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Case No. 288/1982

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the matter between:

THE MOTOR VEHICLE INSURANCE FUND

Appellant

and

MADELEINE LOUISE NESER

Respondent

CORAM:

MILLER, JOUBERT, NICHOLAS JJA,

HEFER et GROSSKOPF AJJA

HEARD:

15 MARCH 1984

DELIVERED:

27 MARCH 1984

JUDGMENT

/HEFER AJA ...

HEFER AJA:

On the evening of 22 August 1978 the respondent discovered the bodies of two injured men on the Pretoria/Delmas road. She was on her way to Pretoria and alone in the car. She decided to stop and investigate and, if necessary, to render assistance. That was an unfortunate decision. For, whilst next to one of the men, she was run over and struck unconscious by a vehicle which she had at no stage seen or heard. When she regained her senses, the vehicle had disappeared. It has never been traced or identified; nor has its driver.

/The ...

The respondent sued the appellant in terms of section 7 (2) (b) of the Compulsory Motor Vehicle Insurance Act No. 56 of 1972, read with the relevant regulations, for the recovery of the damages which she suffered as a result of the injuries sustained in the collision. The quantum of damages was agreed and the parties eventually went to trial on the issue of the negligence of the driver of the unidentified vehicle, which had been alleged by the respondent and denied by the appellant, and on a counter-allegation of contributory negligence on respondent's part. The outcome of the trial was that negligence on both sides was found (60% on the part of the driver of the

/unidentified ...

unidentified vehicle and 40% on the respondent's part) and judgment was entered in respondent's favour for an amount of R7 729,00 with costs. Against that judgment the appellant has now appealed.

At the trial the dispute, as far as the facts are concerned, related mainly to the position of the injured men on the road when the respondent found them, and to the spot where and position in which the respondent had parked her car before going to assist them. Respondent maintained that both bodies were on the gravel verge next to the tar on the left-hand side of the road as she was travelling towards Pretoria, and that she first drove past them, but then executed a

/U-turn ...

U-turn, passed them again, made a second U-turn and eventually stopped on the gravel with her car again facing in the direction of Pretoria; while her car was in that position and she was squatting directly in front of it next to one of the men, she was struck by a vehicle which could only have come from behind and which, she said, must have swerved around her own car in order to hit her.

The appellant called two witnesses, Mr. le Grange and Mrs. de Lange, who had arrived on the scene shortly after the incident. They found respondent's car not on the gravel, but more or less in the centre of the road; and it was facing towards Delmas - not

/toward ...

towards Pretoria. The bodies of the two injured men were not in the position described by the respondent either. One of them was in the middle of the road, a short distance behind respondent's car. The other one was lying partly on the tar and partly on the gravel, in line with the rear portion of the car.

The respondent was in no position to contradict this evidence. Not only was she hopelessly confused at the stage when le Grange and Mrs. de Lange arrived, but she was suffering (then and still at the trial) from retrograde amnesia. Yet she was not prepared to concede that her description of the incident could not possibly be correct and insisted

/that ...

that her car and the bodies of the two men must have been moved by the person or persons who had collided with her, to the position in which le Grange and Mrs. de Lange found them. As to his or their reasons for doing so, she entertained and vigorously defended a fascinating theory. I do not intend to relate it here. The learned trial Judge rejected it and, although respondent's counsel raised it in his heads of argument again, he wisely refrained from addressing us on the topic. I have no doubt that the learned Judge was perfectly correct in rejecting it: it was so bizarre and so utterly improbable that it never justified serious consideration. I am accordingly

/in ...

in full agreement with the approach which the learned Judge adopted (and which was the basis on which the appeal was argued too) in accepting what was essentially the appellant's version of how the incident must have occurred. It was recorded as follows:

"This version is consistent with the plaintiff having driven past what she thought initially to be packages, but what she saw to be human figures lying prone on the ground. She then did a U-turn and returned to the scene to see what assistance, if any, she could render to the two persons. She had been warned by her brother to be very careful of stopping on the road and therefore drove towards the bodies with great

/caution ...

caution. She stopped her car with her lights on bright to enable her to see what was going on and left the car running and her door open in case of emergencies and then stepped out to see what she could do for the other persons.

Whilst attending to such injured persons she was struck a glancing blow from behind by a car coming from the direction of Delmas."

It appears from the evidence that the road eastwards from the spot where the incident occurred (i e in the direction of Delmas) is straight for a distance of about $1\frac{1}{2}$ kilometres. About 71 metres from the same spot, also in the direction of Delmas,

/there ...

there is a T-junction where another road joins the Pretoria/Delmas road from the south. Le Grange and Mrs. de Lange came along that road and turned westwards into the Pretoria/Delmas road. Le Grange's evidence is that when he did so, he was blinded by the lights of respondent's stationary vehicle. He proceeded cautiously and at a distance of about 15 yards he was able to see the respondent where she stood waving her hands next to her car. He stopped and then found what I have already described.

The learned Judge was of the view that

"... a motorist coming from the direction of Delmas, even assuming that he did not

/join ...

join the main road at the T-junction could and should have avoided a collision with the plaintiff had he exercised due and proper care. It follows that if he failed to do so such a driver would not have been keeping a proper lookout. Any driver approaching the scene from an easterly direction from Delmas would have received warning of the stationary vehicle and the blinding effect of the headlights much earlier than Le Grange did and would have regulated his speed accordingly had he been reasonably careful and prudent.

... the negligence of an oncoming driver in failing to avoid the accident, which he could have avoided as a reasonably prudent driver, would be almost a res ipsa loquitur."

/In ...

In this Court appellant's counsel criticised the learned Judge's reasoning in a number of respects but because some of his criticism, although perhaps justified, related largely to minor points which cannot affect the result, I shall only deal with his main submissions. In the absence of direct evidence, they were made on the basis of the probabilities only.

The hypothesis for the whole argument is that the unidentified vehicle approached from the direction of Delmas (i.e. from the east) and struck the respondent a glancing blow from behind while she was squatting next to one of the injured men on the gravel close to the southern edge of the tar

/behind ...

behind the lights of her own car where she would only become visible to the driver of the approaching vehicle once the lights of that vehicle fell on her. Counsel further postulated that the driver was blinded by the bright lights of respondent's car which were shining directly towards him, and submitted that his natural reaction would have been to steer a course as far as possible to the correct side of the road (even to the extent of travelling with his left wheels on the gravel) whilst focussing his attention on the stationary vehicle, which would bring about that he would probably have seen respondent's squatting figure only

/at ...

at the last moment when it could well have been too late to avoid a collision.

Whilst accepting this hypothesis of the manner in which the collision occurred as the most realistic one, I am unable to agree that an inference of negligence on the part of the driver of the unidentified vehicle is not justified. The main thrust of the argument is that the driver probably did not see, nor could he have seen, the respondent until it was too late. But, if this is indeed what happened, it cannot avail him because it is not something which could not reasonably have been foreseen and avoided by taking adequate precautions. Any reasonable

/driver ...

driver would, in my view, have been acutely aware of the danger which lurked on his left-hand side of the road in the vicinity of the stationary vehicle. He would have been alive to the very real possibility of the presence in the dark there of people who had alighted from it and whom he would have scant opportunity to observe and avoid; and he would have regulated his driving in such a manner that, should someone suddenly appear in the lights of his car, he would still be able to take avoiding action. It was, after all, not a situation which had suddenly overtaken the driver; it is not a case of a motorist who was suddenly blinded by the lights of an

/approaching ...

approaching vehicle. As mentioned earlier, the road eastwards is straight for a full $1\frac{1}{2}$ kilometres and the blinding effect of the headlights of respondent's car would have commenced, as appears from le Grange's evidence, at a relatively early stage. The driver thus had ample opportunity to adapt his driving to the new conditions. Gradually as he approached, it would have become plain to him that he was not dealing merely with a driver who refused to dim the lights of his car. He would have seen that the vehicle was stationary, and it was stationary, moreover, in the middle of the road. That would have alerted him to the full extent of the

/danger ...

danger and he would have taken adequate precautionary steps.

I do not agree with appellant's counsel that the driver must have been more or less on the horns of a dilemma which entailed an election between driving more towards the centre of the road (and running the risk of colliding with someone immediately next to the stationary vehicle) and driving on the extreme left or on the gravel (and incurring the risk of colliding with someone there). I do not think that such a dilemma existed at all. For, wherever he elected to drive, a collision could have been avoided simply by driving at an extremely low speed

/whilst ...

whilst keeping the sharpest lookout that the prevailing conditions permitted. Indeed, the very fact that a collision was not avoided affords proof, in my view, that the driver did not adopt these simple measures, probably because he was not as appreciative as he should have been of the extent of the danger.

In my judgment the learned trial Judge correctly concluded that negligence on the part of the driver of the unidentified vehicle had been established. He was also correct in finding that the respondent had been negligent too. Appellant's counsel submitted that her negligence outweighed that of

/the ...

the driver. But, although I would perhaps not have apportioned the damages in the same proportions as the learned Judge, the difference would have been so slight that interference with his award is not justified.

The appeal is dismissed with costs.

J.J.F. HEFER AJA

MILLER JA

JOUBERT JA

CONCUR

NICHOLAS JA

GROSSKOPF AJA