how possible it was for the insured driver to take evasive action. It would, in my view, be wrong for the court to accept the mere *ipse dixit* of Dr Kok as to the ability of the insured driver to avoid a collision. He should have explained how he had come to that conclusion. If the court were to accept his bald statement, it would abdicate its function. The judge *a quo* had exactly the same problem. He bemoaned the fact that he did not know how far the Nissan Sentra was away when the Opel started its movement into the road. Without knowing that, it is not possible to infer negligence on the part of the insured driver.

It was argued that the speed of 70 kilometers per hour, admitted by the insured driver, and in excess of the speed limit, constituted negligence. It is trite that a mere contravention of a regulation does not *per se* constitute negligence. In this case the insured driver was driving at 2hOO in the morning in a semi rural area along a straight stretch of road. I cannot see how his mere speed can be branded as negligence.

For all these reasons I am of the view that the first appellant had not proved any negligence on the part of the insured driver. In particular I am of the view that the occasion to apply the rule in **Galante v Dickenson supra** did not arise. It was a case where the cause of the collision was clearly the inopportune entry of the Opel into the main road, and where it cannot be said that there were two alternative causes of equal plausibility that presented themselves on the evidence.

For all these reasons I am of the view that the appeal should be dismissed.

Mr Fourie argued that if the appeal of the first appellant was dismissed, the court should award the second appellant her costs for the trial as well as for the appeal.

The trial judge made no order against the second appellant (the third party). The second appellant, however, chose to appeal against that order.

When granting leave to appeal, the court *a quo* only granted leave in respect of the merits. I shall assume that the order granting leave to appeal also embraced the issue of the costs of the second appellant.

The second appellant was properly joined by the respondent as a third party. She made common cause with the first appellant to prove that the collision had been caused solely by the negligence of the insured driver. She was unsuccessful in that attempt. Viewed in that light she was indeed fortunate not to have incurred any liability for the costs of the trial.

In the circumstances there is no basis to interfere with the trial court's order in respect of the second appellant, and more particularly the issue of her costs.

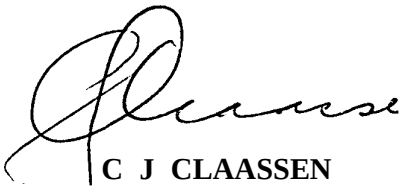
She has appealed against the judgment of the court *a quo*, and having failed, she should be liable for the costs of appeal. Those costs should include the costs of the application for leave to appeal, which were left for this court to decide.

In the result the following order is made;

The appeals of both appellants are dismissed with costs, which costs shall include the costs of the application for leave to appeal. The first and second appellant shall be liable for the costs of appeal jointly and severally.

C BOTHA
JUDGE OF THE HIGH COURT

I agree



C J CLAASSEN
JUDGE OF THE HIGH COURT

I agree

E M PATEL
JUDGE OF THE HIGH COURT