THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 096/06

In the matter between:

ROAD ACCIDENT FUND Appellant

and

JASON KING GROBLER Respondent

Coram: *Farlam JA, Hancke et Musi AJJA*

Date of hearing: **23 March 2007**

Date of delivery: **31 May 2007**

Summary: Collision between a motor vehicle and motor cyclist – to avoid a collision, the cyclist swerved to his incorrect lane of travel – if the motor cyclist committed an error of judgment, the question is whether a reasonable man in the circumstances could have done the same – it is wrong to examine meticulously the options taken by the cyclist in the light of after-acquired knowledge – no contributory negligence proved on the part of the motor cyclist – order in para [15].

Neutral citation: This judgment may be referred to as *RAF v Grobler* [2007] SCA 78 (RSA).

JUDGMENT

HANCKE AJA

HANCKE AJA:

[1] I have had the advantage of reading the judgment of my colleague Musi AJA. I have come to the conclusion that the appeal must fail for the reasons which follow.

[2] The facts I consider relevant for the determination of the appeal are either set out in my colleague's judgment, or are referred to hereinafter.

[3] It is common cause between the parties that immediately prior to the collision, the insured driver had executed an overtaking manoeuvre, overtaking a Isuzu bakkie which was stationary in his lane and thereby entering his incorrect lane of travel, being the lane of travel upon which the respondent was travelling. The appellant having conceded the negligence of the insured driver, it bore the onus to prove contributory negligence on the part of the respondent. Of importance was the distance between the two vehicles at the point when the insured vehicle failed to return to its correct side of the road, presenting the respondent with a sudden emergency. On the evidence, the distance between the two vehicles at that point was between 50 metres, as estimated by the eyewitness Basson, and a maximum of 100 metres, being the reconstruction of the expert Professor Lemmer.

[4] It is apparent from the evidence that the respondent must have had an unrestricted view down the road ahead of him of more than 1,5 kilometres as he crested the rise, and that in this vista he would have been able to see both the stationary Isuzu in the oncoming lane, and the insured vehicle. There was however no evidence as to the distance between the crest and the stationary Isuzu, and, more importantly, as to where the insured vehicle would have been at that point. It is important to note that nowhere in the evidence was a distance between the Isuzu and the crest or the dip canvassed.

[5] As already mentioned the distance between the insured vehicle and the respondent's motorcycle at the point where the former failed to return to his correct lane was, at best for the appellant, somewhere between 50 metres and a maximum of 100 metres. That was accordingly the distance between the vehicles when the

respondent could first reasonably have realised that the oncoming vehicle was not returning to its correct lane.

[6] In this regard, the Court *a quo* stated the following:

'Only when the insured driver failed to take the expected action, did the emergency arise. There is no evidence indicating at what distance this motorcyclist should have realised that the insured driver was acting oddly. Likewise, there is no evidence indicating how much earlier than its abortive swerve to the left, the insured driver could have returned to its correct side of the road.'

[7] The respondent was obliged to take evasive action. One possibility was to swerve away from the oncoming vehicle to the left. According to the evidence the terrain to the left was hazardous. There was loose gravel, a culvert, trees and a fence. According to Professor Lemmer's evidence, even if the vehicles were 100 metres apart at that point, going off onto the gravel to the respondent's left would have been 'quite a dangerous exercise'. It is also important to note that approximately 80 metres in front of the respondent, there was a stationary Golf with five people (including Basson) standing next to it on the gravel to his left. On the other side of the road there was the stationary Isuzu and, further to the right, Basson's vehicle parked on the opposite gravel verge to the Golf. According to Professor Lemmer's calculations, on the assumption that the distance between the two vehicles was 100 metres at that stage, then they probably had two seconds to impact. If the distance between the two vehicles at the time was closer to the 50 metres as estimated by Basson, the time to impact could have been closer to one second.[1] The evidence of Basson in this regard is not contradicted and his impression was that it happened 'in the wink of an eye'.

[8] A driver of a motor vehicle who is faced with an oncoming vehicle which has swerved and entered its incorrect lane of travel, and an impending collision must, as a general rule, avoid swerving to its incorrect lane as his primary course of action. *Kleinhans v African Guarantee and Indemnity Company Ltd* 1959 (2) SA 619 (E) at 624F; *President Insurance Company Ltd v Tshabalala and Another* 1981 (1) SA 1016 (A) at 1018F-H and 1020C; *Burger v Santam Versekeringsmaatskappy Bpk* 1981 (2)

[1]Allowance must be made for reaction time. Cf *Pretorius v African Gate and Fence Works Ltd* 1939 AD 567 at 575; *R v Goodall* 1969 (3) SA 541 (RAD) at 543A-B. In his evidence Professor Lemmer allowed for reaction time of about one second.

SA 703 (A) at 708A. It is important that each case be judged on its own merits. The cases referred to must be seen in the context of their own facts. In all the cases mentioned the motorists who veered onto the incorrect side of the road had more opportunity and/or options than the respondent had.

[9] It is clear from the evidence that the respondent was plunged by the insured driver's negligence into a situation of sudden emergency, that he had no more than a second within which to escape that emergency, and that he effectively was given a choice between facing the danger, or veering away from it and hoping that it would not follow him. He did the latter. In *Rodrigues v SA Mutual & General Insurance Company Ltd* 1981 (2) SA 274 (A) Van Heerden AJA stated the following on 280H-281A:

'He was confronted by a sudden emergency as a result of the unexpected presence of a kneeling person in the street. He judged that by swerving as he did he would be allowing a sufficient berth to avoid colliding with the appellant. He also had to consider his own safety as well as that of the passengers in the back of the van, which could have been endangered by a violent swerve. In my view the circumstances were such that his failure – if indeed it was one – to swerve more to his left did not amount to negligence but at the most to an error of judgment.'[2]

[10] If he committed an error of judgment, the question is whether a reasonable man in the circumstances could have done the same. In *Ntsala and Others v Mutual & Federal Insurance Company Ltd* 1996 (2) SA 184 (T) Els J stated the following on 192F-H:

'Where a driver of a vehicle suddenly finds himself in a situation of imminent danger, not of his own doing, and reacts thereto and possibly takes the wrong option, it cannot be said that he is negligent unless it can be shown that no reasonable man would so have acted. It must be remembered that with a sudden confrontation of danger a driver only has a split second or a second to consider the pros and cons before he acts and surely cannot be blamed for exercising the option which resulted in a collision.'[3]

[11] The question is whether the respondent acted reasonably in the circumstances. In *SAR and H v Symington* 1935 AD 37 Wessels CJ stated (at 45):

'Where men have to make up their minds how to act in a second or in a fraction of a second, one may think this cause 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

[2] See also *Von Wielligh v Protea Versekeringsmaatskappy Bpk* 1985 (4) SA 293 (C) at 301D-F.
[3] See also *Rabe v Multilaterale Motorvoertuigongelukkefonds* [1997] 4 All SA 407 (T).

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*.'[4]

[12] When a person is confronted with a sudden emergency not of his own doing, it is, in my view, wrong to examine meticulously the options taken by him to avoid the accident, in the light of after-acquired knowledge, and to hold that because he took the wrong option, he was negligent.[5] The test is whether the conduct of the respondent fell short of what a reasonable person would have done in the same circumstances.

[13] In finding no contributory negligence on the part of the plaintiff, the Court *a quo* stated the following:

'There is no basis upon which it cannot be found, that until a very late stage the second plaintiff had no reason to anticipate that the insured driver would not return to his lane. After all, the insured driver was executing the more dangerous manoeuvre of passing the LDV on its right, and on the wrong side of the road, and one would have expected him to be very alert as to when he was to return to the correct lane.

It is so, that if the motorcyclist carried straight on, then the collision would not have occurred. On the other hand, if the insured driver did not also swerve to the east and tried to travel in its correct lane, the motorcyclist would have avoided the collision with its right hand swerve.

It is my view, that a sufficient basis has not been established by the defendant on which the court can find that the conduct of the second plaintiff fell short of what a reasonable motorcyclist would have done.'

[14] I agree and am accordingly of the view that the Court *a quo* was correct in finding that no contributory negligence was proved on the part of the plaintiff.

[15] I would therefore make the following order:

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

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SPB HANCKE AJA

CONCUR:

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[4] See also *Sierborger v South African Railways and Harbours* 1961 (1) SA 498 (A) at 506D-G.

[5] Van den Heever J in *Cooper v Armstrong* 1939 OPD 140 at 148.

FARLAM JA

MUSI AJA:

[16] This is an appeal from a judgment of the Transvaal Provincial Division of the High Court delivered on 28 October 2005. The dispute arises out of a road accident that occurred on 4 September 1999 on the road between Pretoria/Tshwane and Hammanskraal (the old Warmbaths road) some 8 kilometres from Hammanskraal, in Gauteng. The collision involved a Nissan Skyline motor vehicle driven by one Mr SR Matseke (hereinafter referred to as the insured driver) and a Yamaha motorcycle there and then driven by the respondent. As a result of the collision, the respondent was severely injured. The injuries are described in the following terms in the judgment of the Court *a quo*:

'The second plaintiff sustained severe injuries as a result of the collision the most traumatic of which, is the fact that he is completely paralysed below T8, with concomitant incontinence complications and that the use of his arms and his hands, have become impaired.'

[17] The respondent, who was a minor at the time and was duly assisted by his mother, instituted action against the appellant as the body that carries responsibility for compensation of the victims of road accidents in terms of s 2(1) of the Road Accident Fund Act No 56 of 1996 (the Act) claiming compensation for the damages he sustained as a result of the accident. Hartzenberg J found that the collision was due to the sole negligence of the insured driver and awarded the respondent damages in the total amount of R3 931 461 with costs, including the costs of two counsel and the qualifying fees of the experts who testified in the trial. He made a further order that the appellant furnish an undertaking in terms of s 17(4)(a) of the Act relating to the respondent's future medical treatment. I should mention that the respondent's mother, who featured as the first plaintiff in the court *a quo*, also claimed and was awarded an amount of R438 031.51 for the expenses that she had personally incurred in respect of the respondent's injuries. This award is not the subject of this appeal and hence the erstwhile first plaintiff no longer features.

[18] The appellant now appeals, with leave of the court *a quo*, against the whole of the judgment and the orders made in respect of the respondent.

[19] The factual background to this matter is largely undisputed. By the time that the case was tried, the insured driver had died of causes unrelated to the accident and could therefore not testify. On the other hand, due to the fact that he had become unconscious upon impact, the respondent could not remember the events of the day, save for a hazy recollection of what transpired immediately before the collision. The case was decided largely on the testimony of the sole eye-witness, Mr Ronald Basson, who was called by the respondent. In addition, two experts testified on behalf of the respondent on the merits and the appellant relied solely on the testimony of an expert. Photographs of the scene of the accident were also handed in and they give a very clear picture of it.

[20] In summary, the evidence is as follows. The accident occurred on a clear sunny day at about 12h30 and traffic was not busy. The section of the road where the accident happened is made up of two lanes, one in each opposite direction. It is a tarred road with broad gravel shoulders on either side. It is a straight road that moves in the direction of north to south as one goes towards Pretoria and south to north as one travels towards Hammanskraal. Just before the scene of the accident, as one comes from the south, there is a rise followed by a gentle curve to the left and then the road straightens, declining toward a dip and then inclining again. The same would be the case with a person travelling in the opposite direction. He would be declining towards the dip and then going up the rise. The accident happened in the area between the dip and the rise as one travels southward. As the respondent emerged from the rise coming from the south he would have had a clear, undisturbed view ahead of him extending to about 1.5 kilometres to 2 kilometres. The same would be the case with the insured driver as he approached the dip from the north.

[21] Basson testified that he had come from Hammanskraal on his way to Pretoria at about 12h00 and when he got to this spot where the accident happened he found an Isuzu bakkie stationary in his lane. The Isuzu had apparently been involved in an accident earlier. He overtook it, pulled off to his left and parked his vehicle a short

distance from the Isuzu. Opposite the stationary Isuzu on the gravel on the other side of the road was a red Golf sedan, next to which stood four men who turned out to be police officers. He walked across the road and talked to these men. The contents of the discussions are not necessary for the purposes of this judgment, save that Basson alerted the policemen to the danger posed by the stationary Isuzu to other road users. At that point he observed the Skyline approaching from the direction of Hammanskraal. The insured driver overtook the stationary bakkie but then did not immediately return to his correct lane. Basson says that he then observed the respondent approaching. The insured driver had still not returned to his correct lane. At that point the Skyline and the motorcycle were 50 metres apart facing each other in the same lane and an emergency ensued. In an attempt to avoid the accident, the respondent swerved to his right but then the insured driver also swerved to his correct lane. Both drivers then swerved back to the western lane and collided with each other in the process.

[22] According to Basson, this was a head-on collision. The motorcycle hit the Skyline on its right front side, on the driver side, and as he did so the respondent and his vehicle split. The respondent hit the top of the Skyline twice, flew over and went to land on the eastern lane. The photographs of the scene confirm this insofar so as the location of the damage on the Skyline and the positions of the respondent and the motorcycle are concerned.

[23] I should say in passing that there are aspects of Basson's evidence that are inherently illogical and unconvincing. Take the evidence that he saw the respondent's eyes turning when the motorcycle went on top of the Skyline. How could this be when he was 30 metres away and the respondent wore a head shield that partly obscured his face? Then there is this piece of evidence, that having first swerved to the eastern lane, both the Skyline and the motorcycle swerved back to the western lane and collided in the course of that manoeuvre. In that event, one would have expected the motorcycle to have hit the Skyline either on its left front or on the middle front. But strangely they collided head on with the motorcycle hitting the Skyline right in front of the driver. It appears that the proposition that was put to Basson under cross-examination to explain why the respondent would have landed where he did would best explain how the collision occurred. It is to the effect that the

collision occurred at the point where the respondent was in the process of veering to his right and the Skyline simultaneously swerving back to its correct lane. The force of the impact would then have carried the respondent in the direction in which he had been moving. The proposition could not be sustained though because its exponent, Professor Lemmer, readily conceded the counter propositions put to him under cross-examination, as he did with numerous other propositions that he had made. Basson's impartiality and objectivity in this matter is also suspect and this begs the question whether he was perhaps not biassed in favour of the respondent. He would have been a vital witness in any possible prosecution of the insured driver but never made any attempt to contact the investigating officer in the matter. Instead he contacted another policeman in Pretoria who apparently gave him information about the earlier accident involving the Isuzu bakkie. Under cross-examination he would not disclose at whose instance he made the typed statement that was handed in in the trial. And he was evasive as to why did he not contact the police. He seems to have avoided disclosing to the investigating officer that there were other eye witnesses to the accident and this may explain why none were called. Be that as it may, Basson's credibility appears not to have been challenged in the court *a quo* and the issue was not even raised in this court. There is therefore no basis on which one can question the acceptance by the court *a quo* of his evidence. In any event, in the view that I take of the matter the discrepancies in his evidence are immaterial.

[24] In the court *a quo*, as in this court, the appellant correctly conceded that the insured driver was negligent. The crux of its case is that there was contributory negligence on the part of the respondent. The issue for determination therefore is whether there was such contributory negligence and, if so, the extent thereof.

[25] The thrust of the submissions made on behalf of the appellant was that the respondent was negligent in swerving to his incorrect lane in an attempt to avoid the accident. It was submitted that there were two clear options that he should have exercised before taking the dangerous step of swerving to his right. The one was that he could have reduced his speed and moved as close as possible to the edge of his lane to his left. Counsel for the appellant pointed out that it is possible for a motorcycle and a motor vehicle to go past each other on the same lane. The second option was to reduce speed considerably and then swerve to his left out of the tarred

road and onto the gravel shoulder. Regarding the evidence of the respondent's expert witnesses that it would be dangerous to stray on to the gravel side at the speed of 70 kilometres per hour, counsel for the appellant countered that it would have been a lesser risk than swerving into the path of an oncoming vehicle and thereby risking a head on collision. He argued that swerving into the incorrect lane in circumstances such as the present was inherently dangerous and should have been done as a last resort. In support of his submissions counsel cited *inter alia Burger v Santam Versekeringsmaatskappy* 1981 (2) SA 703 (A) at 708A; *President Insurance Company Ltd v Tshabalala* 1981 (1) SA 1016(A) at 1020C; *Kleinhans v African Guarantee and Indemnity Company Ltd* 1959 (2) SA 619(E) at 624F.

[26] The gist of the argument advanced on behalf of the respondent was that the respondent's conduct should be judged against the reality that he found himself in an emergency due to no fault of his own and that he only had a matter of seconds to respond. Counsel for the respondent referred to Basson's evidence to the effect that the incident happened in a split second or "the wink of an eye" and submitted that it was unreasonable to expect the respondent to have first pondered the other options mentioned by the appellant's counsel. He submitted that a reasonable driver finding himself in a similar situation would have reacted similarly. In hindsight it could be said that the respondent committed an error of judgment but that does not constitute negligence, so it was argued. Counsel cited reported cases dealing with the position of a driver who finds himself in a situation of emergency due to the fault of the other driver. See *inter alia South African Railways and Harbours v Symington* 1935 AD 37 at 45; *Sierborger v South African Railways and Harbours* 1961 (1) SA 498 (A); *Rodriques v SA Mutual & General Insurance Company Limited* 1981 (2) SA 274(A); *Von Wielligh v Protea* 1985 (4) SA 293 (C); *Diskin v Lester Braun* 1992 (3) SA 978 (T) 981 C-F.

[27] The difficulty I have with the approach and oral submissions made on behalf of the parties is that they focus exclusively on the conduct of the drivers from the moment that the emergency arose. During the course of the hearing I broached the subject of what precautionary measures the respondent took to avoid the impending emergency. In this regard three of the cases that were cited in argument are apposite. The first is *Burger v Santam Versekeringsmaatskapp, supra*. In this case a

Cortina motor vehicle and a panel van (bakkie) were involved in a head on collision on the bakkie's incorrect lane. The driver of the Cortina (appellant) was unable to testify because she was suffering from amnesia. The driver of the bakkie (Kotze) was the only eyewitness. Kotze had for some distance seen the appellant steadily moving towards her incorrect side of the road but had assumed that she would go back to her lane. He had observed that if the appellant continued to veer onto the incorrect side of the road a collision would be inevitable and was aware that the appellant was not seeing him. When the vehicles were about 30–35 metres from each other, Kotze swerved to his right in order to avoid the accident but the appellant then also swerved to the same lane and the vehicles collided on Kotze's incorrect lane.

[28] Although Kotze had been put in an emergency due to the substantial negligence of the appellant it was held that he nonetheless had the opportunity to take pre-emptive measures to avoid the accident but failed to do so. The following passage is instructive:

'Die kernvraag is wat 'n redelike bestuurder in die plek van Kotze sou gedoen het. Dit is nodig om in gedagte te hou dat die appellante nie skielik oor die pad geswaai het nie, maar oor 'n aansienlike afstand na regs beweeg het. Kotze het derhalwe voldoende geleentheid gehad om aanvanklike voorsorgmaatreëls te tref. Na my mening sou 'n redelike bestuurder in sy plek minstens drie stappe gedoen het. Hy sou naamlik, desnoods deur rem te trap, die spoed van die paneelwa tot 'n baie stadige pas laat daal het; hy sou so ver moontlik na links gedraai het, en hy sou aanhoudend getoet het. Die rede vir die draai na links spreek vir sigself. Hy sou spoed verminder het omdat dit dan langer sou neem voordat die voertuie mekaar sou bereik en derhalwe 'n langer tydperk aan die ander bestuurder sou bied om tot verhaal to kom, en ook omdat hy dan moontlik in 'n posisie sou wees om desnoods oor die skouer te ry. Hy sou soos voornoemd getoet het omdat hy sou besef het dat die ander bestuurder waarskynlik vanweë onagsaamheid oor die pad beweeg het en by bewuswording van die posisie van sy of haar voertuig na links sou draai.'

[29] The other case that was cited is *Fourie v Road Accident Fund* 1999 (3) All SA 661 (O). The facts of this case are almost similar to those in *Burger*. The difference is that in *Fourie* the plaintiff had taken precautionary measures to try to alert the driver of the other motor vehicle to the fact that he was on the wrong side of the road. The plaintiff had slowed down considerably, hooted and flicked his headlights to no avail, and only moved to the incorrect lane as a last resort. He was exonerated. The unreported judgment of *LC le Grange v Guardian Verskeringsmaatskappy Bpk* No 12711/91 delivered in the Cape Provincial Division on 7 July 1993, which is annexed

to the Respondent's Heads of Argument, falls in the category of *Fourie* and does not assist the respondent.

[30] In my view, the above cases illustrate one crucial point. In a situation like the present the proper approach is not to confine the inquiry into negligence to the conduct of the drivers from the moment they became embroiled in an emergency. The inquiry must be extended to cover what steps a driver took to avoid the impending emergency. If he/she had the opportunity to take measures ahead of the emergency to avoid the accident, and he/she failed to do what a reasonable person in similar circumstances would have done, then she/he would be negligent.

[31] Reverting to the facts of the instant case, in his Heads of Argument, counsel for the appellant contended that because the respondent had a clear view of the whole vista as he descended from the rise, he should have seen that the insured driver was approaching on the incorrect lane and should have taken evasive action timeously. Counsel submitted that the fact that the respondent failed to do so shows that he had not kept a proper lookout.

[32] This is the same subject that I canvassed with counsel during oral argument. Counsel for the appellant indicated that the point of impact is far away from the crest of the rise and that the respondent would have travelled for a considerable distance of more than 150 metres in the straight before the emergency arose and I did not understand counsel for the respondent to dispute this estimation of distances. Surely the respondent should have seen the stationary Isuzu on the road surface, Basson's vehicle in front of it and the red Golf with the group of people standing next to it. And then there was the Skyline coming towards him on his lane. All this should surely have rung a bell that there was something amiss and it called for alertness and extreme caution. In such circumstances the respondent should at the very least have reduced his speed considerably so that should the unexpected happen he would be in a position to pull safely off onto the gravel to his left.

[33] Basson further testified that both the respondent and the insured driver had been travelling at about 70 kilometres per hour at the point when the respondent swerved to his right. And the evidence of the two experts who testified on behalf of

the respondent was that at such speed it would be dangerous to veer onto the gravel shoulder. However, had the respondent kept a proper lookout and, given the long clear view and the distance he would have travelled before the emergency arose, he should have been able to reduce speed to at least between 30 and 40 kilometres per hour. On the evidence of Professor Lemmer he would have been able to brake and/or pull out at that speed. Furthermore it can be accepted that if he had hooted, Basson would have heard it, judging by the fact that Basson testified that he could hear the sound of the engine and was able to deduce that the respondent had decelerated because of the hammering of the engine. At any rate, there is nothing on record to show that the respondent had hooted or done anything else for that matter to draw the attention of the insured driver to his approach.

[34] I conclude therefore that there was negligence on the part of the respondent which causally contributed to the accident. I think that the estimation of the degree of such negligence made by the appellant (30%) is reasonable. Failure to keep a proper lookout is a serious infraction which can have catastrophic consequences as the facts of this case demonstrate. I would therefore allow the appeal with appropriate orders as to costs and the substitution of the orders of the court *a quo*.

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HM MUSI
ACTING JUDGE OF APPEAL