

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE ~~Provincial~~ Division.)
(Provisiale Afdeling.)

~~Appeal in Civil Case.~~
~~Appel in Siviele Saak.~~

REGINA VILAKAZI (born Nkozi)

Appellant,

versus

S.A. MUTUAL FIRE & GENERAL INSURANCE CO., LTD.

Respondent

Appellant's Attorney Symington & De Kok
Prokureur vir Appellant

Respondent's Attorney Fred S. Wenber &
Prokureur vir Respondent Son

Appellant's Advocate

Respondent's Advocate

Advokaat vir Appellant

Advokaat vir Respondent

Set down for hearing on

Op die rol geplaas vir verhoor op

9-11-70

1.3.6.7.11

Letters van 3 lede A.S.A., getydelik, Simon A.
de Villiers, A.S.A., 11.11.70

WLD

9.11.70 - 11.00 am.

note 30-11-70, per de Villiers A.S.A.
application dismissed with Costs

APPLICATION REFUSED WITH COSTS.


REGISTRAR.
30.11.70

Bills Taxed.—Kosterekenings Getakseer.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Date.
Datum.

Amount.
Bedrag.

Initials.
Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

REGINA VILAKAZI

Appellant

(born Nkozi)

and

SOUTH AFRICAN MUTUAL FIRE AND

Respondent

GENERAL INSURANCE COMPANY LTD.

CORAM: VAN BLERK, A.C.J., POTGIETER, JANSEN, JJ.A.,

DE VILLIERS et MULLER, A.JJ.A.

HEARD: 9.11.1970. DELIVERED: 30.11.1970,

J U D G M E N T

DE VILLIERS, A.J.A. :

This is an application for condonation which arises in the following circumstances.

At about 6.45 p.m. on the 12th of May, 1968, when it was already dark, Mishack Vilakazi was driving his car from West to East on a tarred road in the Alberton district, on which there was room for two cars to pass one another comfortably but no more, and on the sides of which

there/.....

there were gravel verges. At the same time two cars approached from the opposite direction, the one closely followed by the other. The front car was being driven by one Doman, with his wife as passenger, and the other, insured by respondent, hereinafter referred to as defendant, by one Richardson. At a point on the road about 50 yards beyond where it curves slightly to the left in the direction he was travelling, Mishack Vilakazi's car collided with the car driven by Richardson as a result of which Mishack Vilakazi was killed. Applicant instituted action against respondent for damages on her own behalf and on behalf of her minor children on account of the death of Mishack Vilakazi, hereinafter referred to as the deceased, her lawful husband and the father of the minor children, alleging that the collision and the resultant death of the deceased was due to the negligence of Richardson.

At the trial evidence was tendered on behalf of applicant that deceased's death was caused by the negligent conduct of Richardson in driving on to his incorrect side of the road in an attempt to pass Doman's car, and

colliding/.....

colliding with deceased's car at a time when the latter was approaching from the opposite direction and on its correct side of the road.

The evidence tendered on behalf of respondent was that of Doman and his wife and Richardson, and it was in sharp conflict with that of applicant's witnesses.

Doman's evidence, as appears from the application record and from such parts of the trial record as have been incorporated by reference into the application record, was to the effect that the deceased drove his car over on to his incorrect side of the road and that he, Doman, narrowly averted a collision by swerving sharply off the road on to the gravel verge to the ^{South} ~~North~~ of it. In particular he said:

"And did you notice anything ahead of you? ---
There was a car approaching me, your Lordship.
Did you notice anything strange about this car?
--- Yes your Lordship, this car came straight
for me.

Were you on your correct or incorrect side of the road? --- I was on the left-hand side of the road, your Lordship.

What did you do when this car was coming for you?
--- When I saw this car approaching me, your Lordship, he didn't give any indication that he

was/.....

was going to try and avoid an accident, I swerved off to the left-hand side of the road.

Do you remember whether your lights were on dim or bright, and whether or not you flicked them before you swerved to the left? --- My lights were on dip at the time, your Lordship. I flashed the lights once at the driver of the approaching vehicle. He was on headlights. When I saw that he was not corresponding to anything I was doing, I then swerved off to the left-hand side of the road."

"By what margin would you say that you avoided this collision with the Vauxhall? --- Your Lordship I would say about 2 ft.

Was it as close as that? --- It was very very close."

"Do you know whether the oncoming car, after it had just missed you, whether it continued on the same course, or whether it moved to the left or to the right? --- It continued on the same course until the point of impact."

Richardson stated in evidence that he was travelling on his correct side of the road, behind Doman's car and continued:

"Were you far away from it or fairly close behind it? --- I think two car lengths behind it at that stage. I can't be absolutely certain.

Yes, did you, before this collision, try to overtake this car, Mr. Richardson? --- Not at all.

What sort of car were you driving? --- A 1958 Ford.

Ten years old at the time of this collision? ---
Yes.

As you were travelling along, could you in your own words please, tell us what happened? ---

Well it happened quite suddenly. The car in front of me swerved to the left, and I immediately saw the car...

Slowly. You say the car in front of you..? ---
Swerved to the left.

Swerved to the left. And you said that you saw something? --- I then noticed a car coming towards me, and to avoid a collision, I also swerved to the left."

"Now, just before the accident, there was a car travelling in front of you. What note did you take of oncoming traffic? --- I can't say I noticed any oncoming traffic at that particular stage.

You see, I want to put it to you that from the point of the collision, to the robot, there is a clear view for a distance of something like 200 yards? --- Yes, I would say there is.

How far was this car with which you collided, from you, when you first became aware of it? --- I honestly can't tell you the distance, it happened so fast, and it seemed to be right on top of me before I noticed it.

At the time of - just before the collision, was the first time that you saw this car? --- As far as I can recall, yes."

"Just before the time of the accident, since you were not particularly watching for oncoming traffic, it would seem you weren't concentrating particularly on driving conditions? --- I'd say I/.....

I was concentrating more on the car in front of me, than I was on anything else.".....

"Now, why didn't you see the oncoming car earlier, Mr. Richardson? --- Well I think it was on the wrong side of the road and it was blocked by the car in front of me.

However careful you may have been on the day in question, would you have been able to see it ahead of you through the car in front of you, coming on the incorrect side of the road? --- I don't think I could have.

Did you expect anybody to emerge from the front of the car travelling ahead of you on the incorrect side of the road? --- No, I did not expect anybody.

And once you did see it, would any useful purpose have been served in applying your brakes? --- Not at all.

Why not? --- Because it would have meant a head-on collision. I tried to swerve to avoid it."

The Court a quo was unable to find any basis upon which it would be justified in holding that applicant's witnesses were more acceptable than those of respondent. It also dismissed an alternative contention on behalf of applicant that Richardson was negligent even on the basis that respondent's witnesses were truthful. The Court's reasoning in regard to the latter contention was the following:

"I have considered counsel's submission in that regard, but I find myself unable to accept it. Richardson, in evidence, stated candidly that he could not recollect seeing the deceased's car approaching from the west until a very late stage, when he says, it was driving straight at him. If Richardson's version of the accident is true, that

failure/.....

failure to observe the deceased's car when it was a considerable distance away, could be explained in one of three ways: one possibility is that it was masked from his view by Doman's car, which admittedly was travelling only a short distance in front of the insured car. The suggestion that even in that event the lights of the deceased's car would have shone through the front windscreen and the back window of Doman's car is, I think, conjectural. It would not be safe without something in the nature of a demonstration, or alternatively, some expert evidence, to assume that a driver in Richardson's position could necessarily have seen those lights through the car of Mr. Doman. Another possibility is that Richardson did, in fact, see the approaching lights of the deceased's car when there was nothing abnormal about the position of those lights or the course which the car appeared to be taking, so that he was left, after the collision, with no recollection of his initial sight of the car. A motorist in the ordinary course of night driving, sees the lights of many approaching cars, but unless there is some special reason to recollect those events, they make no striking impact upon his mind and do not remain in his memory. A third possibility is that Richardson was looking only at the car ahead of him, (that, indeed, is a theory which he volunteered himself) and therefore, paid no attention to anything beyond or to the right of it.

I do not know which of the three theories I have mentioned embodies the true explanation of Mr. Richardson's present failure to recollect a sight of the deceased's car well before the time of impact. But on any of those theories, I cannot see that any relevant negligence on the part of Richardson is established. I am dealing with the matter still on the assumption that his own version is to be accepted. His speed was probably something between 30 and 40

miles/.....

miles an hour, which to me does not seem unreasonably high in the prevailing circumstances. He may have been following Doman's car a little more closely than was prudent, but that was clearly not the cause of the collision.

Richardson was under no duty to take precautions against the unlikely contingency that an oncoming driver would swerve over, without warning and for no discernible reason, to his incorrect side of the road in the face of the approaching headlights of two vehicles. The evidence does not show that after the danger became apparent to Richardson, he had sufficient time within which to avoid the collision, and failed to take the measures which were available to him during that period. He could, perhaps, have swung further or more violently to the left than he did in the emergency. I am not sure, however, that that would have averted the impact. And in any event, if Richardson's version is true, such an error of judgment in the agony of the moment, would not, in my view, constitute negligence."

The Court a quo accordingly granted an order of absolution from the instance with costs.

Applicant timeously noted an appeal to this Court and followed it up with an application for leave to appeal in forma pauperis. This application was, however, not lodged with the Registrar of this Court within the period required by Rule of Court 4 (7): hence the present application.

At/.....

At the hearing of the application counsel on behalf of applicant did not seriously contend that the Court a quo erred in not accepting applicant's version of how the collision occurred, but strenuously argued that on the basis of the correctness of the evidence tendered on behalf of respondent, the Court a quo should have found that Richardson was negligent and that such negligence, even if slight, entitled applicant, who is suing on behalf of deceased's dependants, to damages, the Apportionment of Damages Act not being applicable.

I proceed to deal with this contention, it being common cause that if there are no reasonable prospects of it succeeding in the appeal, the application for condonation cannot be granted. (See Ngobane & Another v. Minister of Justice & Another, 1969 (3) S.A. 365 (A) at p. 370).

In my view there are no such prospects.

It was contended that Richardson was negligent in that he drove too close to Doman's car and did not keep a proper lookout for oncoming traffic and that had he not been/.....

It is a fact that the following is true:

1. The first part of the document is a list of names of persons who

are known to the author of the document as having been in contact with

the author of the document in the period from 1945 to 1947.

2. The second part of the document is a list of names of persons who

are known to the author of the document as having been in contact with

the author of the document in the period from 1948 to 1950.

3. The third part of the document is a list of names of persons who

are known to the author of the document as having been in contact with

the author of the document in the period from 1951 to 1953.

4. The fourth part of the document is a list of names of persons who

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known to the author of the document as having been in contact with

the author of the document in the period from 1954 to 1956.

5. The fifth part of the document is a list of names of persons who

are known to the author of the document as having been in contact with

the author of the document in the period from 1957 to 1959.

6. The sixth part of the document is a list of names of persons who

are known to the author of the document as having been in contact with

the author of the document in the period from 1960 to 1962.

7. The seventh part of the document is a list of names of persons who

been so negligent, he would timeously have seen that deceased's car was proceeding on its incorrect side in a straight line towards Doman's car and would have been able, like Doman, to avoid the collision. I cannot agree. As the Court a quo correctly pointed out, Richardson was under no duty to take precautions against the unlikely contingency that deceased would swerve over, without warning and for no discernable reason, to his incorrect side of the road in the face of the approaching headlights of two vehicles, which must have been clearly visible to him. His duty was to keep a watchful eye on deceased's car and to take avoiding action when it became apparent to him that deceased's car had moved over on to the incorrect side of the road and that a collision was imminent. See Solomon and Another v. Mussett and Bright, Ltd., 1926 A.D. 427 at p. 433. But it must be remembered that he also had to keep Doman's car and all other traffic on the road under observation. In the present case it is contended that Richardson only looked at Doman's car and paid no attention to deceased's car. But the evidence does not disclose that this

was/.....

was so. Richardson admitted that he concentrated more on the car in front of him - natural under the circumstances - but did not admit that he never saw deceased's car when it was still approaching the scene of the collision. What he did say was that he had no recollection of seeing deceased's car at that stage, and, for the reasons stated by the Court a quo, it may very well be that he did see deceased's car but had no recollection of doing so. After all he was called upon to testify about 2 years after the date on which the collision took place. The contention that Richardson was negligent because he drove too close to Doman's car is also unfounded. Richardson estimated that he was travelling about two car lengths behind Doman's car. He added that he could not be certain that his estimate was correct with the result that the distance may have been considerably greater. Both cars were travelling at reasonable speeds. Whatever the exact distance that separated the two

cars, it has not been established that he would not have been able to avoid colliding with Doman's car had Doman for instance, for some reason, been forced to suddenly applying his brakes

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and bring his car to a standstill. And I do not think that it can validly be said that he was in duty bound vis-a-vis deceased to drive at a greater distance behind Doman's car so as to give himself a better opportunity of avoiding the consequences of a negligent act by deceased which he could not reasonably have foreseen. The evidence also does not disclose that the deceased's car proceeded in a straight line on its incorrect side of the road for a considerable distance before the collision. This submission is based on a misreading of Doman's evidence. All that Doman said was that deceased's car came straight at him but he was never asked how far deceased's car was in front of him when it crossed to its incorrect side. Conceivably this could have happened when deceased's car was very near to him and when his car partly, if not wholly, obscured Richardson's view of it. That there probably was such a sudden swerve appears from Doman's evidence that he had to move on to the gravel verge and even then only narrowly averted a collision. The basis for applicant's contention is therefore non-existent with the result that it is impossible to find that Richardson

was/.....

was negligent in any respect prior to the point of time when Doman's car swerved to the left in front of him. As pointed out by the Court a quo, in the absence of something in the nature of a demonstration or some expert evidence it would be conjectural to say that he must have seen the lights of deceased's car through the windscreen and back window of Doman's car. Nor can it be said that Richardson should in any event have been able to avoid the collision. He was called upon to act in an emergency not of his own making, and even if he could, like Doman, have swerved more to the left than he actually did and thereby have avoided a collision, his failure to do so does not, in the circumstances, constitute negligence on his part.

The application is accordingly refused
with costs.

VAN BLERK, A.C.J.
POTGIETER, J.A.
JANSEN, J.A.
MULLER, A.J.A.

Concur.


DE VILLIERS, A.J.A.