THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 431/96 In

the matter between

JOHANNES MOLEFE Appellant

and

FREDDY MAHAENG Respondent

CORAM: Hefer, Zulman JJA et Melunsky AJA

DATE HEARD: 15 September 1998 DATE

DELIVERED: 25 September 1998

JUDGMENT

MELUNSKY AJA

MELUNSKY AJA

At about 11:00 on 11 August 1991 the appellant and the respondent were driving their respective motor vehicles in opposite directions in Mothusi Road, Thabong, Welkom. As they were about to pass each other the respondent's car suddenly moved onto its incorrect side of the road where it collided with the appellant's vehicle and immediately thereafter with a motor car driven by Mr Jacob Khatiti, a traffic officer, who was travelling behind the appellant. It then came to rest on the right-hand side of the road after hitting the fence of a private house.

The appellant sued the respondent for damages in the Welkom magistrate's court as a result of the damage to his vehicle. He alleged that the collision was due to the sole negligence of the respondent. Apart from denying that he was negligent, the respondent pleaded that the collision was unavoidable as immediately before and at the time of the collision he was overcome by a

sudden, unforseen and uncontrollable black-out ("breinfloute") which resulted in his being unable to control his vehicle. Although it was also alleged in the plea that the collision was due to the sole negligence of the appellant, this contention was, quite correctly, not persisted in.

The matter went to trial on the question of negligence only. The magistrate was of the view that as the respondent had raised the defence of automatism he bore the onus to establish that defence. He rejected the respondent's version and found in the appellant's favour. Subsequently the parties reached agreement on the appellant's damages and the magistrate entered judgment in the appellant's favour for the agreed amounts and costs.

The magistrate's decision was reversed by the Orange Free State Provincial Division (Hancke and Cillie JJ) on appeal. That court held that, as a matter of probability, the respondent had suffered a "breinfloute" and that the collision was not due to his negligence. The appeal was therefore allowed and

the appellant's claim was dismissed with costs. This is an appeal against that order with the special leave of this Court.

It is necessary to have regard to the events which, according to the respondent's evidence before the magistrate, resulted in the alleged black-out. On the morning of the collision the respondent made certain purchases at the Welkom Minimarket. On the way to the pay point he slipped on a banana peel and fell. According to his evidence the back of his head struck the floor. He also injured his right leg but felt well enough to drive back to his home. Before driving off he agreed to give a lift to a woman who had asked him to take her to church. The respondent drove normally at first and it was only when he reached Mothusi Road that he realised that something was wrong with him. According to the interpreted evidence, his version of what happened immediately before the collision was the following:

"Ek het warm geword, ek het begin vomeer en dit het

> sommer donker geraak voor my. Ek kan nou nie vir u sê wat gebeur het daardie spesifieke dag nie."

He said that he thought of swerving to his left but had no specific recollection of doing so. Nor did he remember colliding with the two vehicles. After the collision his first recollection was being woken up by Khatiti who asked him for his particulars. Later that same day he went to the St Helena Mine Hospital where he sought treatment for his injured leg and, he said, for his head injury. On the following day he returned to the hospital for further treatment and was discharged. He was admitted to the same hospital for observation for his head injury on 2 September and was transferred to the Rand Mutual Hospital in Johannesburg a few days later.

Leaving aside the question of onus for the time being, I turn to consider to what extent the other evidence and the surrounding circumstances tend to support or contradict the respondent's version. That the respondent

slipped and fell in the Welkom Minimarket is reasonably clear from the evidence of Mr Texeira, the co-owner of that establishment. Texeira did not see the fall but he was told about the incident and he spoke to the respondent shortly thereafter. The respondent told him that he had injured his leg in the fall and complained of pain in his leg but mentioned no other injury.

Khatiti told the magistrate that the respondent's manner of driving led him to assume at first that the respondent was under the influence of alcohol. This assumption was purely an inference which Khatiti drew from the fact that the respondent was travelling on the incorrect side of the road. Khatiti in fact saw the respondent's vehicle for the first time when it was already on the wrong side of the road and only a few metres away from the appellant's car. After the collision Khatiti approached the respondent's vehicle. According to his evidence, there appeared to be something wrong with the respondent for he remained in his car with his eyes open but did not react at first.

7 Lance-Sergeant Tshikeli of the South African Police, who arrived at the scene shortly after the accident, testified that the respondent told him that he had suffered from a "verdonkering of floute" and was therefore unable to say how the collision had occurred. He recorded the following in his accident report:

> "............................die bestuurder van OKE 40012 (the respondent) het bewusteloos geraak en na regs gery.."

The only other evidence placed before the trial court was given by Dr De Coito, a senior medical officer at the St Helena Hospital. His evidence was based to a considerable extent on the hospital records. Although the records were not handed in they were referred to by both parties without objection and apparently contain a fair and accurate reflection of the respondent's complaints and treatment. The respondent first presented himself at the hospital on 11 August 1991. He was seen by a nurse to whom he complained of a leg injury as a result

of a fall. This was diagnosed as a muscular injury. The respondent was not admitted to hospital but was told to return on the following day, which he did. He was then seen by a Dr Angelo who treated him only for the muscular injury. Dr Angelo issued a medical certificate on that day. This reads:

> "Re: Freddy Mahaeng
>
> Apparently abovementioned patient slipped and fell at Minimarket, injuring his (R) thigh.
>
> On examination the hamstring of the (R) thigh is tender to touch and straining. No other abnormalities.
>
> Diagnosis: Sprain (R) hamstring."

The certificate was addressed to "Minimarket" probably because Texeira had advised the respondent that he (Texeira) had a public liability insurance policy and that a claim would be met under the policy if the respondent had injured himself. Although the appellant's attorney initially objected to the certificate being handed in, he later agreed thereto and the certificate was accepted as evidence. Dr Angelo was not called as a witness.

9 The respondent again reported to the hospital on 2 September. On this occasion, according to De Coito, he gave "a history of having a black-out on 11 August." He was then admitted for investigation and was transferred to the Rand Mutual Hospital on 5 September "to investigate a black-out which he had apparently suffered in a motor vehicle". On his return from Johannesburg he was seen by De Coito who finally discharged him from further treatment on 10 September.

The hospital personnel at both institutions were unable to establish any cause for the respondent's alleged black-out. De Coito conceded that there was a possibility that the respondent could have lost consciousness on 11 August if he had fallen onto the back of his head earlier that day. It was also possible, according to De Coito that the respondent, who was on medication for diabetes, could have suffered from a black-out if he had taken excessive quantities of his medicine or if he had combined his medication with alcohol.

10 I now turn to the reasons given by the magistrate and the Provincial Division for their respective decisions. The court of first instance considered that Khatiti was a biased and untruthful witness. It therefore disregarded his evidence. The Court a quo, however, held that the magistrate's view of Khatiti's credibility was partially based on the existence of alleged contradictions in his evidence and that on a closer analysis these contradictions were more apparent than real. There is some force in the Provincial Division's criticism of the magistrate's judgment in this respect. It must not be overlooked, however, that the magistrate's finding that Khatiti was biased was also based on the undisputed evidence that the respondent and Khatiti had become firm friends after the accident and that the respondent had paid for the costs of repair to Khatiti's vehicle arising out of the collision. Therefore the magistrate's factual findings should not lightly be disregarded. Moreover it is interesting to note that, according to Khatiti, the respondent told him that he had

slipped on a banana peel and had momentarily lost consciousness at the Minimarket. He added, almost gratuitously, that the respondent said this immediately after the accident when no-one else was present - "die skare was heeltemal eenkant gewees by die voertuig en op die botsingtoneel". The respondent, however, denied that he had lost consciousness in the Minimarket. The Court a qu.o also criticised the magistrate's approach to Tshikeli's evidence on the grounds that while Tshikeli testified that the respondent's behaviour after the accident was similar to that of a drunk person, the magistrate held that, according to Tshikeli's evidence, the appellant appeared to be normal. There is justification for this criticism. It should, however, be noted that at a later stage in his evidence Tshikeli said that because he smelt no alcohol on the respondent's breath he realised that the respondent was not drunk but that

> "dit is 'n siekte wat hom in daardie toestand laat verkeer."

He later conceded that he was unable to say why the respondent appeared to him to be in a "sieklike toestand". Tshikeli's evidence to the effect that the respondent behaved abnormally after the accident is, therefore, not entirely satisfactory. What is perhaps of more significance is the fact that the respondent must have told Tshikeli that he had suffered from a loss of consciousness as Tshikeli recorded this on his form. The magistrate made no adverse finding on Tshikeli's demeanour or credibility, apart from pointing out that there appeared to be a conflict between the witness and the respondent on whether there were indications that the latter had vomited.

The onus of proof now has to be considered. I have mentioned that the magistrate held that the onus was on the respondent to establish his defence and counsel for the appellant, too, submitted that the burden of proof rested on the respondent to establish on a balance of probabilities that he had suffered from a black-out which precluded him from being able to control his vehicle.

The Provincial Division did not consider it necessary to deal with this question because it was satisfied that the evidence showed, as a matter of probability, that the respondent had suffered a black-out

Subject to certain qualifications which are not relevant for the purposes of this appeal, a defendant's involuntary act does not give rise to delictual liability (see Neethling et al: Dilektereg. 3rd Ed at 24-26). Defences based on automatism have to be scrutinised with great care but this requirement has no bearing on the question of onus. However in The Government v Marine and Trade Insurance Co Ltd 1973 (3) SA 797 (D), James JP expressed the view (at 799 A-B) that the onus was on defendant insurance company to establish that the driver of the insured vehicle had suffered a black-out which resulted in his being unable to manage and control the car that he was driving. This condition, the learned judge went on to say

"amounts to a defence of automatism and in my opinion it is for

> the defence to establish the existence of this state of affairs on a balance of probabilities."

In support of this proposition James JP referred to the decision in S v Van Zyl 1964 (2) SA 113 (A). It should be appreciated that in criminal cases the onus of proofs where the defence of automatism is raised, depends upon whether the accused's alleged state of automatism is due to a mental disease. If it is the onus is on the accused, but if the automatism is not due to a mental illness the State is required to prove the voluntariness of the act. In S v Cunningham 1996 (1) SACK 631 (A) Scott JA said the following at 635 g-i:

> "Criminal responsibility presupposes a voluntary act (or omission) on the part of the wrongdoer. Automatism therefore necessarily precludes criminal responsibility. As far as the onus of proof is concerned, a distinction is drawn between automatism attributable to a morbid or pathological disturbance of the mental faculties, whether temporary or permanent, and so-called 'sane automatism' which is attributable to some non-pathological cause and which is of a temporary nature. In accordance with the presumption of sanity the onus in the case of the former is upon the accused and is to be discharged on a balance of probabilities. Where it is sought to place reliance on the latter, the onus remains on the State to establish the voluntariness of the act beyond a reasonable doubt. See S v Mahlinza 1967 (1) SA 408 (A) at 419 A-C; S v Campher 1987 (1) SA 940 (A) at 966 F-I; S v Trickert 1973 (3) SA 526 (T) at 530 A-D."

S v van Wyk. which was relied upon by James JP, was a case in which it was alleged that the appellant suffered from a "disease of the mind or mental defect" and it was apparently for this reason that the court placed the onus on the defence. The remarks of James JP have not escaped criticism (cf Gabellone v Protea Assurance Co Ltd 1981 (4) SA 171 (O) at 174 C-D; Stacey v Kent 1992 (4) SA (C) 495 at 499 J-500 D and 1995 (3) SA 344 (E) at 358 I-J.)

It is not necessary to decide whether, for the purposes of delictual liability, the onus is on the defendant to establish the defence of automatism which arises out of "a morbid or pathological disturbance of the mental faculties". There is no suggestion that this is such a case or that the respondent's mental capacity was in any way impaired. In this matter the appellant has to establish that the respondent was negligent and this obviously includes proof that the negligence relied upon consisted of a voluntary act. As Van den Heever

JA put it in Heneke v Royal Insurance Co Ltd 1954 (4) SA 606 (A) at 611 A-B:

> "I think it is so clear as to require no authority that in a case of this kind (a motor collision) the burden of proving the defendant's negligence and the causal connection between that negligence and the damages suffered falls upon the plaintiff."

In the present matter prima facie inference of negligence would have arisen because the evidence established that the respondent had driven on to the incorrect side of the road. However the burden of proof does not shift. What still has to be decided is whether, on all of the evidence and the probabilities, the appellant discharged the onus on a preponderance of probability (See Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (A) at 574-576 and Sardi and Others v Standard and General Insurance Co Ltd 1977 (3) SA 776 (A) at 780 C-H.)

The fact that the respondent's vehicle suddenly moved onto its incorrect side of a straight stretch of tarred road in broad daylight is not, in itself, a matter of great importance but in conjunction with the other facts of the

case it assumes more significance. One of the facts is that the respondent did fall a short while before the collision and the fall was of sufficient severity to warrant his seeking medical attention. According to the medical evidence if his head had struck the floor in the fall it could have resulted in a black-out later that morning. It is, moreover, quite plain that the respondent complained of a loss of consciousness to Tshikeli shortly after the accident. Tshikeli could not have been mistaken on this matter and, as I have mentioned, the magistrate did not find him to be a biased or unsatisfactory witness. It is true that the respondent, despite his evidence to the contrary, did not mention the black-out to the nurse or Dr Angelo on 11 and 12 August. Indeed he first complained of this to the medical personnel only three weeks later and after he had received a letter of demand from the appellant's attorney. These facts do not mean that he was deliberately untruthful in his evidence or that the complaint of a black-out was a fabrication but they are of sufficient importance to negative a finding

that his version was the more probable one.

Having regard to the evidence as a whole, and despite shortcomings in the respondent's own testimony, I am not satisfied that the appellant has discharged the onus of proving that the respondent's conduct in driving on to the incorrect side of the road was due to his voluntary act. In short the appellant failed to prove, as a matter of probability, that the respondent did not have a black-out. I have detailed the facts which tend to support the respondent's version and which, I believe, result in the appellant's inability to establish a substantial probability in his favour and nothing further needs to be said in this regard.

An argument by the appellant's counsel that an adverse inference should be drawn against the respondent because of his failure to call his passenger as a witness cannot be upheld in the absence of evidence to show that the passenger was available to give evidence.

19 Finally it was submitted that the respondent was negligent in driving his vehicle when he knew or should have known that he was not in a fit state to do so. It is not necessary to analyse all of the evidence in this regard. According to the respondent the black-out came upon him suddenly after he had entered Mothusi Road. At that stage it was not possible for him to exercise control over his vehicle. Until then he did not appreciate the possibility of a black-out. There was no evidence to show that a reasonable person in his position should have been aware of such a possibility.

The result is that the appeal fails and is dismissed with costs.

LS MELUNSKY AJA

HEFER JA)
CONCUR
ZULMAN JA)