CASE NUMBER: 480/99

In the matter between:

WILFRED DANIELS **Appellant**

-and-

VINAYAGAM MOODLEY **Respondent**

CORAM: SCOTT, NAVSA JJA, FRONEMAN AJA

DATE OF HEARING: 15 AUGUST 2001

DATE OF JUDGMENT: 31 AUGUST 2001

JUDGMENT

FRONEMAN AJA

[1] The appellant instituted action in the Magistrates' Court, Port Shepstone,

claiming damages arising from a motor collision between his vehicle and a vehicle driven by the respondent. The magistrate found in the appellant's favour, holding that the respondent's negligent driving caused the collision. The issue of the quantum of the appellant's claim for the damage to his vehicle was not adjudicated upon at the same hearing, but it is common cause between the parties that on 4 September 1998 the magistrate granted judgment for the appellant in the sum of R30000,00, together with costs. On appeal to the High Court (Hugo J and Kondile J) the magistrate's finding was overruled and the judgment altered to absolution from the instance. The present appeal is with the leave of the court below.

[2] The facts are relatively straightforward and not in dispute. What is in issue is whether an inference of negligence on the part of the respondent may legitimately be drawn from those facts. It is common cause that the appellant was not negligent in any way. He was travelling on his correct side of the road when the vehicle driven by the respondent in the opposite direction suddenly veered across the road and collided with his vehicle. At first blush it would thus seem that the respondent had some explaining to do.

[3] The respondent testified that the collision occurred in the early evening

when it was already dark. He was travelling northwards in the direction of Durban. In the immediate vicinity of an intersection the tarred surface of the road broadened from a single lane in each direction to one with an additional portion of tarred surface on the side of the road on which the respondent was travelling. It is not clear from the evidence how far this additional surface extended on each side of the intersection, but it appears to have been intended as an acceleration and deceleration lane for vehicles turning left into or emerging from the cross road. The respondent's evidence was that he used this extension to move over to his left to enable following cars to overtake him. After doing so he suddenly noticed that the extended portion came to an end and that the road resumed its original format of a one-lane road in each direction. There were no signposts or markings on the road to warn him that the extension was coming to an end, nor were there any reflector boards at the end of the extension to signify its ending. At the stage that he became aware that the extension came to an end it was too late to come to a stop on the tarred surface, nor could he move back onto the single lane at that stage because of the presence of other cars travelling alongside him. Although he did apply brakes and reduce speed his vehicle continued ahead onto the ground adjacent to the tarred single lane. Unfortunately he drove into a ditch, or hole, situated in the ground right next to the tar surface.

This caused him to lose control of the car and it veered across the road into the line of travel of the appellant's vehicle.

[4] It was contended on behalf of the respondent that a reasonable person in the position of the respondent would have been entitled to move to the left onto the extended tarred portion of the road and, absent any warning signs that it was coming to an end, to continue driving on it on the assumption that it was part of a dual-lane carriageway or at least that it would extend for some considerable distance. The sudden ending of the lane without any warning signs placed the respondent in an emergency situation not of his own making. Accordingly no blame could be attached to him for driving off the tar and encountering the difficulty there that he in fact experienced. The real negligence lay with the road authority that failed to erect the necessary warning signs.

[5] This argument loses sight of a number of important factors. It is irrelevant for the purposes of determining the respondent's possible negligence that the road authority may also have been negligent. It is not a party to these proceedings. Even if it was negligent it does not follow that negligence on the part of the respondent would thereby necessarily be

excluded. In addition, the evidence discloses that the respondent knew the road was unmarked and under construction. He said that he had driven on that particular road earlier on the day in question. A reasonable person in the position of the respondent, having knowledge of these facts, can hardly be heard to say that he or she could assume that the extended portion of the tar road was part of a normal dual carriageway or safe to drive on in a normal manner for any extended distance. The extension was in the near vicinity of an intersection, the road was under construction and there were no markings on the road itself. Given these circumstances a reasonable person would, in my view, have foreseen as a reasonable possibility that the extended portion of the road would end within a relatively short distance and would adapt his or her driving accordingly. Knowing that the road was under construction and unmarked would make a reasonable driver in this situation even more alert than usual and not solely reliant on the presence of warning signs. For the same reason he or she would not make any assumptions that the ground next to the tar road under construction would be safe to drive on. The respondent’s conduct fell short of all this. It follows, in my view, that the magistrate was correct in finding negligence on the part of the respondent and giving judgment for the appellant.

[6] The appeal is accordingly upheld, with costs.

[7] The order of the Court below is set aside and replaced with the following:

> "The appeal is dismissed with costs."

_____

J.C.FRONEMAN
ACTING JUDGE OF APPEAL

SCOTT JA)
NAVSA JA) CONCUR