

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 12895/2014

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

Date:

WHG VAN DER LINDE

In the matter between:

Salumu, Odette (obo Medi Bless)

Plaintiff

And

Road Accident Fund

Defendant

Judgment

Van der Linde, J:Introduction

[1] This is a claim by a mother, on behalf of her minor son, for damages following injuries sustained on 6 August 2010 when he was knocked down by a motor vehicle when crossing a street. I was asked to deal only with two issues: whether the plaintiff was in truth the

mother of the minor; and whether the driver of the vehicle for whom the defendant statutorily accepts liability (“the insured vehicle”), was negligent in relation to the collision.

[2] I was informed that the parties had settled quantum, but that I would only be informed of the amounts involved when I handed down judgment on the two issues to which I have just referred.

[3] In opening the plaintiff’s counsel said that the minor was nine years old at time; that the insured vehicle was a Toyota panel van; that it was a robot-controlled intersection; and that the minor’s injuries included a fracture below the knee which necessitated an operation to repair a femoral artery, as well as a head injury evidenced by concussion during the collision.

[4] Three witnesses were called, all of them for the plaintiff. The plaintiff herself testified; the minor testified; and a Mr Moise Mansita, who describes himself as a street trader at the intersection where the collision occurred, was called. I proceed to discuss their evidence.

The plaintiff

[5] She was called to say that the minor was her son. That is all she said in chief. In cross-examination the maternity issue appears to have arisen because of two documents issued by the Department of Home Affairs. According to one, an “Asylum Seeker Temporary Permit,” her nationality is Congolese, and the DRC is her country of origin. The second, similar permit was issued to “Medi Bless,” a male born on 13 April 2000 (making him ten years old at the time of the collision), also of Congolese nationality. One of the conditions was: “Accompanying mother in RSA (Appeal).”

[6] The plaintiff said that both permits were issued to her by the department. The second one referred to her son. It was completed by a Home Affairs official to whom she, the plaintiff, gave the necessary particulars. She saw that her son’s surname was not correctly recorded. She has been to Home Affairs to have it corrected, but administrative delays have resulted in

it not being fixed. It did not bother her very much though, because her sons' permit was in her file, together with her permit, at Home Affairs.

Demeanour and discussion

[7] The plaintiff, whose first language is French and whose adroitness in English was somewhat lacking, impressed me as an honest witness. She gave her evidence in an open manner, and her demeanour was helpful and, where expected, indignant.

[8] Particularly, challenged that the minor was not her son, her response was politely condescending when she said that he was her boy, and that no-one could say that she was not.

[9] In argument the defendant submitted that there was no documentary evidence to substantiate her version. There was none, to be true. But to my mind that is not surprising, given her probable status as an asylum seeker.

[10] More importantly, virtually any documentary evidence would most likely be second-hand, if the plaintiff was conscious when the minor was born; and if there was no suggestion, as there was not, of a baby-swap at hospital at birth.

[11] The minor, when he was called, said that the plaintiff was his mother. But is evidence can at best be that, so far as he knows, she is his mother. When he first acquired cognitive function he would have been confronted by the presence of the plaintiff, virtually as a *fait accompli*. Although he would have been present at birth, will not have observed or remembered anything about it.

[12] The best evidence that the minor was her son was therefore that of the plaintiff herself. Since I believe her, the only remaining question is whether she could have erred. But that was not put to her, and so there was no suggestion as to how such an error could have come about, as perhaps in the baby-swap scenario. Any potential error is therefore speculative.

[13] In these circumstances the conclusion must be that the plaintiff has proved her *locus standi*.

The minor

[14]He said in chief that on the day in question, it was dry, hot and fine. He was walking at around 14h00 on the pavement of Rose Street, Rosettenville, Johannesburg, towards the traffic light –controlled intersection with Prairie Street. He proved a sketch, exh A; and explained that he crossed the intersection from the number 2, where there was the Shul, towards the number 1, where there was a Pick n Pay. In argument the wind directions were added to the sketch; so he was crossing east to west.

[15]He crossed Prairie Street; the lights were green. The next thing, he was knocked down by a car. He never saw the car, and found himself “down”. He lost consciousness. He was injured; his knee was broken.

[16]In cross-examination he said that he waited for the green light before crossing. He did not see whether the car was from his left or from his right. In his opinion the car was speeding, since other cars had stopped. He could not tell the point of impact. There are two lanes each direction in Prairie Street. The first lane is close to the pavement; the cars that had stopped, had stopped in that lane.

Demeanour

[17]I will deal with the probabilities below, when discussing the parties’ submissions. Here it is only necessary to record that I was not impressed with the evidence of the minor. He was soft-spoken; and his demeanour was generally woody, virtually robotic.

[18]This may have been ascribed to a degree of apprehension in having to testify; or in insecurity in having to recall what happened virtually six years ago.

[19]Either way, the plaintiff submitted that allowance has to be made for the fact that the minor's memory was likely impaired; and that, in the event of a conflict between his evidence and that of Mr Mansita, the evidence of the latter, who was said to be "superior" witness, was to be preferred.

Mr Moise Mansita

[20]In chief, he explained that his first language was also French; in fact, he knew the plaintiff's family, the father of which operated an Internet Café, and such that after the collision he was able to call the father on his phone to tell him what had happened.

[21]He described himself as a street trader, whose store was at the Shul on the north eastern corner of the intersection. There is a fixed barrier that runs north to south across Rose Street, just on the boundary of the intersection, so no vehicular traffic accesses Rose Street there. He sets up his two tables just on the inside of the barrier, in Rose Street.

[22]On the day in question he had just arrived, and had put down his two tables. He observed that the traffic lights were green for pedestrians; pedestrians from the mall on the north western corner, where there is a Pick n Pay, were crossing Prairie Street from west to east. Almost on his right hand side, he said, he could see the minor crossing.

[23]Next, he heard braking, a knock, and saw the minor lying on the road in Prairie Street. He was trying to sit up. The witness rushed to him to tell him not to move. He phoned his father who came. The police arrived and the minor was taken to hospital.

[24]In cross-examination he explained, with reference to a tick and a "Y" on exh A, where he was when he saw the minor, and where the minor was then. It depicts the minor slightly back from the traffic light on the north eastern corner of the intersection, and the witness just into Rose Street, behind where the barrier would have been.

[25]He explained that when he saw the minor at that position, the minor was walking, but fast. They normally greet each other, but on that day the minor did not, because he was "in a

hurry.” The witness explained that he saw the minor and the pedestrians crossing from west to east over Prairie Street “almost simultaneously”.

[26]The witness saw the colour of the traffic lights as the minor was walking past once only (and then it was green); he did not look again to see the colour. He said that those traffic lights are for pedestrians.

[27]The witnesses then paid attention to setting up his tables; he leaned on the top table to remove it. It was while this was occurring that he heard the collision.

[28]He did not see the minor enter the intersection, and cannot say what colour the traffic light was when he entered the intersection.

Demeanour

[29] Mr Mansita impressed me as an honest witness. His evidence was lucid, and he tried to be helpful in giving as clear a recollection as he could. He engaged the cross-examiner meaningfully and although he appeared to have sympathy for the minor, I did not get the impression that he was falsifying anything.

Submissions

The plaintiff

[30]The plaintiff submitted that the only probable reconstruction of the events, having regard to the probabilities and the evidence, with an appropriate slant in favour of the evidence of Mr Mansita, was as follows.

[31] The events commence with Mr Mansita looking north, and observing the minor hurrying along. Although Mr Mansita does not see it, because he is not looking there, the traffic light for pedestrians is red at that moment.

[32]Mr Mansita then turns his gaze to his left, and observes the pedestrians crossing from west to east across Prairie Street. As his gaze is on the pedestrians, the minor stops to wait for the traffic light to turn green. So the light must then have been red for the minor.

[33]In that movement of Mr Mansita's gaze from the minor to the pedestrians, the pedestrians start walking across the road, possibly when the light had not actually turned green for them yet. It is while they are doing this that the minor is waiting for the light to turn from red to green.

[34]Mr Mansita drops his gaze to arrange his tables; the collision occurs.

[35]On this argument the collision occurred just as the traffic lights had turned from red to green for the pedestrians; in other words, the insured driver would have approached the intersection with the lights green, changing to amber and then red, for him. He thus, in common parlance, typically "jumped" the traffic lights.

[36]The submission was also that this explanation fits with the minor's evidence of cars that had stopped; they would have stopped at the intersection in Prairie Street as the lights turned red for them, having travelled from south to north.

[37]In the course of the submissions for the plaintiff, Mr Mansita was identified as the preferred witness. The minor may have suffered from memory challenges following the injury, according to the submission.

[38]The plaintiff criticised the defendant for remaining silent about the insured driver. It was not explained why he was not called to testify. The plaintiff also submitted in the alternative that even if the finding is that the insured driver had crossed the intersection with the lights green in his favour, he ought to have made sure that there were no pedestrians, such as the minor, still in the intersection. He was negligent in not doing this, according to the submission.

The defendant

[39]The defendant argued that the court is not able to find what had happened. The versions are conflicting; the defendant had no onus; and absolution from the instance was the indicated result.

Discussion

[40]It is axiomatic that civil cases are decided on a balance of probabilities. It is equally well-accepted that probabilities are mixed in with credibilities: thus what is probable or not is related to what is credible or not in the circumstances.

[41]One also needs to record that human memory of events is usually fallible; more so when they occurred as long ago as these, and even more so when they were played out in such a short space of time.

[42]Against this background, it is often useful to distinguish between hard fact and soft fact, and in-between fact. This distinction helps to accord appropriate weight to conflicts in evidence when these have to be resolved.

[43]The events of the afternoon begin with Mr Mansita, as the plaintiff in my view correctly pitched. He observes the ten year old boy, in a hurry, on the pavement, along Rose Street, still a short distance away from the traffic light. So driven is the minor that he does not greet Mr Mansita, as usually occurs. This first observation, and this first scene, is what might be described as a hard fact.

[44]The second relevant event is Mr Mansita's observation of the pedestrians crossing from west to east across Prairie Street, with the traffic light green for them. This is an important piece of evidence and more needs to be said about it. Mr Mansita's presence in the witness box was justified because he was able to give this evidence: he was called because he could thereby prove that the light was green too for the minor. So he gave this piece of evidence in chief. I regard this too as a hard fact.

[45]There was no suggestion by him that the traffic light was then red; or that the pedestrians had precipitously stepped off the pavement onto the tarmac of Prairie Street, while the light was still red, and had then started to move across before the light had turned green. His description of his observation was that of pedestrians normally crossing an intersection with traffic lights in their favour.

[46]The timing of this second observation relative to the first is crucial. If it occurred at more or less the same time, then the traffic light was green for the minor as Mr Mansita saw him hurrying along; and then there could not have been a time when the minor waited for the light to change from red to green.

[47]The answer lies in the evidence of Mr Mansita himself. He said that his observation of the crossing pedestrians occurred “almost simultaneously” with his observation of the minor. This evidence was proffered in cross-examination, and not when he was pressed to fix a time-differential between the two observations. In my view, this evidence too is a hard fact, and thus credible.

[48]The third relevant observation is that Mr Mansita did not actually observe the minor cross into the intersection. This is not contested by the plaintiff.

[49]The fourth relevant observation is that the court can accept that traffic lights have cycles, and that their cycle changes from green, to amber, to red; and then back to green. There may be a flicker interspersed also between green and amber.

[50]Having regard to these four observations, it is not possible that the minor actually stopped at the intersection, and waited for the traffic lights to turn from red to green. They were already green as he approached the intersection, and there were people crossing the intersection on that green light.

[51]Further inevitable inferences follow from this probability. Since there were people crossing Prairie Street, vehicles travelling from north to south, as likely did the insured river, would have been faced by red traffic lights in the way of their progression down Prairie Street. And

they would have been faced by pedestrians crossing the road in front of them. This explains the presence of stationary vehicles in the first lane of Prairie Street, north to south, as the minor testified.

[52] That makes it not impossible but improbable that the insured driver would have been able to have sped down the second lane across the pedestrian crossing, into the intersection. He would have been confronted by the crossing pedestrians, the red light, and the stationary vehicles to his left.

[53] Far more probable, it seems, that the traffic light cycle was changing from green to amber for pedestrians, and then possibly to red, as the insured driver was approaching. Far more probable that the insured driver was observing the changing traffic light cycle for pedestrians; and that he was biding his time to cross the pedestrian crossing just as the light turned favourably green for him.

[54] Of course, what this reconstruction is unable to do, is to tell whether the insured driver actually called it right: was the traffic light already green for him, or was it still red, and still amber or flickering for the minor? And did he therefore still “jump” the robot, but as it was about to change from red to green, rather than as it was about to change from amber to red, as one also frequently observes in the streets of Johannesburg?

[55] One cannot tell, on this evidence. Rather, it seems that the correct conclusion is the following. The minor most probably did not cross into the intersection when the light was still green; it is more probable that he did so when the light was changing into amber, or flickering, on its way to red. But one cannot conclude that it was already red when he did so. The absence of the insured driver, without explanation, rather justifies an inference against him, namely that his version does not immunise him.

Conclusion on the cause of the collision

[56]So, in conclusion, it seems more probable that the in-between scenario prevailed: the light was changing in the direction towards red for the minor; he was in a rush; he skipped across, hoping to make it, not looking out at all: after all, the first lane vehicles were still stationary. In the meantime, the insured driver was biding his time to cross the moment the light would turn green for him; but he called it wrong, just so, and banged across when the light was still red for him.

[57]On this view of things, both were to blame; the insured driver more than the minor, because he skipped a red light, and the minor an amber one. Both were not keeping a proper lookout. I believe a fair apportionment in the circumstances is 25/75 in favour of the minor.

[58]According I make the following order:

- (a) It is declared that the plaintiff has *locus standi* to act on behalf of Medi Bless in this action.
- (b) It is declared that the quantum of the minor's claim for damages is to be reduced by 25%.
- (c) The question of costs stands over for determination once the quantum figures are conveyed to the court.

WHG van der Linde
Judge, High Court
Johannesburg

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Dates of trial: Thursday, Friday 9 & 10 June 2016

Date of judgment: Monday, 13 June 2016