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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 418/06

In the matter between

STEPHANUS WESSELS **APPELLANT**

and

BENJAMIN CHRISTOFFEL PRETORIUS **RESPONDENT**

Coram: **SCOTT, HEHER and VAN HEERDEN JJA**

Heard: **28 AUGUST 2007**

Delivered: **20 SEPTEMBER 2007**

Summary: **Negligence – father permitting sixteen year old son to drive motor vehicle without supervision – reasonably foreseeable that peer pressure would lead to son overstepping bounds of reasonable behaviour – father's conduct negligent – resultant injury to passenger foreseeable – father personally liable.**

Neutral citation: This judgment may be referred to as *Wessels v Pretorius* [2007] SCA 108 (RSA).

JUDGMENT

HEHER JA

HEHER JA:

[1] On Saturday, 2 March 2002 Benjamin Pretorius was a matric student just short of his seventeenth birthday. On the afternoon of that day he was one of four teenage passengers on the open back of a truck (a 'bakkie') belonging to the appellant and driven by his son Albert (then aged 16 years and 10 months), an unlicensed driver. The vehicle had just left the appellant's farm and entered the Mareetsane road in the Lichtenburg area. It was travelling at about forty kilometres per hour when Albert performed a manoeuvre known as a 'handbrake turn'. That apparently requires a sudden application of the handbrake with a simultaneous drag on the steering wheel. If skillfully executed on a loose surface – the Mareetsane road was sand or gravel – the vehicle will slew to a stop in its original direction of travel after having turned a full circle. Such a stunt excites the youth, no doubt because of the inherent hazard that it involves. The trial judge (Landman J) seems to have accepted that immediately before the incident Albert warned Benjamin and the other passengers of his intentions. Benjamin, unfortunately, either did not hear or did not respond appropriately because he was

not holding on to the roll bars (or any other part of the bakkie) at the critical moment. He was thrown off and suffered grievous injuries. By the time of the appeal all the aforegoing facts were common cause.

[2] Stephanus Wessels (the appellant), the father of Benjamin, caused two actions to be instituted in the Bophuthatswana Provincial Division of the High Court. In the first, Benjamin, duly assisted by his father, sued the appellant in his representative capacity for damages caused by Albert in the course of his alleged negligent driving of the vehicle. In the second, Benjamin, again duly assisted, claimed damages from the appellant in his personal capacity, seeking to hold him liable on various grounds. The only ground of importance for the purposes of the appeal was that the appellant negligently allowed Albert to drive the vehicle without supervision, and when it was reasonably foreseeable that he would drive without reasonable care. All these allegations were denied by the appellant in his pleadings.

[3] The actions were consolidated. At the trial an order was made for a separation of the issues with the quantum of damages to stand over until questions of negligence and liability had been decided.

[4] After hearing evidence for all parties – but not the version of Benjamin who was unable to testify by reason of his injuries – Landman J found that Albert had been negligent and that his negligence had been a contributing factor to the damages suffered by Benjamin. He apportioned fault between Albert and Benjamin at 65 : 35. He further held that the appellant exercised a power and duty

to oversee the conduct of Albert and his friends on the day in question, that he allowed and perhaps encouraged Albert to use the vehicle when it was reasonably foreseeable that Albert would not exercise proper care in driving it and that injury to the passengers was a foreseeable consequence. He ordered the appellant to pay *pro tanto* to the apportionment the costs of the proceedings including the costs of two counsel.

[5] The learned judge granted the appellant leave to appeal against the orders made against him in his personal capacity. There was no cross-appeal.

[6] Before proceeding to a consideration of the merits of the appeal it is necessary to set out in greater detail the factual findings made by Landman J:

‘[5] Albert woon by sy ouers en suster op die plaas Wienan in die distrik van Mareetsane, Noordwes Provinsie. Hy het sy maats Gerhardt, Wouter en Bennie uitgenooi om die naweek op die plaas vanaf 1 tot 2 Maart 2002 deur te bring. Die seuns het Vrydagmiddag by die Wesselse se plaas aangekom. Bennie het ‘n bottel brandewyn saamgebring.

[6] Die aand wou die seuns vir Bernice Bloem gaan kuier omdat Magriet ook daar oornag het. Ongeveer 19:00, met mnr Wessels se toestemming, het Albert en die seuns met sy pa se bakkie tot by die Bloems se plaas gery. Die Bloems se plaas is sowat 15 km ver van Wienan. Albert was te jonk om’n bestuurderlisensie te bekom. Twee seuns het agterop die bakkie gery. Toe die seuns daar aangekom het, het mnr Wessels hulle deur middel van radio gekontak om seker te maak dat hulle veilig aangekom het. Die seuns het by die meisies tot ongeveer 21:00 gekuier en hulle is toe weer terug na die Wesselse se plaas saam met Marnus, wie hulle by die Bloems gekry het.

[7] Albert het huis toe bestuur. Die volgende oggend, Saterdag 2 Maart, het die seuns aan tafel vir mev Wessels genoem dat hulle springhase op ‘n ander maat, Marnus Bothma, se

plaas wil gaan jag. Mev Wessels het hulle goed laat verstaan dat mnr Wessels nie Albert sal toelaat om sy bakkie te gebruik nie. Albert het slegs eenkeer in die verlede sy pa se bakkie sonder toestemming geneem en raas gekry.

[8] Albert het Saterdagoggend in Lichtenburg rugby gaan oefen. Die ander seuns is opgelaai en het die oggend op Bothma se plaas deurgebring. Mnr en mev Wessels het vertrek om'n huweliksplegtigheid op Ottosdal te gaan bywoon. Albert en sy suster het tuisgebly. Albert sê dat hy het sonder toestemming die bakkie se sleutels van die rak geneem en die seuns by Marnus gaan haal het.

[9] Op pad terug het hulle by 'n winkel stilgehou en 'n pak van ses biere gekoop. By die huis gekom, het hulle telefonies met die meisies kontak gemaak. Hulle is daarheen met mnr Wessels se bakkie. Albert het bestuur. Bernice het die bakkie na die Wesselse se plaas terugbestuur. Die meisies het 'n bottel rosé wyn saamgebring.

[10] Die seuns het geswem en daarna vleis gebraai. Toe Albert 'n bier drink, het sy suster gedreig om haar ouers daarvan te vertel. Wouter het twee biere gedrink. Bennie en Gerhardt het brandewyn gedrink. Die meisies het wyn, met Schweppes gemeng, gedrink. Niemand was besope nie. Volgens die getuies was hulle daaraan gewoond om te drink. Bennie se toestand is as "vrolik" beskryf.

[11] Die meisies moes terugkeer na die Bloems se plaas. Albert het bestuur. Bennie en Gerhardt het vir die passasier se sitplek binne die kajuit gewedywer. Die eer het Gerhardt te beurt geval. Magriet het agter op die bakkie aan die agterkant van die passasiers se plek gestaan en aan die rolstaaf vasgehou. Wouter het agter haar gestaan en met sy arms om haar ook vas gehou.

[12] Bernice het langs Magriet op die regterkant van die bakkie gestaan dws agter Albert, die bestuurder. Bennie het agter Bernice gestaan en ook aan die rolstaaf vasgehou. By die T-aansluiting van die plaaspad en die openbare pad ('n grondpad) het Albert stilgehou en Bennie beveel om vas te hou.

[13] Albert het regs uit die plaaspad gedraai en ongeveer 130 meter verder is die “handbrake turn”, met tragiese gevolge, uitgevoer.’

[7] The learned judge went on to consider the various accounts concerning the circumstances under which Benjamin was flung off the bakkie. Having assessed the evidence he continued:

‘[23] Bennie het nie getuig nie. Ek bevind dat hy genoeg alkohol ingeneem het in so ‘n mate dat hy “vrolik” voorgekom het. Dit was vir Albert nodig om by die T-aansluiting stil te hou om hom [te] maan om te sit en vas te hou. Bennie moes daarvan bewus gewees het dat passasiers agterop ‘n bakkie aan meer gevaar blootgestel word as passasiers wat binne die kajuit sit. Hy wou voor sit. Hy het geweet dat Albert nie ‘n voertuig op ‘n openbare pad mag bestuur nie.

[24] Albert het die bakkie bestuur. Hy beskik nie oor ‘n bestuurderslisensie nie omdat hy te jonk is om een te bekom. Hy het betreklik min ondervinding om op openbare paaie te bestuur. Hy het meer gedrink as wat hy bereid was om te erken. Tog was hy in ‘n nugterder toestand as Bennie. Hy het immers Bennie se optrede dopgehou en die bakkie tot stilstand gebring om hom aan te sê om te sit en vas te hou. Die bespreking onder die seuns (Bennie inkluis) ten opsigte van die uitvoering van ’n “handbrake turn” sou sekerlik groepsdruk op hom uitgeoefen het.

[25] ’n “Handbrake turn” is ’n gevaarlike beweging. Dog een wat wel nut het in sekere omstandighede. Maar dit is nie ‘n beweging wat die gewone alledaagse bestuurder moet uitvoer nie. Die uitvoering daarvan met ‘n klomp passasiers op ‘n oop bakkie was ‘n onbesonne daad. Albert het in ieder geval te min waarskuwing van sy voornemens gegee. Hy het ook nie seker gemaak dat sy passasiers sy bevele gehoorsaam het voordat hy die beweging uitgevoer het nie. Alles in ag genome skat ek Bennie se nalatigheid op 35% en die van Albert op 65%.’

[8] The court *a quo* analysed the case against the appellant and concluded that he had granted permission to Albert to drive the vehicle on the day in question. The correctness of this finding was debated at length before us on appeal. It was common cause that the appellant had submitted a claim to the insurer of the vehicle under the public liability section of the policy in his favour. For the purpose of completing the claim form the insurer's representative, one Rossouw, had visited the appellant at his farm. There he filled in the required details in accordance with information imparted to him by the appellant. The appellant signed the completed form. In addition, at the request of Rossouw, he signed those divisions of the form which contained answers ostensibly furnished by him relating to the driver of the vehicle and the description of the accident respectively. (It was not in dispute that that description was false due to no fault of the appellant but because the five young people in and on the vehicle, excluding Benjamin, had concocted a version designed to protect Albert which they only recanted shortly before the trial started.) According to the details on the form the name of the driver was Albertus Johannes Wessels, scholar, born on 7 May 1985. This, the appellant admitted, was information that Rossouw derived from him and was correct. So also the replies in relation to the driver's telephone number, purpose for use of the vehicle ('privaat'), whether the driver was in his employ ('nee – seun'), previous motor vehicle offences ('geen'), physical infirmities ('geen') and details of previous accidents ('geen').

[9] However, between the questions about the use and the employment the

following question appeared on the form: ‘Het hy/sy met u toestemming bestuur?’ against which Rossouw wrote ‘Ja’. He testified that he did so in accordance with an answer furnished by the appellant to a direct question put to him in conformity with that on the form. Cross-examination by counsel for the appellant did not succeed in changing or materially weakening his testimony.

[10] The appellant, by contrast, testified that Albert not only drove the vehicle on the Saturday without his permission but also in despite of a standing instruction that he was not to use the vehicle without the appellant’s permission, and in the face of an express prohibition against such use communicated by him to Albert on the Saturday morning. Therefore, the appellant surmised, he must have misunderstood Rossouw’s question ‘Did the driver have your permission to drive the vehicle?’ as ‘Did Albert in fact drive the vehicle?’ or a question to that effect.

[11] But, as the court found, such a misunderstanding was incomprehensible since, as the appellant well knew, the earlier question and answer had unequivocally identified Albert as the driver and his reply left no sensible room for a repetition shortly thereafter. The finding that the appellant’s explanation was unsatisfactory cannot be faulted. But counsel on appeal attempted to persuade us that the totality of the evidence given by the appellant, his wife, and Albert about the standing instruction, the evidence of the appellant and Albert concerning the former’s express ban and that given by Albert and his mother (and supported by Albert’s friend Philip de Vos) concerning the express prohibition laid down by her, jointly or severally outweighed or at least balanced the existence of the

'admission' in the claim form. Therefore, counsel submitted, the overall probabilities negated both the likelihood and the accuracy of such an admission. This proposition requires a reconsideration of the evidence and probabilities.

[12] I consider first the value of the evidence of the appellant and his wife relating to the imposition of their respective express prohibitions. It seems to me that the objective probabilities against both are strong.

1. No express prohibition was pleaded. This silence is significant in context. The plaintiff had alleged in his particulars of claim that before and at the time of the accident the defendant had the duty and right to control and limit the manner in which Albert drove the vehicle in various ways, inter alia

'8.4.1 Hy het die voertuig tot Albert Wessels se beskikking gestel terwyl hy bewus was van die feit dat Albert Wessels nie oor 'n geldige rybewys beskik het nie, en passasiers op gemelde voertuig sou vervoer;

. . . .

8.4.3 Verweerder in bovermelde omstandighede Albert Wessels se beheer en toegang tot die voertuig moes beperk deur hom te verbied om die voertuig te bestuur en sy toegang tot die voertuigsleutels te ontneem of te beperk.'

The appellant's plea to these averments was as follows:

'6.3 Behalwe om te erken dat Verweerder die reg gehad het om Albert die gebruik van die voertuig te verbied, word iedere en elk van die bewerings in paragraaf 8.4 nadruklik ontken en word Eiser tot bewys van sodanige bewerings geplaas.'

2. In cross-examination of Rossouw counsel put it to him that

'indien dit nodig is sal hy sê dat sy begrip was nooit . . dat sy seun toestemming gehad het om te bestuur nie. Hy het geweet sy seun het bestuur maar hy sê hy was nie eers daardie dag daar op

die plaas gewees nie. Hy het eers daarna uitgevind van die voorval. So hy het dit nooit in sy kop verstaan dat die seun toestemming het nie.'

This suggests that counsel had not been apprised of any express prohibition by the time he faced up to Rossouw.

3. The appellant did not mention to Rossouw during the completion of the claim form that he had forbidden Albert to drive the vehicle or that he required consent which had not been given.

4. The evidence of the appellant and his wife was that Albert was an honest, reliable and obedient son. There is no reason to doubt their veracity in this regard. It seems highly unlikely that he would deliberately have flouted express instructions which either or both parents had only hours before impressed on him. While one may readily understand the bravado which led him to perform the unfortunate stunt under the eyes of his peers, cynical disregard of respected authority is much less explicable.

5. The appellant allowed Bernice Bloem to drive the vehicle from her home to the appellant's farm, a distance of about fifteen kilometers, over public roads, although it must have been obvious to him that she did not possess a licence (she was under age). He meanwhile travelled on the back of the truck with the boys. In this instance also, so egregious a flouting of his parents' authority is inconsistent with his known character.

6. Albert could never seriously have believed that his use of the vehicle would not be revealed to his parents as his teenage sister was left behind at home and was

well aware of his comings and goings. (As may be seen from para [6] above she had that same afternoon threatened to report Albert for drinking beer.) According to his evidence and that of his mother he had expressly been ordered to remain at home in order to look after his sister in the absence of his parents and to study for examinations. If that was the case his dereliction of duty would have invited prompt exposure.

7. The appellant gave various reasons for his express prohibition. Neither singly nor cumulatively are they persuasive given that he had allowed Albert to drive in the dark carrying passengers over the same roads on the preceding evening and that his only means of 'control' had been contact over a mobile radio. According to the uncritical testimony of his mother Albert had long been accustomed to driving on the roads in the area.

8. If there existed a firm, clear and immutable standing rule governing the use of the vehicle then an express prohibition served no purpose, given that neither parent had reason to think Albert would disobey the rule. The evidence of his mother was

'En so is dit aan hom seker honderd maal gesê die middag voor ons gery het, julle bly in die huis. Jy gaan nêrens.'

That too does not accord with long and materially unbroken observance of a standing instruction which neither parent believed he would breach again.

[13] The probabilities to which I have referred point towards consent. They strengthen the likelihood that the appellant's reply to Rossouw was correctly

recorded. Seen as a whole the evidence provided a strong case in favour of actual consent. Albert, as a witness, was less than convincing. He showed a marked propensity to fabricate where that suited his defence on the aspect of the circumstances which gave rise to the incident and a willingness to cover up afterwards. All of this led the trial court to be understandably disinclined to accept his say-so at face value. Mrs Wessels possessed a very material interest in the outcome of the case and, for the reasons already traversed, her account of the instructions given to her son must be taken with more than a pinch of salt. The trial judge did not attach much, if any, weight to the evidence of Philip de Vos and counsel did not submit that we should do so. The appellant's credibility, as I have pointed out, is open to serious question.

[14] Weighing all these considerations I am satisfied that the respondent succeeded in establishing on a balance of probability that Albert in fact possessed the appellant's permission to use the vehicle on the afternoon of 2 March 2002. Whether that consent was granted expressly one does not know; it was certainly the subject of an unspoken understanding between father and son which was sufficient to overcome whatever limitation generally prevailed on such use.

[15] That of course is not an end of the matter. The respondent had to prove that the appellant was negligent in allowing Albert to drive the vehicle and such negligence was causally connected to the injuries suffered by Benjamin (see, eg, *De Beer v Sergeant* 1976 (1) SA 246 (T) at 251D-G; *Godfrey and Others v Campbell* 1997 (1) SA 570 (C) at 577E-580I). Counsel for the appellant argued

that both parents knew Albert to be a competent driver and that the conduct which gave rise to the claim was not reasonably foreseeable by them in the circumstances. But the conclusion does not follow from the premise. The performing of the stunt did not detract from Albert's skill as a driver. Nor did it *per se* matter that he was, to the knowledge of the appellant, not in possession of a licence to drive on public roads. The appellant's negligence lay rather in giving unrestricted access to the vehicle to a boy who lacked both maturity and judgment in circumstances where it should have been obvious that peer pressure might adversely influence his decisions in driving that vehicle. The conduct of the appellant was, it seems to me, no different in principle from the case of a person who has control of a dangerous object (eg a firearm, a motor vehicle or a bottle of poison) and gives such control into the hands of another whom he ought to know is ill-equipped, by reason of physical or mental infirmity, lack of insight or self-control, to exercise proper or sufficient supervision over that object to prevent harm being caused to himself or others. Such abandonment of control is culpable and the person who allows it is liable for damage which results (within the confines of legal remoteness).

[16] In the present instance the appellant admitted in cross-examination that he was aware that teenagers are not always obedient, sometimes behave badly and take chances. Although he did not believe that his son would behave irresponsibly, he conceded that he would not go so far as to say he thought that would never happen. It is notorious that when groups of teenage boys (with or without girls)

come together in circumstances where there is opportunity to show off or assert themselves, the potential for overstepping the bounds of reasonable behaviour is present. Misuse of a motor vehicle by speeding or acting the daredevil is an easily foreseeable hazard in such an environment. A prudent father would have taken the steps reasonably necessary to prevent his son from falling into either the temptation or the danger, either by withholding consent or by securing the keys. The appellant did neither.

[17] I conclude therefore that the respondent succeeded in proving that the appellant negligently made his vehicle available to his son in circumstances in which he ought reasonably to have foreseen that the boy might use it so as to cause harm to himself or others. The damage which resulted was causally connected to his negligence. That was sufficient to impose personal liability on the appellant.

[18] The issue in the appeal was a matter of the most serious concern for the future welfare of the victim. The employment of senior counsel was prudent in the circumstances.

[19] The appeal is dismissed with costs including the costs of two counsel.

J A HEHER

JUDGE OF APPEAL

SCOTT JA **)Concur**
VAN HEERDEN JA **)**