REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 322/03
Reportable

In the matter between

T DE MAAYER	**APPELLANT**
and	
T A SEREBRO	**FIRST RESPONDENT**
ROAD ACCIDENT FUND	**SECOND RESPONDENT**

T A SEREBRO	**APPELLANT**
ROAD ACCIDENT FUND	**FIRST RESPONDENT**
T DE MAAYER	**SECOND RESPONDENT**

CORAM: SCOTT, NUGENT, CLOETE JJA, COMRIE, PATEL AJJA

HEARD: 10 September 2004

DELIVERED: 29 September 2004

Summary : *Application for special leave to appeal – once an application is refused – decision final. Action for damages – proof of negligence – two vehicles colliding – third party turning across path of travel of insured driver –injured plaintiff passenger in third party's vehicle- plaintiff sued Road Accident fund and third party- Galante rule not applicable – third party exclusively negligent – Decision of Full Court confirmed.*

JUDGMENT

PATEL AJA

1] At approximately three pm on 6 August 1998 and in the intersection of Katherine and Amalinda Streets, Sandown, Gauteng, a collision occurred between a Ford Sierra ('the Sierra') driven by Mr A M Baudry (' the insured driver') and a Ford Tracer ('the Tracer') driven by Dr Tim de Maayer ('the third party'). The Road Accident Fund ('the defendant') was at all material times the insurer of the Sierra in terms of the provisions of the Road Accident Fund Act 56 of 1996.

[2] At the time of the collision, Dr Terry Serebro ('the plaintiff') together with Dr Gail Atherstone and Dr Lauren Raine were passengers in the Tracer. The insured driver was alone in the Sierra. The plaintiff sustained serious injuries and sued the defendant for damages. The defendant joined the third party in the proceedings claiming a contribution from the third party in respect of any amount which the defendant might be ordered to pay the plaintiff. Before the commencement of the trial the plaintiff also issued a third party notice against the third party claiming damages from the third party should the insured driver be found not to be negligent and should it be found that the sole cause of the accident was the negligence of the third party. By agreement between the parties the matter proceeded on the question of liability only.

[3] Labe J gave judgment in favour of the plaintiff holding the insured driver's negligence to be the sole cause of the collision. The defendant was ordered to pay such damages as the plaintiff might prove. The trial court absolved the third party from the instance. The defendant, with leave, appealed against this decision. On 19 June 2002 the full court of the Johannesburg High Court (in what I shall call the 'first appeal') upheld the appeal. Flemming DJP (in whose judgment Van Oosten J and Ponnan J concurred) absolved the defendant from the instance and ordered the plaintiff to pay the defendant's costs in the court of first instance. The plaintiff should have conditionally cross-appealed against the absolution order made by Labe J in favour of the third party in tandem with the appeal lodged by the defendant so that a finding could have been made that the third party was negligent if such a finding was appropriate. Her failure to do so timeously created for her a procedural hurdle to which I shall refer hereinafter.

[4] On 20 August 2002 and subsequent to judgment being given in the first appeal, the plaintiff sought and obtained further leave from Labe J against his finding of absolution in favour of the third party. Leave was granted by Labe J to the plaintiff to appeal either to the full court of the Johannesburg High Court or to this court, depending on the outcome of

the plaintiff's application for special leave to appeal against the judgment of Flemming DJP which in the meantime had been lodged with this court. This court refused the application for special leave on 26 August 2002. The second appeal was thereafter heard by the full court of the Johannesburg High Court. On the 20 March 2003 Landman J (in whose judgment Van Oosten J and Ponnan J concurred) found the third party to be exclusively negligent and liable for the plaintiff's damages. The court also made ancillary orders with regard to costs.

[5] Following the judgment of the full court in the second appeal, the plaintiff once again applied to this court for special leave to appeal against the judgment of the full court in the first appeal while the third party applied for special leave to appeal against the judgment handed down in the second appeal. On 18 June 2003 this court granted leave to both plaintiff and the third party. In light of the refusal of special leave by this court on 26 August 2002, the initial question which arises is whether the plaintiff is properly on appeal before this court.

[6] Section 20(4) of the Supreme Court Act 59 of 1959 provides that no appeal shall lie to this court against a judgment or order of a full court of a provincial or local division in civil proceedings without special leave of this court. In terms of ss 21(3) (a) (b) and (c) an application for special

leave is considered by two judges designated by the President of this court. In the event of a difference of opinion the application is considered by the President or any other judge designated by the President. The judges so designated may grant or refuse the application for special leave or may order that the application be argued before them or 'refer the matter to the Appellate Division for consideration, whether upon argument or otherwise'. Section 21(3) (d) of the Act further provides:

> 'The decision of the majority of the judges considering the application, or the decision of the Appellate Division, as the case may be, to grant or refuse the application shall be final.'

It is quite clear from the section just quoted that the refusal of leave to appeal by this court is final (see *Beinash and another v Ernst & Young and others* 1999 (2) SA 116 (CC) para [29]; *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC) para [14]). Once an application is considered in terms of s 21(3) (d) and refused, this court is *functus officio.*

[7] It was argued on behalf of the plaintiff that the first application for special leave was brought prematurely in that the second appeal had not been heard; and accordingly, that when the first application was refused,

this court did not dismiss the application on its merits. But the application was not premature. The plaintiff was perfectly entitled to bring this application which she did and this court was obliged to consider it. Both the defendant and the third party filed comprehensive opposing affidavits. The plaintiff filed a replying affidavit. Not a scintilla of evidence is to be found in the affidavits which would have suggested to the court that it was not to consider the application on its merits. Nor does the order reflect that it did not. This submission by the plaintiff, which was supported by the third party, is without merit. The subsequent granting of leave to appeal to the plaintiff by this court was *per incuriam*. The plaintiff's appeal therefore falls to be struck from the roll. In any event it would not have succeeded on the facts.

[8] The appeal which remains to be considered is that of the third party against the finding of the full court in the second appeal. The crucial issue on appeal is whether the third party was causally negligent. This necessarily involves a consideration of the conduct of the insured driver.

[9] With that prelude I turn to the facts. The occupants of the Tracer, all medical students, had spent the better part of the day picnicking at the Hennops River. At about three pm they decided to go home. The third party drove the Tracer southwards along Katherine Street. Katherine

Street is a dual carriageway. This dual carriageway is separated by a traffic island. Close to the intersection with Amalinda Street the island is recessed to create a third lane to be used by motorists who wish to turn right (to the west) into Amalinda Street. Similarly the traffic island on the opposite side of Katherine Street is also recessed to create a third lane for traffic turning right (to the east). There are no traffic lights to control traffic turning either to the east or west. Motorists turning west into Amalinda Street have to exercise caution and yield to traffic travelling from south to north on the dual carriageway.

[10] The third party wished to turn right (to the west) into Amalinda Street and was accordingly in the third lane. The insured driver was at the time travelling from south to north in Katherine Street and had the right of way. As the third party negotiated the turn a collision occurred between the Sierra and the Tracer. There was no reliable evidence as to the exact point of impact. It is common cause that the weather, visibility and the road conditions were good.

[11] The only occupant of the Tracer who had any recollection of the collision was Raine who at the time of the collision was seated behind the third party. Seated next to the third party was his girlfriend, Atherstone, and behind her was the plaintiff. The learned trial judge

based his finding of negligence on the part of the insured driver on the evidence of Raine, traffic officer Van Rensburg and Professor Hillman, an engineer. Van Rensburg had visited the scene of the accident and made certain observations. Hillman relied on these observations in drawing an inference about the probable speed at which the Sierra was travelling just before the collision. The Plaintiff herself did not testify. The defendant closed its case without calling the insured driver. The third party testified but had no recollection of the accident.

[12] Landman J, in the second appeal, in coming to the conclusion that the third party was negligent, agreed with the factual findings and conclusions reached by Flemming DJP in the first appeal. I am in agreement with Flemming DJP's conclusion and I can find no misdirection in his analysis and interpretation of the evidence of Raine, Van Rensburg or the expert Hillman who were the plaintiff's witnesses on the issue of negligence. I shall however advert to salient aspects of their evidence. Before doing so it would be convenient to restate the well established principles applicable in a situation such as that which arose in this matter.

[13] Turning across the line of oncoming traffic is an inherently dangerous manoeuvre and a driver intending such a manoeuvre must

do so by properly satisfying himself that not only is it safe but opportune to do so (see *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A) 52E-G). This rule, however, does not create a general presumption of negligence since each case has to be considered on its own special facts and circumstances. It does not confer on a through-driver an absolute right of way (see *Milton v Vacuum Oil Co* 1932 AD 197 at 205). A through-driver has to be vigilant and in appropriate circumstances reduce his speed to accommodate a driver who turns across his path of travel.

[14] Raine's evidence can be summarised as follows. She testified that she had paid particular attention because she wanted to learn the route to Atherstone's home. The third party, after entering the third lane in order to negotiate a turn to the right into Amalinda Street, stopped the Tracer. Two trucks were in the third lane waiting to turn to their right (to the east). The third party had edged forward and had progressed into the westerly lane beyond these two trucks. Raine looked initially thorough the front passenger window and thereafter through the left rear passenger window but saw no oncoming traffic. The collision happened

‘as he started executing the turn’. Her evidence did not shed any light as to the exact point of the collision nor the speed of the third party's vehicle at the time. She could not comment on the exact position of the trucks or whether the first truck had already commenced negotiating a turn to its right. Nor could she remember whether the trucks would have obstructed the view of the third party or the insured driver. She only saw the Sierra just before it collided with them. It was then approximately half a metre away. She did not know from where it had come.

[15] Van Rensburg’s evidence does not assist the plaintiff or the third party. He concluded that the collision occurred in the eastern lane of the north bound carriageway. His conclusion was based on the spread of glass fragments. He looked for but did not observe any tyre marks on the road. This latter evidence is fatal for Hillman’s opinion that the Seirra was travelling at a speed of 100kmh in a 60kmh area and was accordingly, because of a bend in the road, not visible to Raine. Hillman’s calculation of the speed of the Sierra was based essentially upon the premise that the Tracer was pushed and came to rest where Van Rensburg found it by the force of the impact without the Tracer’s own speed or movement having contributed to the positioning of the Tracer post collision. As Hillman was constrained to concede in cross-examination, the absence of tyre marks indicating that the Tracer was

pushed is wholly inconsistent with the premise on which his calculation of speed was based. At the end of the day there is no acceptable evidence to suggest that the Sierra was travelling at an excessive speed before the collision.

[16] A hypothesis advanced by an expert as to how and why a collision occurred is of little value if it is based on unproved assumptions. If the hypothesis is contrary to the proved facts, it is of no value at all. As Ogilvie Thompson A J said in *Van der Westhuizen and another v S.A. Liberal Insurance Co Ltd* 1949 (3) SA 160 (C) 168:

> 'In my opinion, however, the strictly mathematical approach, though undoubtedly very useful as a check, can but rarely be applied as an absolute test in collision cases, since any mathematical calculation so vitally depends on exact positions and speeds; whereas in truth these latter are merely estimates almost invariably made under circumstances wholly unfavourable to accuracy.'

Or as Van den Heever J A said in *Santam Beperk & African Guarantee And Indemnity Co v Moolman* 1952 P.H. (2) O16 (AD):

> 'Ons is vergas op 'n rekenkundige vertoog omtrent die relatiewe bewegings en stand van die twee voertuie op verskillende tydstippe. Myns insiens was dit tydverkwisting. Dit het groteliks gesteun op 'n beweerde merk wat S se motor in die pad gemaak het. Die oorsprong van die merk is egter nie bewys nie. Dan steun die berekeninge verder op gissings omtrent snelheid uitgedruk in

> soveel voet per sekonde. Om die rekenkundige metode op rekbare gegewens toe te pas is slegs om die ongewisse met die onbekende te vermenigvuldig.'

[17] On the evidence before the trial court the insured driver, if his vision was not totally obstructed by the trucks, would have observed the Tracer edging forward to enable the third party to see if there was any oncoming traffic. The insured driver would have had no reason to believe that the Tracer would not wait but would suddenly proceed into the intersection in the path of the insured vehicle. It cannot be said that the insured driver ought to have foreseen this dangerous manoeuvre and ought to have taken evasive action before the insured driver drove into his path.

[18] In the absence of direct evidence as to how the collision occurred and because the hypothesis advanced on the plaintiff's behalf fell to be rejected, both appeal courts were obliged to draw inferences from the proven facts. In both the appeals the court properly balanced the probabilities and selected the conclusion which seemed to be the more 'natural, or plausible conclusion from amongst several conceivable ones, even though that conclusion be not the only one' (*Govan v Skidmore* 1952 (1) SA 732 (N) at 734C-D, as explained in *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B and thereafter repeatedly approved by this court). The most plausible

inference on the facts as a whole which was drawn by both courts is that the third party turned across the path of the insured driver at a time when it was inopportune and dangerous to do so. His conduct thus constituted negligence and was the sole cause of the collision.

[19] In the absence of any evidence from the insured driver who, though available, was not called, this court was urged to apply the rule laid down in *Galante v Dickinson* 1950 (2) SA 460 (A) at 465, as follows:

> 'But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant.'

(see also *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (AD) 37A-41A and cases there referred to; *Jordaan v Bloemfontein Transitional Local authority and Another* 2004 (3) SA 371 (SCA) para [20-21]). As is apparent from the passage quoted, what is described as the 'Galante principle" applies only where the two alternative explanations as to the cause of the accident are more or less equally open *on the evidence* before the court. Where, on the evidence, there is an obvious explanation as to the cause of the accident which

favours the defendant, and an unsubstantiated theory advanced by the plaintiff with no evidence to support it, it cannot be said that there are ‘ two alternative explanations of the cause of the accident which are more or less equally open on the evidence’ and the Galante principle does not apply. That is the situation in the present matter. On the evidence, the obvious explanation for the collision is that the third party did not keep a proper lookout and attempted to cross Katherine Street at a time when it was inopportune to do so because of the oncoming Sierra. Hillman’s explanation as to how the collision occurred was discredited and there was no other evidence to suggest that the speed of the Sierra could have been a cause of the accident.

[20] The following order is made:

1. The plaintiff’s appeal is struck from the roll with costs such costs are to include the costs of the preparation by the defendant of the three bundles of documents relating to the applications to this court for leave to appeal.

2. The third party's appeal is dismissed with costs.

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CN PATEL
Acting Judge of Appeal

Concur:
Scott JA
Nugent JA
Cloete JA
Comrie AJA