THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NUMBER 188/97

In the matter between:

Multilateral Motor Vehicle Accidents Fund	First Appellant
Multilateral Motor Vehicle Accidents Fund (Substituted for Santam Limited)	Second Appellant
and	
Daniël Makhingila Nkosi	First Respondent
Tryphinah Ntombi Lekhuleni Second Respondent	

CORAM: **Smalberger, Marais, Olivier JJA et Melunsky, Madlanga AJJA**

Date of Hearing: Thursday 25 February 1999
Date of Judgment: Tuesday 23 March 1999

JUDGMENT

MADLANGA AJA:

[1] At about 18h00 on 16 April 1992, which was the beginning of the Easter weekend, a collision involving three motor vehicles occurred on the N4 between Johannesburg and Nelspruit in the vicinity of the Arnot off-ramp. It is common cause that this collision was the result of the negligent driving of the driver of a certain Golf motor vehicle ("the Golf"), that the Golf never came into contact with any of the three motor vehicles involved in the collision, that it did not stop and that neither it nor its driver or owner were subsequently identified.

[2] The first and second respondents ("Nkosi" and "Lekhuleni" respectively) instituted actions in the Transvaal Provincial Division of the High Court. Nkosi's action was for damages arising from bodily injuries sustained during the collision. He had been a passenger in one of the three motor vehicles involved in the collision ("the Toyota minibus"). Lekhuleni's action was for loss of support. Her husband ("the deceased") who died as a result of the collision had been the driver of the Toyota minibus. Lekhuleni acted on her own behalf and on behalf of her six minor children of whom the deceased was the father.

[3] Nkosi and Lekhuleni each cited the then Multilateral Motor Vehicle Accidents Fund ("the Fund") and Santam Limited ("Santam") as first and second defendants respectively. The Fund was cited because "an unidentified motor vehicle" (the Golf) caused the collision (article 40 read with article 3(b) of the Schedule ("the Agreement") to the **Multilateral Motor Vehicle Accidents Fund Act** 93 of 1989 ("the Act")). Santam was cited on the basis that the drivers of the three motor vehicles involved in the collision were also negligent (article 40 read with article 13(b) of the Agreement). It is rather strange that Lekhuleni also based the loss of support claim on the negligence of the deceased, her husband, but for present purposes nothing turns on this.

[4] In both actions the Fund raised special pleas contending that in terms of regulation 3(1)(a)(v) (promulgated in terms of sec 6 of the Act) no liability

attaches to it if the "unidentified motor vehicle" never came into physical contact with Nkosi and the deceased or with the motor vehicles in which they were. This legal contention was preceded by a denial of the respondents' allegation that there was in fact physical contact.

[5] Both respondents replicated to the special pleas and averred that the content of regulation 3(1)(a)(v) is **ultra vires** the empowering legislation (the Act) and that, therefore, it cannot affect their claims.

[6] The two actions were consolidated and heard by Spoelstra J. A ruling was made in terms of rule 33(4) of the Uniform Rules that the issue of liability be considered first and that the determination of **quantum** be stayed for later hearing, if necessary. Spoelstra J held that regulation 3(1)(a)(v) is **ultra vires** the provisions of sec 6 of the Act, this being the section empowering the Minister to make regulations "to give effect to any provision of the Agreement". He also found the collision to have been the result of the negligence of the drivers of both the Golf and one of the three motor vehicles involved in the collision ("the Ford"). The Fund and Santam were thus held to be jointly liable to the respondents.

[7] Spoelstra J granted the Fund and Santam leave to appeal to this Court. The Fund appeals against the **ultra vires** finding. Santam appealed against the finding that the driver of the Ford (" Perumal") was negligent.

[8] This appeal was argued together with the appeal in **Road Accident Fund (formerly the Multilateral Motor Vehicle Accidents Fund) v Barend Phillipus Prinsloo** (Case No. 299/98) which also involved the question of the validity of regulation 3(1)(a)(v). In that appeal it was held that regulation 3(1)(a)(v) is **ultra vires** the provisions of sec 6 of the Act and is, therefore, invalid. As the Fund, in its capacity as the first appellant, is appealing only against the **ultra vires** finding, its appeal on this point must fail. I next deal with the question of the negligence of Perumal.

[9] Although the respondents called three witnesses, the Court **a quo** decided the matter on the basis of the evidence of only one of them, Alberts. The Fund and Santam closed their cases without calling any evidence. With the exception of his suggestion that Perumal was negligent, all the parties accepted the evidence of Alberts. His evidence was to the following effect. On the day in question there had been a thunderstorm accompanied by heavy rain. At the time of the collision the thunderstorm had stopped but it was still raining. The tarred surface of the road was wet. As is usually the case on South Africa's major routes at the beginning of the Easter weekend, the volume of vehicular traffic was "***natuurlik baie geweldig besig gewees",*** especially from West to East, the direction in which Alberts was driving. Alberts even referred to the traffic as a **"**queue**"** and a "***verkeerstroom***". Because of the weather conditions, it was beginning to get dark. About visibility Alberts said, ***"Dit was nog redelik, maar nie goed, ek sal nie sê goed nie, maar dit was nog redelik gewees. Daar was geen probleem dat jy nie 'n ding kan sien nie.***"

[10] Alberts was driving a Mitsubishi minibus. In front of it was the Toyota minibus. In front of the Toyota was the Ford. Alberts's evidence which was not necessarily reliable on this point was that the motor vehicles were travelling more or less five to six car lengths behind each other. All three motor vehicles were driving in the middle of their lane. Because it was raining all the motor vehicles had slowed down and were travelling between 80 and 90 kilometres per hour. At the point where the collision took place there was a single lane on Alberts's side of the road. There were two lanes on the side of oncoming traffic. The Golf came from behind the Mitsubishi, moved onto one of the two lanes on its incorrect side (the lane nearest to its correct side) and began to overtake Alberts's motor vehicle and the other two in front of it. As it was in the process of overtaking, a truck was approaching from the opposite direction and driving on the outer lane. There was a motor vehicle, also approaching from the

opposite direction, which was driving on the inner lane and in the process of overtaking the truck. At this stage the driver of this motor vehicle flashed his lights. The Golf then cut in in front of the Ford, so closely that Alberts thought that the two motor vehicles had made contact. Alberts saw the brake lights of the Ford come on. The Ford violently swung to the left and began to spin. As it was spinning, the Toyota minibus collided with it. Both motor vehicles swung around and collided a second time. Alberts, on advice from a passenger, realised that because of the wet surface and the laden trailer pulled by his minibus he could not bring the minibus to a standstill before reaching the two motor vehicles in front of him. He steered to his incorrect side of the road in order to avoid them. By then the truck and the motor vehicle overtaking it had gone past. The Toyota minibus suddenly shot across the road in Alberts' s path of travel and collided with his minibus. The two minibuses came to a standstill on their incorrect side of the road. The Ford which was on the left of the road caught fire. Perumal and, as already indicated, the driver of the Toyota minibus died as a result of these events.

[11] In his evidence Alberts said that Perumal "***oorgereageer het"*** and that his reaction was a "***swaar reaksie***". However, save for mentioning the coming on of the brake lights and the violent swerve to the left, Alberts did not proffer any factual basis for the conclusion that Perumal overreacted. The following is all that the Court **a quo** said in finding Perumal to have been negligent:

> "***Ek is van oordeel dat die noodwendige afleiding is dat die bestuurder van die Ford ook nalatig was. Hy het klaarblyklik oorgereageer toe die Volkswagen Golf voor hom ingeswaai het. Hy moes opgemerk het dat die voertuig van voor sy ligte flikker. Dit was 'n aanduiding dat daar 'n gevaartoestand aan sy kant van die pad bestaan. Dit moes die bestuurder van die Ford op sy hoede geplaas het. Selfs al het hy nie so 'n waarskuwing gehad nie, het hy klaarblyklik nie sy voertuig***

behoorlik onder beheer gehou nie. 'n Redelike man sou onder dieselfde omstandighede nie beheer oor sy voertuig verloor het nie."

[12] Before one can adjudge Perumal to have been negligent, one should be satisfied that his conduct fell short of what would be expected of a reasonable driver in similar circumstances. Save for the sweeping statement by Alberts that Perumal overreacted, there is no evidence which suggests what action Perumal could have taken to avoid colliding with the Golf and, at the same time, to keep his motor vehicle under control and avoid colliding with motor vehicles following him. It would appear that the Ford started spinning as a result of the violent swerve to the left and the application of brakes. It was suggested by Mr *Geach* who, together with Mr *Jacobs*, appeared for Nkosi and Lekhuleni that had Perumal been keeping a proper lookout, he would have seen the Golf in his rearview mirror. The suggestion was that on seeing it he would have realised the danger of an imminent collision between it and the motor vehicle that was overtaking the truck or the possibility of the Golf cutting in dangerously in front of the Ford. On realising this he would have been able to move timeously to the extreme left and drive on the shoulder of the road which is demarcated with a yellow line. Mr *Geach* further contended that the volume of vehicular traffic travelling from West to East made it necessary for a driver to look in the rearview mirror constantly. Put differently, the respondents'case is that a reasonable driver would have foreseen the possibility of negligent drivers overtaking in the manner in which the Golf did and would, therefore, have been on the lookout for them so as to be able to timeously take avoiding action.

[13] It is certainly not unknown for drivers to negligently or recklessly attempt to overtake a string of vehicles in the manner in which the driver of the Golf did, thus exposing the drivers and occupants of other vehicles to grave danger. Whether the mere existence of that possibility sufficed to cast upon Perumal a duty or obligation to monitor the behaviour of following traffic more frequently

than might ordinarily be called for is debatable. However, even if it be assumed that it did, in the circumstances which prevailed in this case there is no evidence to show that he failed to do so. He was obviously not required to drive with his eyes glued to his rearview mirror. Appropriate intermittent surveillance of following traffic is the most that could be expected of him. There is nothing to show that he did not from time to time look in his rearview mirror. Nor is there any evidence to show that at the particular moments when he might have done so he would or should have seen any untoward behaviour by the driver of the Golf. Any failure to see the Golf cannot, in the circumstances, be attributed to negligence on his part.

[14] It was argued that the Golf's lights as it approached from behind should have alerted Perumal to the fact that it was overtaking the vehicles behind him. Even if it be assumed that the driver of the Golf did have his lights switched on, it was not shown that that would have alerted a reasonable driver to danger. There were other vehicles immediately behind Perumal and their lights were also switched on. There were vehicles ahead of him and approaching him and their lights too were switched on. It was not yet dark and there is no evidence to show that in such circumstances the lights of the Golf would have been so conspicuous as to register in the mind of a reasonable driver in Perumal's position.

[15] The next question is whether Perumal can be said to have been negligent in dealing with the situation that arose when the Golf cut in in front of him. From Alberts's evidence, it is clear that the Golf was dangerously close to the Ford, hence his belief that the two motor vehicles had made contact. That the Golf must have cut in when very close to the Ford is further confirmed by Alberts's suggestion that had it not cut in when it did, it might have collided with the oncoming motor vehicle. It seems to me, therefore, that Perumal was not left with much room for the luxury of avoiding the hard application of brakes when

driving on a wet surface. The option of not applying his brakes exposed him to the **real** danger of a collision with the Golf and, had that happened, one is not in a position to exclude the possibility of a multiple collision with equally, or more, disastrous consequences. Equally, one cannot discount the real possibility that the swerve to the left must have been necessitated by the closeness of the Golf. I am thus not convinced that a sufficient factual basis exists for concluding that Perumal "***oorgereageer het***" and that he failed to avoid the collision when, with the exercise of reasonable care and the necessary skill, he could and should have done so (see (a)(ii) of the test for negligence enunciated by Holmes JA in **Kruger v Coetzee** 1966(2) SA 428 (A) at 430E. This part of the test implicitly entails an ability to take the reasonable steps mentioned). It should be borne in mind that having to respond to a sudden emergency may impact negatively on such ability. In **SAR v Symington** 1935 AD 37 at 45 Wessels CJ said:

> "One man may react very quickly to what he sees and takes in, whilst another man may be slower. We must consider what an ordinary reasonable man would have done. ***Culpa*** is not to be imputed to a man merely because another person would have realized more promptly and acted more quickly. Where many have to make up their minds how to act in a second or in a fraction of a second, one may think this course the better whilst another may prefer that. It is undoubtedly the duty of every person to avoid an accident, but if he acts reasonably, even if by a justifiable error of judgment he does not choose the very best course to avoid the accident as events afterwards show, then he is not on that account to be held liable for ***culpa***."

[16] The finding of Spoelstra J (see the quotation from his judgment in paragraph [11] above) that Perumal should have realised that the driver of the oncoming motor vehicle which flashed its lights was warning him of the danger

on his side of the road, that this should have put him on guard and that, therefore, he should not have overreacted is, with respect, unjustified. Why must a driver assume that the driver of an oncoming motor vehicle which has flashing lights is warning him/her of danger on his/her side? As was submitted by Mr *Burman* who, together with Mr *Wessels*, appeared for the appellants, there are any number of possibilities why the driver of the oncoming motor vehicle could have been flashing his lights. For example:

(i) he could have been giving a warning about danger that he had just left behind;

(ii) as often happens on our roads, it could have been a warning about the presence of traffic police behind him; and

(iii) it could have been an indication to the driver of a motor vehicle behind the Ford that its lights were on bright and blinding the driver of the oncoming motor vehicle.

[17] There is also no factual basis for the conclusions contained in the last two sentences of the quotation from the Court **a quo's** judgment. In **Caswell v Powell Duffryn Associated Collieries Ltd** 1940 AC 152 at 169-70 Lord Wright said:

> "My Lords, the precise manner in which the accident occurred cannot be ascertained as the unfortunate young man was alone when he was killed. The Court therefore is left to inference or circumstantial evidence. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from

which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

In the circumstances, I am of the view that Perumal was not proved to have been negligent and that, therefore, the Court **a quo** ought not to have found Santam liable to the respondents.

[18] I need to say a few words to clarify the proposed costs order. The gravamen of the Fund's resistance to the two claims was the law point (the **ultra vires** point) which was contained in two special pleas with the same content. The only factual dimension in the special pleas was the averment that the Golf did not make physical contact with any of the motor vehicles involved in the collision. No pleas-over were filed on behalf of the Fund. The negligence of the driver of the Golf was not put in issue. That, in my view, meant that the only factual dispute between the Fund and the respondents was the question of physical contact. But for this, the dispute between these parties would have been determined without the hearing of any evidence. It was only in November 1996 (apparently on the 19th, the date the trial commenced) that the respondents, in response to a request by the Fund for clarification whether the respondents still maintained that the Golf made physical contact with the other motor vehicles, admitted for the first time that there was no physical contact whatsoever. That, therefore, meant that the dispute between these parties did not require evidence. Evidence was thus necessary solely for purposes of establishing Santam's liability.

[19] I must add that on 29 April 1997, some three months after the handing down of the Court **a quo's** judgment, the Fund was substituted as the second appellant in place of Santam. The practical importance of the apparent fiction in the Fund's appearance as two parties was in the fact that the bases of the statutory liability of the Fund and Santam (whose obligations the Fund was taking over) were different. From the notice of substitution it would appear that

the authority of Santam to act as an appointed agent had been terminated, and such termination had been promulgated, some eight months previously. I do not find it necessary to consider the technical question whether, from the date of termination of its authority to the date of its substitution by the Fund, Santam continued being a party to these proceedings. I am of the view that an appropriate costs order is the one appearing below.

[20] In determining what an appropriate order would be as to the costs of appeal regard must be had to the following considerations:

a) The Fund's dual role in the appeal;

b) The fact that the Fund in both its capacities was represented by the same attorney and counsel; the respondents were likewise jointly represented by one set of attorneys and counsel;

c) The Fund will have been unsuccessful as the first appellant but successful as the second appellant;

d) In the result the Fund remains liable to the respondents for the damages sustained by them;

e) The main issue on appeal related to the question whether regulation 3(1)(a)(v) was **ultra vires**, on which issue the respondents succeeded.

[21] Having regard to the substantial measure of success enjoyed by the respondents it would be just and equitable to require the first appellant to pay their costs. The involvement of the **ultra vires** point in the matter justified the engagement of two counsel and the costs of two counsel will be allowed.

[22] As far as the trial costs are concerned, it has also to be borne in mind that the circumstances of the collisions and the case were such that the respondents' decision to join the Fund and Santam as co-defendants was reasonable and not

ill-advised. Had the Fund acknowledged its liability at the outset, the respondents would not have found it necessary to join Santam. It seems appropriate therefore that the Fund should reimburse the respondents for any trial costs they may be ordered to pay Santam. Cf **Parity Insurance Co Ltd v Van den Bergh** 1966 (4) SA 463 (A) at 480H - 482B; **Ngubetole v Administrator, Cape and Another** 1975 (3) SA 1(A) at 14H - 15E.

[23] The following order is made:

1. The first appellant's appeal is dismissed.

2. The second appellant's appeal succeeds.

3. The order of the court **a quo** is altered to read:

   "a) Die eerste verweerder is aanspreeklik vir die eisers se skade veroorsaak deur die nalatigheid van die bestuurder van die ongeïdentifiseerde Volkswagen Golf voertuig, waarvoor die Multilaterale Motorvoertuigongelukkefonds aanspreeklik was, ondanks daar geen fisiese kontak soos bedoel by regulasie 3(1)(a)(v) van die toepaslike regulasies was nie;

   b) Daar is geen aanspreeklikheid aan die kant van die tweede verweerder vir die eisers se skade nie;

   c) Die eerste verweerder betaal die koste van die eisers verbonde aan dié deel van die verhoor, behalwe vir enige koste aangegaan in verband met of as gevolg van die lei van getuienis;

   d) Die eisers betaal die koste van die tweede verweerder (Santam) gesamentlik en afsonderlik tot op die datum waarop Santam as tweede verweerder deur die Multilaterale Motorvoertuigongelukkefonds vervang is;

e) Die eerste verweerder betaal aan die eisers ‘n bedrag gelykstaande aan die bedrag wat aan die tweede verweerder (Santam) deur eisers betaalbaar word ingevolge bevel d).”

4. The first appellant is ordered to pay the respondents’ costs of appeal such costs to include the costs of two counsel.

_____

M R MADLANGA JA

SMALBERGER JA)
MARAIS JA)
OLIVIER JA)CONCUR
MELUNSKY AJA)