

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: A525/2015

Date: 29/3/17

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

24-3-2017

DATE

SIGNATURE

In the matter between:

M D JANSE VAN VUUREN N.O.

APPELLANT

AND

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

TOLMAY, J:

- [1] This is an appeal brought against the order of absolution from the instance with costs granted in favour of the Respondent against the Appellant by the Court *a quo*.
- [2] The action was instituted as a result of an accident that occurred on 5 January 2011 at about 10:00 on the N3 highway south bound towards Durban, approximately 10km from the Marian Hill tollgate. The accident occurred between a RAV 4 motor vehicle, with registration number BMX443L, driven by Christiaan Harmse Janse van Vuuren, who died subsequent to the institution of the action herein ("the deceased") and an unidentified motor vehicle (the first insured vehicle), driven by Phumlani Nxumalo ("the first insured driver") and a Caravelle Microbus, with registration number NWW703GP ("the second insured vehicle"), driven by R Pretorius ("the second insured driver"). The Appellant claims damages from the Respondent in her capacity as the executrix in the estate of the deceased. Appellant was a passenger in the vehicle driven by the deceased at the time of the collision.
- [3] At a pre-trial conference the Respondent admitted the version of the Appellant that the first insured driver lost control in the path of travel of the deceased and that the deceased took avoiding action in order to avoid a collision with the first insured vehicle. It was also admitted that the deceased thereafter lost control of his vehicle and collided with the second insured vehicle, who was travelling in the opposite direction.

- [4] At the trial the following was common cause:
- a) The N3 is a double carriage highway with lanes on each side of the road and divided by a grass median.
 - b) The deceased's vehicle was travelling in a southerly direction and the second insured vehicle was travelling in a northerly direction. It was also never disputed that the deceased's vehicle and the first insured vehicle was both travelling in the left lane.
 - c) The first insured vehicle overturned in the left lane in front of the deceased's vehicle.
 - d) The deceased, in order to avoid colliding with the first insured vehicle, swerved to the right lane, lost control of his vehicle and collided with the second insured vehicle.
 - e) The collision between the deceased's vehicle and the second insured vehicle occurred on the latter's correct side of the road.
 - f) There was heavy rainfall at the time of the accident.
- [5] The Appellant, who was a passenger in the deceased's vehicle, testified that it was raining heavily and visibility was poor. The deceased reduced speed from plus minus 110 kmp to 70 kmp, when suddenly they saw the first insured vehicle, which had overturned and was sliding in the same direction of travel and by doing so obstructed the left lane of travel. The deceased swerved his vehicle to the right lane, lost control over his vehicle, which skidded across the highway and onto the grass median and ended up in the incorrect side of the

road and in the lane of the second insured vehicle. The deceased's vehicle collided with the second insured vehicle.

- [6] The Appellant testified that there was nothing that the deceased could have done to avoid the accident.
- [7] The Respondent closed its case without calling any of the insured drivers and gave no reason at all for the failure to do so.
- [8] The Court *a quo* found that the overturned vehicle did not create any risk which is causally connected to the collision with the second insured vehicle. It was also found that the facts did not warrant an inference of negligence on the part of the first insured driver. The Court *a quo* found that the deceased was driving too fast in the light of the prevailing weather conditions. He proceeded to find that, due to the fact that the first insured driver did not testify to explain why he overturned the vehicle, the Court is unable to come to a conclusion on the facts before it and granted an order of absolution of the instance.
- [9] The Appellant's version was admitted at the pre-trial and the Appellant testified and told the Court exactly what happened and her version was undisputed. The Appellant explained that visibility was extremely poor and neither she nor the deceased saw the overturned vehicle, because of the heavy rain until it was too late.

[10] The court *a quo* misdirected itself in postulating that one cannot by the mere conduct of the overturning of a vehicle draw an inference of negligence against a driver. A vehicle which is driven properly and without negligence does not normally overturn whilst travelling along a roadway. The principle of *res ipsa loquitur* finds application.¹ The evidence points to an inference of negligence on the part of the first insured driver.² There exists no evidence on which it could be held that the deceased was negligent even if he might not have made the right decision in the agony of the moment.³

[11] As a result of the admissions at the pre-trial and the evidence led the Appellant proved *prima facie* that the first insured driver was negligent. Consequently there was a duty on the Respondent to explain why the vehicle overturned. In the light of the absence of evidence from the Respondent, or any explanation for the failure to call the first insured driver an adverse inference is warranted. It was incumbent on the Respondent to have called the first insured driver to avoid a negative inference to be drawn. Once a plaintiff proves an occurrence giving rise to an inference of negligence on the part of a defendant, the defendant must produce some evidence to explain how the incident happened.⁴

¹ Malgas v Guardian Assurance 1961(1) PH O4; Minister of Justice v Seametso 1963(3) SA 530 on 535-6; Durban City Council v SA Board Mills Ltd 1961(3) SA 397 (AD) at 405

² Sauerman v Barnard 1958(4) SA 149 (O) on p 156; Jama v Auto Protection Insurance 1963(2) PH O49; Kuluse v Marine & Trade Insurance 1969(2) PH J21

³ Cooper, Motor Law vol, 2, par C p 101; Klopper, Derdepartyvergoedingsreg, par (B) p 67; Road Accident Fund v Mehlomakulu 2009(5) SA 390 (ECD) on 397-398

⁴ Van Staden v May 1940 WLD 198 at 201

[12] It is clear that the evidence led by the Appellant called for an answer or explanation by the Respondent. As a result there is nothing to disturb the inference of negligence on the part of the first insured driver.⁵

[13] In the light of the aforesaid the Appellant had proven that the collision occurred as a result of the first insured driver's negligence.

[14] Consequently the appeal must succeed.

[15] I make the following order:

15.1 The appeal is upheld;

15.2 The order of the Court *a quo* is set aside and substituted with the following:

"It is declared that the Defendant is liable for the payment of the Plaintiff's proven or agreed damages flowing from the accident that occurred on 5 January 2011. The Defendant is ordered to pay the Plaintiff's costs of the action relating to the issue of liability".

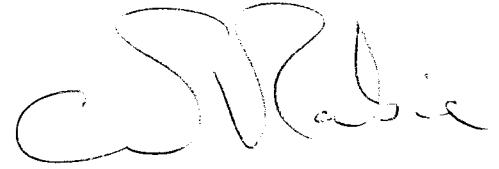
16.3 The Respondent is ordered to pay the Appellant's costs of the appeal, which costs will include the costs of senior counsel.



R G TOLMAY
JUDGE OF THE HIGH COURT

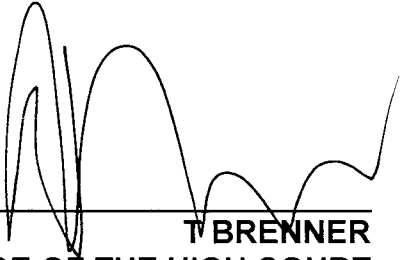
⁵ RAF v Mehlomakulu *supra*, p 397

I agree:



C P RABIE
JUDGE OF THE HIGH COURT

I agree:



T BRENNER
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 1 MARCH 2017

DATE OF JUDGMENT: 28 MARCH 2017

Attorney for Appellant: Klagsbrun Edelstein Bosman

De Vries Inc

Advocate for Appellant:

Attorney for Respondent: AL Ledwaba linc

Advocate for Respondent: