NEGLIGENCE "IN THE AIR" OR ON THE ROAD?

Ndlela v S 2013 (unreported, KZP) Case no AR 630/2012

1 Introduction

In certain circumstances, certain drivers are authorised to drive with a blue light and siren flashing on a public road. Thus, in terms of regulation 308(1)(h) of the Regulations issued under the National Road Traffic Act 93 of 1996 (hereinafter "the Act") any person driving or having a vehicle on a public road is required to "give an immediate and absolute right of way to a vehicle sounding a device or bell or displaying an identification lamp in terms of section 58(3) or 60 or regulation 176". Section 58(3) permits the driver of emergency vehicles, a traffic officer, and duly authorised drivers, as well as, particularly pertinent to the discussion which follows, a "person appointed in terms of the South African Police Service Act … who drives a vehicle in the carrying out of his or her duties" to disregard the directions of a road traffic sign displayed in the prescribed manner. There are two provisos: that such driver must drive the vehicle concerned "with due regard to the safety of other traffic"; and that such vehicle is fitted with a device capable of prescribed sound and a prescribed identification lamp, both of which must be in operation during such driving. Section 60 mirrors the provision in section 58(3), allowing for certain drivers to exceed the speed limit, subject to the same provisos. Regulation 176 authorises a member of the South African Police Service (along with a member of a municipal police service, a traffic officer, and a member of the South African Defence Force performing police functions) to utilise a lamp emitting a blue light in the exercise of his or her duties.

The permission granted to certain drivers to use such equipment has, however, not been without controversy. The excesses of the VIP Protection Unit, or "blue-light brigade", on South Africa's public roads have been the subject of extensive criticism and condemnation (see Van der Bijl "Blue-light Brigades and the Politics of Bad Driving" 2013 *Obiter* 136 for discussion of criminal law consequences flowing from such conduct; and Keepile "Blue-light blunders" http://mg.co.za/article/2010-05-04-bluelight-blunders (accessed 2016-06-15)). The proliferation of road accidents and other incidents arising from the driving of those with such blue-light privileges has given rise to a media statement by the South African Human Rights Commission, which expressed the need for urgent action to be taken in this regard, failing which the provision of blue-light usage would be seen as "disregarding safety and traffic regulations and basic human rights" (Media statement issued by the SA Human Rights Commission (SAHRC) regarding

the usage of blue lights by the SAPS VIP Protection Unit 18 April 2012 http://www.sahrc.org.za/index.php/sahrc-media/news-2/item/149-media-statement-issued-by-the-sa-human-rights-commission-regarding-the-usage-of-blue-lights-by-the-saps-vip-protection-unit (accessed 2016-06-15)). The SAHRC statement elaborates (Media statement issued by the SA Human Rights Commission (SAHRC) regarding the usage of blue lights by the SAPS VIP Protection Unit) as follows:

> "Notwithstanding the provision that authorises the usage of blue lights for emergency purposes, the Commission is however concerned that certain incidents seem to suggest that the usage of blue lights is sometimes grossly abused. The violation of traffic rules has an impact on the provision of the right to life as enshrined in the constitution. The special concession granted for blue-light usage should not override the minimum safety and traffic rules that apply to all road users."

The ongoing challenge posed by blue-light driving is reflected in the recent conviction and sentencing for reckless driving of Joseph Semitjie, the driver of then Gauteng housing MEC Humphrey Mmemezi, after he skipped a red light and collided with young motorcyclist Thomas Ferreira, causing serious head injuries (along with convictions on related charges, Semitjie was sentenced to an effective five years in prison – Makhafola "Blue-light driver jailed for 5 years" http://www.iol.co.za/news/crime-courts/blue-light-driver-jailed-for-5-years-1810182 (accessed 2016-06-15)). In addition, both the President ("Two hospitalised after Zuma's convoy involved in head-on collision" http://www.timeslive.co.za/politics/2016/05/25/Two-hospitalised-after-Zumas-convoy-involved-in-head-on-collision (accessed 2016-06-15) and the Deputy President ("Ramaphosa car in blue light crash" http://www.iol.co.za/news/south-africa/western-cape/ramaphosa-car-in-blue-light-crash-1984054 (accessed 2016-06-15) have recently been associated with blue-light collisions.

The case which will be discussed below is yet another example of blue-light driving which exceeded the parameters of lawfulness: *Ndlela v S* (KZP, unreported, AR 630/2012, 5 September 2013), an appeal from a conviction in the regional court, Pietermaritzburg, on a count of negligent driving (contravention of s 63 of the Act), leading to a sentence of a fine of R3000 or two years' imprisonment, with a further period of two years' imprisonment suspended for five years on condition that the accused was not convicted on a charge of negligent driving during the period of suspension.

2 Facts

The appellant, Ndlela, was a member of the South African Police Service, attached to the VIP Protection Unit, with specific responsibility for the protection of the MEC for the Department of Agriculture and Environmental Affairs. He had undergone psychometric testing and advanced driving training for his duties, including how to conduct himself in an emergency situation. On the day in question he was driving a State vehicle, a VW Golf, which was equipped with a blue light and siren, on the N3 southbound, en route to pick up the MEC for his official duties, along with another policeman (who was accused 1 in the court *a quo*, and shall be referred to as such for

the purposes of this discussion) as crew in the vehicle. The blue light on the vehicle was on and flashing as they drove. They encountered the complainants, who were driving a Mazda in the same direction, near Ashburton, outside Pietermaritzburg. The common cause facts (8–9) were that while the N3 consisted of two lanes, it was not possible for the appellant to carry out his intention to overtake the complainants' vehicle, and at the point where the N3 diverged into three lanes, the Mazda took the middle lane. Whilst overtaking the complainants, accused 1 fired two shots, whereupon Moodley, the driver of the Mazda, lost control of the vehicle, veering across the island between the southbound and northbound lanes, and colliding with another vehicle. There was no evidence that either vehicle was exceeding the speed limit.

The State's version differed from that of the appellant in a number of important respects. Moodley testified that although he saw a vehicle with a blue light approaching him, and was aware that he was obliged to give way (although there was no sign for him to stop or pull over), and indicated his intention to do so, the presence of trucks in the left-hand lane prevented him from doing so (10). He denied that he had made any hand signals towards the Golf, or that he had slammed on the brakes of the vehicle at any stage, and stated that he had stayed in his lane, and continued to drive steadily in the centre lane when he moved over, until he lost control of the vehicle (10). Moodley related that he heard a gunshot just prior to moving into the centre lane, and that as the Golf drew alongside him, his wife shouted "gun", and immediately after hearing a second gunshot he lost control of the vehicle (10). Moodley testified that the second gunshot caused him to go into a state of shock (10), and further stated that the driving of the appellant played no part in him losing control of the vehicle (11). Moodley's testimony was corroborated in so far as the firing of the gun, and his controlled driving in the lane that the Mazda was in, by the passenger sitting directly behind him, Ms Y Moodley (11). Ms Moodley also testified that "the Golf behind them constantly put them under pressure because it did not maintain a one car distance" (11). The passenger sitting next to Ms Moodley in the back seat, Pillay, corroborated Moodley's version in respect of the impossibility of pulling onto the left-hand lane due to the presence of trucks, and the firing of the gunshots (11–12). Roberts, a policeman, who was travelling on the same road, confirmed the presence of many trucks on the road and having to give way to the Golf (12).

The appellant averred that his driving did not contribute to Moodley losing control of the vehicle, and that he drove as he did in the execution of his duties, and because he was in an emergency situation, having to get to the minister with all haste. Thus, he argued, by driving closer to the Mazda, and putting the driver under pressure to give way, he was not engaging in negligent driving (12 and 13–14). Moreover, the appellant testified that the Mazda moved from the slow lane to the fast lane to block the Golf, that the driver "gave him the middle finger", and then failed to take the opportunity to move over when it came about, instead braking on a number of occasions (13). It was argued by the appellant that the Mazda, having moved to the slow lane, furthermore swerved to the right on a number of occasions as the Golf tried to fire warning shots (13). In no way was the complainant scared by the manner in which the Golf was driven, the appellant testified, in fact the

way in which the Mazda was being driven led the appellant to believe that the Golf may be subject to an ambush (14). Accused 1 testified that the shots were fired by him in response to the danger that the swerving Mazda posed to the lives of himself and the appellant (14).

3 Judgment

Having listed the grounds of appeal (2–4) and the arguments for respondent (the State 5–6), the court (per Moodley J, Nkosi J concurring) set out the single issue to be determined on appeal: whether the court *a quo* erred in convicting the appellant of negligent driving (6). Prior to setting out the facts (as summarized above), the court embarked on a brief synopsis of the role of the court on appeal (6–8), before turning to examine the judgment of the court *a quo* in relation to the issues before it, namely: (i) whether the version of the State or the accused fell to be accepted; and (ii) whether, on the accepted facts, the accused were guilty of any offence (8).

In relation to the first issue, the appeal court held that the court *a quo* was entirely correct in holding that the varied versions of events from the six persons in the Mazda did not undermine the truth of what occurred, but rather lent a ring of truth to their evidence, in the context of the mobility of the scene and the shock endured by them (15):

> "The thrust of their evidence, namely that the appellant placed them under pressure, is consistent and is not undermined by the discrepancies about the exact position the Mazda and the Golf were in relation to each other when the shots were fired."

Whilst the appeal court held that Roberts' testimony only had value as a general observation as to the appellant's driving and the road conditions, it held that it was "highly improbable" that Moodley, with five passengers, including his future wife, in the car would have deliberately have acted with the utmost provocation in making a rude sign and swerving violently in front of the Golf in order to prevent it from passing the Mazda (16). In fact the appeal court held that Moodley's version was not undermined and that the allegations of obstructive conduct directed against him by the accused were properly rejected (17).

As regards the second issue (or leg of its judgment), the court *a quo* rejected the appellant's contention that this was an emergency situation, as the minister was not in the vehicle, and moreover, failure to take the minister to his meeting on time was not a life-threatening event that gave the appellant the right to "drive any differently to other drivers or place other road users at risk, and that the appellant was required to comply with the rules of the road" (17). Based on the evidence of the State witnesses, the court *a quo* held that the appellant did not adhere to the requisite following distance between two motor vehicles, and that "this is a negligent form of driving from which a real danger of accident can arise" (17). The appeal court disagreed. Citing the well-accepted three-stage test for negligence from Burchell (18) (Burchell *South African Criminal Law and Procedure Vol I* 3ed (1997) 273), the appeal court held that the appellant was not negligent with regard to the collision, given that Moodley testified that what made him ultimately lose

control of the vehicle was the firing of the second shot, rather than the driving of the appellant, and in particular the failure of the appellant to keep a requisite distance from the Mazda (19).

Thus, the conviction on the basis of negligent driving was overturned. The court however held that the appellant could be convicted on the alternative charge of inconsiderate driving (contravention of s 64 of the Act). The basis for this conviction was the following reasoning by the court:

(i) Despite the evidence of trucks preventing the Mazda from moving over, the appellant "did persist with keeping [the complainants] under pressure under those very circumstances, although it was evident to him that they could not give way as they could not change lanes" (20).

(ii) The court *a quo* was correct in holding that the fact that the MEC may have arrived late for an appointment did not constitute an emergency justifying the appellant placing other vehicles and road users under pressure (20).

(iii) The court thus held (despite the testimony of the trainer of the Protection and Security Services, and defence counsel's reference to the case of *Davidson v the Cape Town City Council* 1965 (2) SA 559 (C) 564A–B, which was distinguished by the court by reference to 564C–D of the same judgment) that there was thus no emergency justifying inconsiderate driving by failure to show reasonable consideration to other drivers in the circumstances, as evidenced by the pressure placed on other road users in the context of heavy traffic (20).

(iv) It was further held that a flashing blue light or siren upon a vehicle does not in itself legitimate the driver of the vehicle concerned driving "as he or she pleases, thereby compromising the safety of other road users and to the detriment of the rights of other drivers"(22):

> "The objective of the equipment is to ensure that an official vehicle can travel unimpeded in an appropriate situation, usually an emergency or when special circumstances warrant unimpeded and secure official travel. It therefore does not lend itself to use on any and each occasion such vehicles are on the road, irrespective [of] the purpose of the trip."

In handing down the conviction of inconsiderate driving, as opposed to negligent driving, the court was at pains to stress that there should be no perception that such verdict was akin to holding that "the drivers of vehicles with blue lights may use the roads with impunity" or to "condoning or advancing the abuse of blue lights, sirens, etcetera, by drivers of official vehicles, in contravention of the rules that govern the ordinary road user" (22). Instead, the court held, the authority of such drivers is "circumscribed by the specific conditions under which traffic legislation may not be adhered to" (22–23) and that each case prosecuted against the abuse of emergency and official vehicles "will be decided on its own merits, fairly, and in accordance with law and justice" (23).

Taking into account the conviction on the basis of inconsiderate driving, as opposed to negligent driving, the court was compelled to reconsider the sentence handed down by the court *a quo*. Whereas a conviction for negligent driving carries a maximum sentence of three years (s 89(5)(b) of

the Act), in terms of section 89(6) of the Act, the maximum sentence for inconsiderate driving is a fine or imprisonment for a year. Taking into account the nature of the offence, the personal circumstances of the appellant, and the interests of society, the court sentenced the appellant to a fine of R2000 or six months' imprisonment, with a further term of six months' imprisonment suspended for two years on condition that the appellant was not convicted of inconsiderate driving during the period of suspension (24). It was held in terms of the goal of the sentence that whilst a conviction would in itself have a retributive effect, in order to achieve a deterrent penalty – given that "other road users are sometimes jeopardised by the manner in which blue light vehicles are driven" – a partially suspended sentence should be imposed (24). The evaluation of the offence of inconsiderate driving by the court is notable (23):

> "The offence of inconsiderate driving, though infrequently prosecuted in our courts, except as an alternative charge, is nevertheless sufficiently serious because of the constant carnage on the South African roads. The consequences of driving without reasonable consideration of other road users are frequently not as apparent as a collision. But inconsiderate driving frequently results in road rage and irate drivers who become distracted from the driving. There is also a fine line between inconsiderate driving and reckless driving."

4 Discussion

It is submitted that the judgment in *Ndlela* is worthy of both bouquets and brickbats. First, it is submitted that the judgment should be praised for its recognition that the appellant's driving in the circumstances could not be condoned. Given that the court held that there was no emergency – the probability that the MEC would be late for an appointment could not qualify as such (20) – and given that the court held that there was no obstructive or dangerous driving on the part of the complainant driver Moodley (17), the notion that the mere fact that a driver is entitled to make use of a blue light and siren in itself constitutes authority to ignore traffic rules or infringe the rights of other road-users is thoroughly and soundly rejected by the court. In similar vein, the fact that a driver has undergone psychometric testing and advanced driver training cannot provide a blanket exemption from abiding by traffic rules, such as maintaining a safe following distance (which the evidence in the case conclusively established the appellant had not done – see 15, 20). As stated in section 58(3)(a) and 60(a) of the Act, in order for a road traffic rule to be disregarded, the authorised driver must drive the vehicle with "due regard to the safety of other traffic". Where this does not occur, a conviction of inconsiderate driving is certainly a possible option. In respect of all these issues, it is submitted that the reasoning of the court cannot be faulted.

However, the judgment does give rise to some difficulties. It was contended by counsel for the appellant that appellant's conduct in driving in such a way as to pressure the complainants to move out of the way was not *per se* negligent: negligent driving requires negligence in respect of other road users, and those reasonably expected to be on the road, and not mere

"negligence in the air", that is that the negligence must have "a causal effect on the other road users" (4). It was thus contended that a "wilful disregard of the rights of other road users does not necessarily involve negligence" (4). Defence counsel further contended that the trial court erred in not recognising that it was the firing of the shots which gave rise to the complainant's loss of control, rather than the appellant's driving (4). It is clear that this argument weighed heavily with the court in its finding that there could be no conviction of negligent driving, not least because the State conceded that "although driving without adhering to a proper distance between two vehicles may be considered dangerous because of the pressure it places on the driver in front, it does not constitute negligence *per se*", and consequently that a conviction for inconsiderate driving was appropriate (6).

As indicated above, this line of reasoning was accepted by the court (which simply ignored defence counsel's associated argument that the trial court was motivated to an incorrect conviction as a result of its "antagonistic predisposition" towards the drivers of blue-light vehicles (4)). The court, citing the three-stage test for negligence, held that such test "lends merit" to the argument of defence counsel that "the negligence of the appellant in relation to the consequence of the collision is not sustained by the evidence" (19). The court pointed out that it was the admission of Moodley that it was the second shot, rather than the driving of the appellant which made him lose control, thus undermining the conviction for negligent driving (19). Moreover, the court held, the cited test for negligence does not sustain the conclusion of the court *a quo* 'that the failure of the appellant to keep a required distance from the Mazda while it was in front of the Golf, was sufficient proof of negligence to convict the appellant of negligent driving' (19). Thus, it was held, the court *a quo* was guilty of a misdirection, and the conviction was overturned.

It is however submitted that it is the appeal court which is guilty of faulty legal reasoning. Unfortunately it seems to have evaded the notice of both counsel and the court that the offence of negligent driving is not a materially defined crime (as is culpable homicide for example), where the causing of a certain forbidden situation or consequence (in the case of culpable homicide, death) is prohibited. Instead, negligent driving – in terms of which it is an offence for any person to drive a vehicle negligently upon a public road (Burchell *Principles of Criminal Law* 5ed (2016) 814; and s 63(1) of the Act, discussed in Hoctor *Cooper's Motor Law: Criminal Liability, Administrative Adjudication and Medico-Legal Aspects* 2ed (2007) B11–1ff) – is a formally defined offence, in terms of which only a specific act is prohibited, irrespective of its consequences (Snyman *Criminal Law* 6ed (2014) 209). Hence the court is mistaken in focusing on the issue of loss of control giving rise to the collision, in assessing whether the offence of negligent driving had been committed. The concession by Moodley that the appellant's driving did not cause him to lose control is simply not relevant to the question at hand: whether the appellant drove negligently.

Could the appellant's driving be characterised as negligent? It is recognised in South African law that the failure to maintain a safe following distance may give rise to both delictual liability (Cooper *Delictual Liability in*

Motor Law (1996) 140ff) and criminal liability (the test for negligence being the same in civil and criminal cases; Cooper states 77 fn 10 that it is thus permissible to refer to civil cases in criminal matters and *vice versa*). In this regard regulation 308(1)(b) of the Road Traffic Regulations (promulgated under the Act) states that no person driving a vehicle on a public road "shall follow another vehicle more closely than is reasonable and prudent having regard to the speed of such other vehicle and the traffic on and the condition of the roadway". In fact the issue of the negligence of the appellant's conduct may be resolved in terms of the very test applied by the court (18), where the first question to be addressed is:

> "Would a reasonable person in the same circumstances of the accused, have foreseen the reasonable possibility of the occurrence of the consequence or *the existence of the circumstance* in question, including its unlawfulness …"

It seems clear that in its mistaken focus on the consequences of the appellant's driving for the purposes of assessing negligence, the court entirely neglected the relevant part of the test (author's italicized emphasis). Would a reasonable person in the circumstances of the appellant have foreseen the reasonable possibility of the existence of the circumstance in question – that by not maintaining the required safe following distance he was driving negligently? The court (correctly it is submitted) specifically approved of the conclusion of the court *a quo* that the appellant drove in such a way as to place the complainants under pressure – indeed the basis of the finding that the appellant ought to be convicted of inconsiderate driving, was that he had not driven with reasonable consideration for other road users. Hence, it was established on the facts that the appellant's conduct did not merely constitute "negligence in the air" (a phrase defence counsel appears to have borrowed from *S v Ephraim* 1971 (4) SA 398 (RA), where although the result of the case was the same – a negligent driving conviction converted into an inconsiderate driving conviction – the facts are entirely distinguishable), but negligence in relation to other persons actually on the road. It therefore seems clear that if the court had applied the correct legal principles, the appellant's conviction for negligent driving ought to have been confirmed on appeal.

As a lesser offence to that of negligent driving, the offence of inconsiderate driving – the driving of a vehicle on a public road without reasonable consideration for any other person using the road (s 64 of the Act, discussed in Hoctor *Cooper's Motor Law* B11–34ff) – would certainly be applicable to the type of conduct of which blue-light excesses consists. The court's foregrounding of this under-used offence is thus to be welcomed, particularly for the recognition that egregiously inconsiderate driving could well contribute to an incident of road rage, with potentially grave consequences (for discussion of the meaning of "reasonable consideration", see Hoctor "What does "Reasonable Consideration" Mean in the Offence of Inconsiderate Driving?" 2006 *Obiter* 146). While negligent driving will always include inconsiderate driving, it is not the case that inconsiderate driving will always amount to negligent driving (given that negligent driving can occur in the absence of other persons on the road, but inconsiderate driving can only be committed if other road users are present – *S v Van Rooyen* 1971 (1) SA 369 (N) 370A–C). However, the court's statement that there is "a fine line"

between inconsiderate driving and reckless driving (23) cannot be supported. The legislative view of the gravity of these crimes is demonstrated by the distinction in maximum sentences of imprisonment (one year and six years respectively, in terms of s 89 of the Act). Moreover, reckless driving requires either intentional or grossly negligent conduct (*S v Van Zyl* 1969 (1) SA 553 (A) 559E), whereas, as indicated above, inconsiderate driving does not require that the driving in question amounted to negligent driving (*S v Van Rooyen* 1971 (1) SA 369 (N) 370A–B). It is evident that these offences are in fact on opposite ends of the spectrum insofar as the seriousness of driving offences is concerned, rather than there being the possibility that they may be confused with one another, as the court suggests.

5 Concluding remarks

The judgment in *Ndlela* is to be welcomed for the way in which the court was prepared to restrict the excesses of the "blue-light brigade", by imposing criminal liability for inconsiderate driving on the appellant. However, it is unfortunate that the court's mistaken application of the test for negligence contributed to a lesser conviction (and sentence) being handed down than what was appropriate in the circumstances. It is to be hoped that courts will be bold in convicting all drivers responsible for mayhem on the roads by driving without due regard for the safety of other traffic – including those driving under the authority of a flashing blue light and siren.

Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg