THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 20024/2014

In the matter between:

WIHAN POSTHUMUS NO **FIRST APPELLANT**

ANGELO ADELINO DA SILVA MOREIRA NO **SECOND APPELLANT**

and

THE ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *Posthumus v The Road Accident Fund* (20024/2014) [2015] ZASCA 40 (25 March 2015)

Coram: Mhlantla, Leach, Saldulker and Mbha JJA and Gorven AJA

Heard: 10 March 2015

Delivered: 25 March 2015

Summary: Delict – negligence of a motorist parked alongside a roadway leaving headlights shining at oncoming traffic – reasonably foreseeable that oncoming motorist might be dazzled and lose control of vehicle – driver of parked vehicle negligent.

ORDER

On appeal from: Gauteng Division, Pretoria (Preller and Makgoka JJ and Sethusha AJ sitting as court of appeal):

1 The respondent's application for a postponement of the appeal is dismissed with costs.

2 The appeal succeeds with costs, and the order of the full court is set aside and substituted with the following:

'(a) The appeal succeeds with costs.

(b) Paragraph 1 of the trial court's order of 25 October 2010 is amended by the deletion of the words "limited in terms of section 18(1)(*b*) of the Act".'

JUDGMENT

Leach JA (Mhlantla, Saldulker and Mbha JJA and Gorven AJA concurring)

[1] During the early hours of 20 May 2003 Mrs Petronella Posthumus and her husband Mr Pierre Posthumus were passengers in a Mercedes Benz Sprinter minibus being driven by Mr Andries Maritz along the N14 national road near Sannieshof when it left the road and capsized. In the course of this accident both Mr and Mrs Posthumus sustained bodily injuries and, some four years later, they instituted action for damages against the respondent under the provisions of the Road Accident Fund Act 56 of 1996 (the Act) alleging, inter

alia, that the accident had been caused at least in part by the negligence of the driver of another motor vehicle, a ‘bakkie’(a colloquialism I intend to use for convenience) that had been parked alongside the roadway with its headlights shining into the roadway that had blinded Maritz and led to him losing control of the minibus and driving off the road. It is this assertion that falls to be determined in this appeal.

[2] It was common cause at the trial, having been admitted both in the respondent’s plea and recorded in the pre-trial minute under Uniform rule 37, that Mr Maritz had been negligent in regard to the accident. However the importance of the issue whether Mr Maritz lost control at least partly due to his being blinded by the lights of a stationary bakkie is that, should that have been the case and the driver of the bakkie have been causally negligent in regard to the accident, the liability of the respondent would not be limited by the provisions of s 18(1)(b) of the Act as it would be if Maritz had been solely to blame.

[3] The litigation proceeded at the speed of a snail. Despite the defendant’s plea having been filed in October 2007, it took a further two years before the matter came to trial in the Gauteng Division, Pretoria. At that stage the issues relating to the merits of the claim were separated from those relating to the quantum of damages under Uniform rule 33(4), and the trial proceeded solely in order to determine negligence and liability. The evidence led on behalf of Mr and Mrs Posthumus was fairly terse and uncomplicated, and the respondent closed its case without calling any witnesses. Although all that was required was a straight forward factual decision, it unfortunately took a year before judgment was delivered in October 2010. Ultimately the court found that there had in fact not been a bakkie on the scene and that Mr Maritz had therefore

been solely responsible for the accident. It therefore ordered that the respondent was liable only to the limited extent prescribed by s 18(1)(*b*) of the Act.

[4] Dissatisfied with this outcome, Mr and Mrs Posthumus sought leave to appeal against the order. For reasons not apparent from the record, it took almost a year for their application to be dealt with. Eventually, on 5 August 2011, they were granted leave to appeal to a full court of the Gauteng Division, Pretoria. But then, having obtained such leave, it took more than two years for the appeal itself to be finalised, the appeal having been heard on 17 April 2013 and judgment having been delivered seven months later.

[5] The full court was unanimous that the trial judge had erred in concluding that the bakkie was not on the scene at the time of the accident. However they were divided as to the outcome of the appeal. Preller J, in a minority judgment, found that the driver of the bakkie had been negligent in leaving the lights of the vehicle shining brightly into the road, that Maritz had been blinded thereby and that this had contributed to the accident taking place. On the other hand, in a majority judgment Makgoka J and Sethusha AJ, in dismissing the appeal held that a causal link between the bakkie's lights shining into the road and the accident had not been established. They concluded that 'save for the misdirection concerning the finding on the presence of the bakkie we find no misdirection in the manner the trial court approached the facts' and that they were therefore not at liberty to interfere with its factual findings. Thus although Preller J would have allowed the appeal, the majority dismissed it.

[6] The simple answer to the reasoning of the majority of the full court is, of course, that the trial court's finding that there had not been a bakkie on the scene was the very cornerstone of its finding that Maritz had not been blinded and had been solely to blame for the accident. Once that fundamental finding

had been proved wrong, the full court on appeal was free to reach its own conclusions on the evidence on record. It is thus not surprising that this court granted special leave to appeal.

[7] And so some 12 years after the accident which gave rise to the claim, the matter came before this court. Tragically it comes at a time when it is too late for the outcome to have any meaning for either Mr or Mrs Posthumus, he having committed suicide before the judgment of the trial judge was delivered and she having died subsequently. The two appellants are the administrators of their respective estates.

[8] Turning to the facts of the matter, Mr and Mrs Posthumus were travelling together with Mr Maritz and his wife in the minibus from Kathu to Johannesburg when the accident happened. On the outskirts of Sannieshof the road curved almost 90 degrees to their right. Mr Maritz testified that on approaching this curve he saw the bright lights of a motor vehicle parked on the inside of the curve off the roadway facing towards him. These lights dazzled him as he negotiated the curve and, as he could not see properly, he allowed the minibus to stray onto the gravel verge where it struck a curb. He then lost control over the vehicle and it overturned.

[9] His description of how the accident occurred was materially supported by his wife, Mrs Louisa Maritz, who testified that she had been sitting in the front of the minibus alongside her husband. As they approached the curve, she was turned in her seat talking to Mr Posthumus who was seated behind her. Suddenly he exclaimed about the bright lights of a vehicle. Glancing ahead, she was dazzled by the lights of a vehicle shining onto her face. She only had time to remark that the other vehicle should dim its lights when the minibus left the

road. She sustained a severe head injury in the accident that followed and only recovered consciousness in hospital the following day.

[10] The respondent had no direct evidence to contradict that of Mr and Mrs Maritz. Its case largely relied on its counsel's aggressive and protracted cross-examination of Mr Maritz, cross-examination which in the minority judgment of the full court was correctly described as having been 'at times irrelevant and unfair'. Moreover, although counsel representing the respondent at the trial accepted that there had in fact been another vehicle with headlights on the scene, she subsequently appeared to change her stance by placing on record that she did not concede that to have been the case. However the police documentation points inexorably towards there having been such a vehicle, and this was confirmed by a sworn affidavit made by Mr KPW Kgantsi to a police reservist, constable Tshiping, on 2 July 2003.

[11] Mr Kgantsi stated under oath in his affidavit that while driving his bakkie from Sannieshof to Delareyville on the night in question, he had stopped alongside the road in order to relieve himself and that, 'unfortunately I left my vehicle's lights on bright and neglected to dim them'.[1] He went on to state that he had seen a Mercedes Benz Sprinter minibus approaching from the direction of Delareyville which left the road in a curve, and that he had gone to render assistance and given his particulars to those in the minibus. That this was the accident in which Mr and Mrs Posthumus were injured is self-evident, as was borne out by the evidence of Mr Maritz that the driver of the other vehicle had come to their aid after the accident.

[1] This is my translation from the Afrikaans 'ongelukkig het ek my voertuig se ligte op helder gelaat en nagelaat om die ligte te domp'.

[12] It is common cause that Mr Kgantsi had died on 14 July 2004.[2] Despite this, counsel for the respondent fought tooth and nail to avoid his affidavit being introduced into evidence under s 3(1)(*c*) of the Law of Evidence Amendment Act 45 of 1988. She was successful in that the trial court refused to accept it. However the full court, quite correctly bearing in mind that the affidavit had been taken during the course of a routine investigation from a person who had since died, unanimously found that it ought to have been admitted in the interests of justice.

[13] The affidavit of Mr Kgantsi provides substantial corroboration for the version advanced by Mr and Mrs Maritz. It is therefore clear from all the admissible evidence that Mr Kgantsi's bakkie was parked alongside the road on the inside of the curve and that its headlights were on bright and shining into the road. The trial court erred and misdirected itself in reaching the contrary conclusion.

[14] There is also no reason not to accept the evidence of Mr Maritz that the bakkie's bright headlights blinded him momentarily thereby interfering with his vision and causing him to drive onto the gravel verge which, in turn, led to the minibus capsizing. It was argued by the respondent that Mr Maritz would not have been blinded by the headlights, even if bright, as the bakkie would not have been facing directly towards him had he been looking at the roadway directly ahead. However, not only are the respective angles of approach between the two vehicles a matter of speculation, but such an argument is based on a theoretical reconstruction of the event, an exercise always fraught with uncertainty that generally carries less weight than the direct and credible evidence of eyewitnesses.[3] Mrs Maritz corroborated her husband on the

[2] A copy of his death certificate was available.
[3] Compare *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432E at 436G-437B cited with approval by this court in *Roux v Hattingh* 2012 (6) SA 428 (SCA) para 20 and *Biddlecombe v Road Accident Fund* [2011] ZASCA 225 para 10.

dazzling effects of the bakkie's headlights and his statement that he was blinded was, in my view, satisfactorily shown to probably have been the case. Indeed it is the most obvious cause of what occurred.

[15] The issue then to be considered is whether Kgantsi was negligent in allowing the bright lights of his vehicle to shine into the roadway as he did. It is now well settled that negligence will be established if (a) a reasonable person in the position of the defendant would foresee the reasonable possibility of his or her conduct injuring another's person or property and would take reasonable steps to guard against that occurring, and (b) the defendant failed to take such steps. Whether a reasonable person would take steps to guard against harm and what steps would be reasonable must of course be determined in the light of the particular circumstances of each case.[4]

[16] It is a matter of common experience for motorists driving at night to be faced with bright headlights of oncoming traffic that dazzle them. Some 67 years ago the learned authors MacIntosh and Scoble expressed the opinion that it would probably be negligent for a motorist to fail to dim his or her lights when approaching an oncoming vehicle, but observed that there appeared to be no authoritative decision on the issue.[5] The law reports of this country in the intervening years are replete with decisions on whether a motorist had driven negligently after having been blinded by bright oncoming headlights[6] but the issue of whether motorists who blind others by not dimming their headlights are negligent does not appear to have arisen for decision (counsel were unable to refer us to any such reported case nor did our own research bear fruit in this regard). As was suggested by counsel for the appellant, this may well be due to

[4] See eg *Hawekwa Youth Camp and another v Byrne* 2010 (6) SA 83 (SCA) para 23.
[5] MacIntosh & Scoble *Negligence in Delict* 3ed at 244.
[6] See eg *Flanders (Pty) Ltd v Trans Zambezi Express (Pty) Ltd* 2009 (4) SA 192 (SCA), *Rodrigues v SA Mutual & General Insurance Co Ltd* 1981 (2) SA 274 (A) and *Seemane v AA Mutual Insurance Association Ltd* 1975 (4) SA 767 (A).

the fact that motorists who blind other motorists normally do not stop at the scene of an accident to which they have contributed or because the former provisions of the regulations promulgated under s 26 of the Act provided for the respondent's liability only in the event of an unidentified motor vehicle coming into physical contact with any other person, vehicle or object.

[17] Be that as it may, the answer to the question whether Mr Kgantsi acted negligently in the circumstances of this case must be answered in the affirmative. The dazzling effect of the bright headlights of oncoming traffic impeding a motorist's view of the roadway ahead is all too common an experience, as already mentioned. Accordingly it is self-evident that a reasonable person in Mr Kgantsi's position who parks a motor vehicle with its headlights shining brightly into a roadway at night would foresee the reasonable possibility of an approaching motorist being blinded thereby and driving off the road. Indeed the danger of this occurring in the present case was exacerbated by the bakkie being on the inside of a relatively sharp curve rather than alongside a straight stretch of roadway.

[18] Obvious reasonable steps to take to guard against this occurring were to dim the headlights or, indeed, to turn them off, leaving the bakkie's parking or hazard lights to warn of its presence. Mr Kgantsi failed to take either of these steps, and his failure to do so fell short of what is required of a reasonable person in his position. The inevitable finding is that he was causally negligent in regard to the accident and the contrary conclusion reached by both the trial court and the majority of the full court cannot stand.

[19] Section 17(1) of the Act provides that the respondent shall be liable to compensate persons who have suffered damages as a result of bodily injuries 'caused by or arising from the driving of a motor vehicle'. Section 20(2) of the

Act goes on to provide that a person 'who has placed or left a motor vehicle at any place shall be deemed to be driving that motor vehicle' whilst it is stationary. The turning on of headlights of a motor vehicle, and the failure to dim or turn them off, is causally connected to a motorist's use of a motor vehicle, and must be regarded as 'arising from the driving' of that vehicle. Indeed, the respondent appears at all times to have accepted that to be the case. Consequently, as a result of Mr Kgantsi's negligence, the respondent was liable to whatever damages Mr and Mrs Posthumus had suffered from their bodily injuries arising out of the accident. The appeal must succeed as their claims were therefore not limited by the provisions of s 18(1)(*b*) of the Act, and the trial court's order that they be so limited cannot stand.

[20] One further matter must be mentioned. The appeal in this court was heard on Tuesday 10 March 2015. On the immediately preceding Friday the respondents filed an application for a postponement of the appeal, supported by an affidavit from an attorney who alleged that she had been appointed to a panel that represented the respondent and that, on 5 March 2015, she had received instructions to act for the respondent in the place of the attorney that had until then been the attorney of record. She therefore sought a postponement to enable the respondent's fresh legal representatives 'to acquaint themselves with the matter'.

[21] On the day of the appeal when the matter was called at 9h45, counsel who appeared for the respondent was informed that the terse affidavit did not provide a satisfactory explanation for the respondent not being in the position to argue the appeal (I should mention that counsel involved had neither represented the respondent at any previous stage and was not the author of the heads of argument which had been filed in this court). We therefore allowed the matter to stand down until 11h15 for a supplementary affidavit to be prepared.

That deadline passed but, at 11h25 we were approached by counsel in chambers and asked for an extension until noon. When that deadline also passed without the respondent's legal representatives being present, we requested the appellant's legal representatives to telephone respondent's new attorney of record to ascertain what was happening. This proved unsuccessful as we were informed from the Bar that the call had not been answered. As there had still been no appearance by 12h20, the application for a postponement was dismissed with costs and the appeal then commenced. At 12h35, while counsel for the appellant was still addressing the court, the respondent's counsel appeared and, after the end of the appellant's address, was informed that the postponement application had been refused. This notwithstanding, he not only accepted with alacrity the invitation to argue the appeal but proceeded to do so with vigour, and addressed us fully on the material issues. In these circumstances why a postponement had been requested in the first place is something of a mystery.

[22] Be that as it may, for purposes of completeness the order set out below will include the order made in respect of the respondent's application for a postponement.

[23] It is ordered:

1 The respondent's application for a postponement of the appeal is dismissed with costs.

2 The appeal succeeds with costs, and the order of the full court is set aside and substituted with the following:

'(a) The appeal succeeds with costs.

(b) Paragraph 1 of the trial court's order of 25 October 2010 is amended by the deletion of the words "limited in terms of section 18(1)(*b*) of the Act".'

L E Leach
Judge of Appeal

Appearances:

For the Appellant:	C J Nel Instructed by: Louw & Da Silva Inc Attorneys c/o Van der Merwe & Associates, Pretoria Lovius Block Attorneys, Bloemfontein
For the Respondent:	S E Motloung Instructed by: Gildenhuys Lessing Malatjie Inc, Pretoria Maduba Attorneys, Bloemfontein