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~~REPORTABLE~~/NOT REPORTABLE

Case number 247/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CHARLES ROBERT ROGER MACLEOD Appellant

and

CHRISTOPHER PETERS Respondent

CORAM : E M GROSSKOPF, HOWIE et

SCOTT JJA

DATE OF HEARING : 26 FEBRUARY 1996

DATE OF JUDGMENT : 12 MARCH 1996

J U D G M E N T

HOWIE JA/.....

HOWIE JA :

Respondent was knocked down and injured by a motor car in Strand Street, Cape Town. The car carried a valid token issued by an insurance company in its capacity as an appointed agent under the Motor Vehicle Accidents Act, 84 of 1986. (I shall refer to it as "the insured vehicle".) In due course he gave appellant, a practising attorney, timeous instructions to make a claim on his behalf for compensation under that Act. Appellant failed to take the necessary steps and the claim prescribed. Respondent then sued appellant in the magistrate's court, alleging that the loss of the claim was due to appellant's negligence and that the driver of the car had negligently caused the collision. (I shall refer to her as "the insured driver".) He accordingly claimed damages in the sum which he alleged would have been recovered from the insurer.

The action succeeded. The magistrate found that the

claim under the Act had prescribed due to appellant's negligence, that both respondent and the insured driver had been causally negligent in respect of the collision, that respondent had suffered damages in the sum of R59 200,00 and that the degrees of fault of respondent and the insured driver in relation to the damage were 60 per cent and 40 per cent respectively. Respondent was duly awarded R20 000,00, being the sum of his apportioned damages appropriately reduced to bring it within the limit of the magistrate's monetary jurisdiction.

Appellant noted an appeal. It was limited to the finding of negligence against the insured driver and to the apportionment.

The notice of appeal was filed on 7 December 1992. In terms of rule 50 of the Supreme Court appellant was obliged, within 40 days thereafter, to lodge an application for a date for the hearing of the appeal (sub-rule (4)(1)) and to lodge two copies of the record (sub-rule (7)(a)).

Moreover, he was obliged, within 60 days, to prosecute the appeal (sub-rule (1)). He failed to take any of these steps.

In terms of rule 50(1), therefore, the appeal was deemed to have lapsed.

In due course appellant applied to the Cape of Good Hope Provincial Division (Foxcroft and Traverso JJ) for condonation of his failure to comply with the rules and for an order extending the time within which to prosecute the appeal. The application was dismissed but appellant was granted leave by the Court a quo to appeal against such dismissal.

In this Court it was accepted on both sides that the grant or refusal of condonation was within the discretion of the Court below. However, counsel were not **ad idem** as to whether the exercise of that discretion was only open to appellate interference on recognised, limited grounds or whether this Court was entirely free to substitute its own

discretion. As to the distinction, reference was made to the judgment in *Tjospomie Boerdery (Pty) Limited v Drakensberg Botteliers (Pty) Limited and Another, 1989 (4) SA 31 (T)*, more especially at *36 C* **et seq.** For purposes of this judgment it is unnecessary to decide the question and it is assumed that interference is only permissible in the present case if one of the acknowledged grounds referred to above is found to exist.

The main considerations which will engage the court's attention in a condonation application appear from the judgment in *Melane v Santam Insurance Company Limited, 1962 (4) SA 531 (A)* at *532 C-F*. Those which were debated before us were the extent of appellant's default, the explanation he gave for it and the prospects of his contemplated appeal being successful.

The nature of appellant's default largely emerges from what has already been said above. To elaborate briefly, the time for applying for a date and lodging the record

expired on 4 February 1993, and on 4 March 1993 the appeal was deemed to have lapsed. Appellant was only aware of his predicament when he received a letter on 24 March 1993 from respondent's attorneys in which they pointed out that the proposed appeal had lapsed and demanded payment in terms of the magistrate's judgment. Appellant lodged his condonation application on 8 April 1993, about two weeks later. The Court a quo declined to accept that appellant's delay in attempting to rescue his position had merely been slight, as was then urged by his counsel, but nonetheless held that it was not inordinate.

The explanation advanced by appellant for his default may be summarised thus. Immediately after delivery of the magistrate's judgment in October 1992 he resolved to appeal. In particular, the finding that he had been negligent in the performance of his mandate had so upset him that he was, until the end of 1992, mentally and emotionally distracted from the proper running of his

practice. He had wanted to appeal against that finding but was persuaded by counsel who appeared for him at the trial (who was not counsel for him before this Court) not to do so. In that state of distress he decided to distance himself from the case until its disposal on appeal. Having no partners, and considering that his two professional assistants (one handled conveyancing and the other estates) unsuited to dealing with the appeal, he very unwisely (as he conceded) left it to his articled candidate attorney, one Nel. Even although he had recovered from his anxiety by the time he resumed work in 1993 and felt at ease enough to enquire from insurance brokers whether his negligence was covered by indemnity insurance, he nevertheless omitted to supervise Nel in regard to the appeal and was unaware that Nel had failed to take steps to prosecute it. He conceded that the appropriate thing to have done in the very beginning was to have handed the matter over to a colleague to handle on his behalf.

The application papers include an affidavit by Nel. He admitted having failed culpably in the procedural respects in question. He added that he had diarised the date by when relevant action was required but that a filing clerk had omitted to put the file before him on the required date and that he had not detected the clerk's error. No affidavit by the filing clerk was offered.

In evaluating this explanation the Court a quo commented that not only had appellant, on his own showing, been able to handle the matter from the start of the new year but that reasons should have been given why the filing clerk had not fulfilled Nel's instructions. The explanation proffered by appellant was therefore considered inadequate.

The various failures on appellant's part and those for which he must take responsibility, would unquestionably have been regarded as serious had the aspirant appellant been a client and not appellant himself. However, to an

extent his distress and anxiety offer a measure of mitigation and it seems that that was how the Court a quo assessed the position, too, holding that it was not a case of the "worst possible" kind. Indeed, one must infer that neither the extent of appellant's default nor the inadequacy of his explanation, was considered fatal to the application for the Court below went on to declare the question of the merits of the proposed appeal as decisive. In giving the judgment of the Court, Foxcroft J said:

> "If the prospects of success on the merits were very strong or strong, I would in all probability decide to allow the matter to proceed to appeal."

The learned Judge then reviewed what he saw as the salient features of the evidence presented at the trial as to negligence on the insured driver's part. He concluded that on evidence adduced for respondent such negligence had been **prima facie** established and that because appellant had failed to call the insured driver as a witness, this factor rendered the **prima facie** evidence conclusive.

It is necessary to cite two passages from the judgment which highlight the view of the Court **a quo** of the prospects of success on the negligence issue. The first has most to do with apportionment but gives essential perspective to the second. The passages in question read as follows:

> "I might not have found the degree of apportionment in the same measure as the magistrate did. It may be that a finding that the pedestrian was twice as much to blame as the motorist would have been better. But that would have only been a difference of 66 and two thirds percent as against 60 percent. I certainly cannot find any fault with the finding of the magistrate that there was an indication of negligence, namely, a failure to keep a proper lookout by the driver of the car which struck the pedestrian."

...

> "It follows therefore that I cannot find that there are good prospects of success on the merits. I would describe the prospects of success on the merits as only fair and only to a limited extent. I cannot see any possibility that any Court would ever have found absolution in this situation ..."

From what has been quoted it is plain that the Court **a quo** considered that there were fair but limited prospects

of success on the matter of apportionment but no prospects of success at all on the issue of the insured driver's alleged negligence.

It is in the light of that assessment that the evidence of possible negligence on the insured driver's part must be examined.

The collision happened on a weekday evening in May 1988 just before 6 o' clock. At the place where the collision occurred the northern carriageway of Strand Street is divided into three lanes. Proceeding eastward, the right and centre lanes pass under the Eastern Boulevard flyover bridge and become Newmarket Street. The left lane veers away from the others and becomes an on-ramp giving access to Eastern Boulevard. Demarcating the division between the left lane and the other lanes is an island which extends westward into Strand Street from the base of one of the pillars supporting the flyover. (In refering to Strand Street I mean, for present purposes, the northern

carriageway.) Protruding from the end of the island still further westward is a triangular area of yellow lines painted on the road surface in the pattern of a chevron. West of the chevron Strand Street is straight and level for many hundreds of metres. The insured vehicle travelled eastward in the left lane of Strand Street and was about to proceed up the on-ramp when respondent moved from the chevron into the car's path of travel.

Respondent did not testify but four witnesses gave relevant evidence on his behalf on the present issue.

The first, Soobramoney Madasen, was walking from his workplace in Newmarket Street towards the railway station. He passed next to respondent who was standing on the centre island between the carriageways of Strand Street, opposite the chevron. Madasen crossed Strand Street some distance west of the chevron and was proceeding along the northern pavement when he heard a thud. He turned and saw that respondent had been knocked down. It is to be inferred

from this evidence that after Madasen passed respondent the latter crossed northwards over the right and centre lanes of Strand Street and came to the chevron. It is impossible, however, to determine how long in advance of the collision he made that crossing or whether the insured driver ought reasonably to have seen him do so.

The story is next taken up by one Andrina Hiley who was driving at approximately 50 kilometres per hour about two car lengths behind the insured vehicle in the same lane. According to her it was still daylight, visibility was good and traffic conditions were fairly light. When she first saw respondent he was in motion. She could not describe that movement specifically. He was coming from her right to her left and proceeding from the chevron towards the left lane. He then started to run and she realised that the car ahead of her would inevitably hit him. Despite a late swerve by the insured driver to avoid impact, the collision nonetheless ensued. She ventured the

opinion that if she had been in the insured driver's position she would probably also have collided with respondent.

Dr. J.D. Potgieter examined respondent when the latter was admitted to Groote Schuur hospital later that evening. He testified that respondent smelt moderately of alcohol but it is manifest from his evidence that he was unable to conclude whether this meant that respondent was intoxicated either then or earlier.

Finally, there was Constable B.F.J. Geldenhuys, who went to the scene of the collision shortly after it happened. He found respondent in a semi-conscious state, smelling of alcohol. The insured driver was present and gave him a brief verbal account of the collision which he summarised in his pocket book. No questions were asked about this by respondent's attorney in evidence-in-chief. In cross-examination, however counsel for appellant asked whether, from the insured driver's statement, the witness

gained the impression that she had done what she could to avoid the accident. In reply he said

> "she did say to me that (respondent) was swaying as he was running."

In re-examination, respondent's attorney asked Geldenhuys to read out the entry in his pocket book. He did so. The two relevant sentences are:

> "Kleurlingman het voor haar motor ingehardloop. Sy beweer hy was slingerende."

The remaining aspect of the relevant evidence was a written statement made by the insured driver some days after the event to a policeman. In it she said the following:

> "On 88-05-19 at 18H20 I was driving my private motorvehicle CA251369. I was alone in my vehicle. I was travelling in an Easterly direction towards Woodstock in Strand Street at the turn-off to the free way Eastern Blvd. I turned left when suddenly I noted a coloured male on my left on the painted section where the road divides.
> My immediate thought was that the man was drunk as he was unstable on his feet. I breaked and hooted as the coloured male started crossing the road, he stepped right in front of my path of travel. I collided with

> him as I swerved. There was no way I could have avoided the collision." (The word "left" where it appears the second time is obviously an error by her or the policeman.)

It is clear that the Court below placed cardinal reliance on the content of this statement in concluding that the insured driver ought, **prima facie**, to have observed at an earlier stage that respondent was patently intoxicated and that it warranted an inference adverse to appellant that the insured driver had not explained why she had not seen respondent earlier. The Court also derived some support for this view from the pocket book entry.

I would point out that for causal negligence to have been established, by whatever standard of proof, it had necessarily to have been found that, had the insured driver seen respondent earlier, she would have been able to avoid the collision. The Court **a quo** did not make that finding.

An analysis of the oral evidence reveals that that given by Madasen did not contribute to a solution of the

instant question. Nor did that of Hiley. If anything, her testimony established a **prima facie** case that there was no negligence on the insured driver's part. And the fact that respondent smelt of alcohol cannot justify the inference that at the time of the collision he was, in the eyes of a reasonable motorist, discernibly disabled by drink. It is therefore not surprising that if the Court **a quo** did think that negligence had been **prima facie** proved, that it relied essentially on the insured driver's statements already mentioned.

According to the entry in Geldenhuys's pocket book, as explained by him in cross-examination, the insured driver told him that respondent was seen to stagger as he ran into the path of her car.

Having been elicited by appellant's counsel this statement of course became admissible evidence but it does not constitute even **prima facie** proof that had the insured driver observed respondent earlier she would have noticed

that he was unsteady on his feet and deduced from that that the reckless conduct of which he was subsequently responsible was a reasonable possibility to be urgently guarded against. It is even less capable of supporting the **prima facie** conclusion that avoiding action taken at an earlier stage would have been successful.

As far as the insured driver's written statement is concerned, it came to be introduced into the case in the following way. At the pre-trial conference, as reflected in a detailed minute, the following question and answer were recorded:

> "Are you prepared to admit that this statement can go in without leading the evidence of the policeman who took the statement. It can be accepted as proof of what Ms Strazalkowski (the insured driver) told the policeman.
> Defendant : Yes."
> (My underlining.)

The statement was contained in the police docket relative to the collision investigation. The docket was handed in by agreement at the start of the trial as an exhibit.

Nothing occurred during the trial which indicated any change in the evidential status or worth of the statement. It was not referred to again save in the magistrate's judgment. There it was quoted and used as the basis for the finding that the insured driver was clearly negligent because

> "(h)ad she kept a proper lookout she would at an earlier stage have seen the pedestrian and observing him to be drunk and unsteady on his feet, taken the necessary steps to avoid a collision."

In my view it was not open to the magistrate or the Court below to treat the statement as having been admitted as proof of the truth of its content. That was not what was agreed at the pre-trial conference. What was agreed there was that the statement could go in as proof of the content of the statement. This was quite understandable. If the insured driver came to testify, the statement would already be part of the evidence and could be used as material on which to cross-examine her. But there was no

basis upon which the statement was proof of the truth of what the insured driver had said other than by way of compliance with the provision of s 3(1) of the Law of Evidence Amendment Act, 45 of 1988. In terms of that subsection hearsay evidence is inadmissible unless, broadly speaking, the parties agree to its admission as evidence or the reported speaker testifies or the court, having considered various listed factors, allows its admission in the interests of justice. In s 3(4) hearsay evidence is defined as

> "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving evidence."

Applying to the instant case the explanation of s 3(1) and (4) in *Mdani v Allianz Insurance Limited 1991 (1) SA 184 (A)* at *189 H - 190 B* (regarding a statement just such as this) the evidence of the policeman who took the statement, as to what the insured driver told him, would not have been hearsay. It would have been first-hand

evidence of what she said. But it would have become hearsay in terms of s 3(4), and have required the parties' agreement or the magistrate's decision to admit it, if the statement had been sought to be used as proof of the truth of its contents. Because that which the parties in this case agreed upon at the pre-trial conference was not the admission of hearsay but the admission of the statement as a correct record of what the insured driver said, neither of the two relevant s 3(1) requirements was fulfilled.

It follows that the evidence considered by the magistrate, and by the Court **a quo**, to be crucial to the case against appellant ought not to have been taken into account. The unavoidable conclusion is that both the trial judgment and the exercise of its discretion by the Court a **quo** were tainted by the same fundamental misdirection. This Court is therefore at large to came to its own conclusion as to whether the grant of condonation was appropriate in all the circumstances and more especially in

the light of the prospects of success.

From the remaining evidence it is impossible to conclude, even on a **prima facie** basis, that the insured driver was negligent. Accepting that she had an unimpeded view of where respondent was on the chevron, there is altogether inadequate evidence that her speed was unreasonable or that, keeping a proper lookout, she ought to have foreseen respondent's reckless dash, as a reasonable possibility, at such earlier stage as allowed her time (including reaction time) and space to avoid the collision.

And I do not consider that respondent's case is improved even if, for the sake of argument, the insured driver's written statement were to be taken into account. Assuming in respondent's favour that the insured driver did not see respondent on her right as early as she could have, her statement is essentially an exculpatory protestation that the collision was unavoidable. In an attempt to

extract a telling admission from it, respondent's counsel was compelled to contend as follows. Firstly, from the fact that the insured driver only saw respondent belatedly and that her immediate impression was that he was drunk because he was unstable on his feet, one has to infer that had she seen him earlier she would necessarily have formed the same impression then and therefore have had time to take successful avoiding action. Secondly, because, as the statement reads, the question of intoxication is dealt with in one sentence and the attempt to cross the road in the next, there must have been a significant interval between her "immediate thought" and respondent's rush across her path. In other words the two were not simultaneous. She therefore had yet further time for avoiding action. In the circumstances, so ran the argument, she was culpably late in only reacting when respondent actually did start crossing.

In my view, the first of those suggestions is

speculation and the second involves a conclusion which the wording of the statement does not really justify. In context, and on a fair reading of the statement, the impression of intoxication came virtually simultaneously with the attempt to cross ahead of the car. As already indicated, one cannot ignore the fact that reaction time must be taken into consideration and, furthermore, there is no evidence as to how near the edge of the chevron respondent was before he dashed into the path of the car.

Whether one views respondent's case on the present issue with or without the insured driver's written statement this is not a case where, for the purposes of drawing any significant conclusion from appellant's failure to call her, the inference that she was negligent and the inference that she was not, are equally open: Cf. *Marine and Trade Insurance Company Limited 1972 (1) SA 26 (A)* at *40 D-E*. The latter inference is clearly the stronger in this case.

From the aforegoing it follows that appellant's prospects of success in his contemplated appeal are good and that, all relevant things considered, the application for condonation ought to have been granted. The appeal must therefore succeed.

As to costs, appellant's counsel conceded, rightly, I think, that respondent's opposition in the Court below was reasonable. Consequently appellant must bear his own costs in that Court and the costs of opposition.

As to the costs of appeal, it was, of course, incumbent upon appellant to establish a basis for appellate interference with the exercise of its discretion by the Court below and in that he has succeeded. However, in its essentials the nature of the enquiry before us has been very much a re-hearing of appellant's application for the grant of an indulgence. If, as was conceded, respondent's opposition in the Court a quo was reasonable, then the same holds good for his opposition on appeal.

The following order is made:

1. The appeal succeeds.

2. The order of the Court **a quo** is set aside and substituted by the following:

"(1) The application for condonation is granted.

(2) The appeal sought to be prosecuted is declared not to have lapsed.

(3) Applicant is granted leave to take such steps as remain necessary for the further prosecution of the appeal.

(4) Applicant is to pay the costs of the application."

3. Appellant is ordered to pay the costs of appeal.

C.T. HOWIE

JUDGE OF APPEAL

E.M. GROSSKOPF JA] **CONCUR**

SCOTT JA]

CTH/al