

LULAMILE JOSEPH LUGAWE

APPELLANT

AND

A A MUTUAL INSURANCE
ASSOCIATION LIMITED

RESPONDENT

F S SMUTS, AJA.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

LULAMILE JOSEPH LUGAWE APPELLANT

and

A A MUTUAL INSURANCE
ASSOCIATION LIMITED RESPONDENT

CORAM : KOTzé, JA, SMUTS et GROSSKOPF, AJJA.

HEARD : 13 March 1984.

DELIVERED : 29 March 1984.

J U D G M E N T

SMUTS, AJA :

This is an appeal against an order by

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HOWIE, J, in the Eastern Cape Division dismissing appellant's claim for damages suffered by him when run down, on 26 October 1977, by a motor vehicle of which respondent was the insurer in terms of Act 56 of 1972. In this judgment I shall refer to the parties as plaintiff and defendant.

It was alleged by plaintiff that the driver of the motor vehicle, B J Duda, was negligent in various respects. It appears that the collision took place in M street in the Tanje residential area of Grahamstown. M street runs uphill from west to east and is intersected by S and T streets which run parallel to each other from north to south. T street is the street furthest east. M street has a

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tarred surface. On either side of the street there are gravel sidewalks. Between the tarred surface and the sidewalk on the northern edge of M street there is no kerb but only a dished cement gutter rather in the shape of a flattened V. Plaintiff testified that he walked downhill from east to west in the gutter referred to above. He noticed a motor car approaching from the opposite direction. At that stage the car was still beyond S street. he paid no further attention to it until it was practically upon him. He tried to run away but to no avail and was knocked down while still in the gutter. Shortly before he

was struck he noticed young men playing with a tennis-ball in the road. He thought that the car had swerved to its left in order to avoid colliding with these youths and that this swerve was the cause of the car striking him. The witness M Mcekana corroborated plaintiff to a large extent. According to him he was standing on the verandah of his home which was across the street from the spot where plaintiff was run over. He saw plaintiff walking down the street in the gutter. The car driven by Duda approached plaintiff from the opposite direction. According to Mcekana it was being driven "quite fast". It swerved towards.....5

towards plaintiff and as he was on the point of running away he was struck.

Duda testified that he, a taxi driver, had picked up E Nabo at Duda's home in S street for the purpose of conveying him to a place called Joza. When he came to the intersection of S and M streets he turned to his left and drove up M street. He denied that he was ever beyond the intersection of S and M streets as alleged by plaintiff. As he was travelling along M street with his passenger he noticed many people in the street. There were also children playing with a tennis ball in the road. He safely passed the children. Prior to passing

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his left shoulder. The distance which plaintiff moved prior to being struck was about 2 paces.

E. Nabo testified that he was a passenger in Duda's taxi when the collision took place. He was being conveyed from Duda's house, no 9 S street, to Jozza. He corroborated Duda in regard to the route they had followed up to the time the collision took place. He agreed that Duda was not travelling fast. He also saw children playing in the street and in addition he noticed plaintiff on the point of crossing M street from right to left. When he first noticed the latter the car was about 20 paces from him. He then saw plaintiff crossing the road. Plaintiff appeared to

be walking normally. He reached the gutter, crossed it and moved forward on to the pavement for about another 2 to $2\frac{1}{2}$ paces. He then commenced walking backwards into the road at a quick pace. At the stage that he was on the gutter the car was already close to him. Nabo estimated the distance to be about 4 metres. Duda tried to swerve but he was too close to avoid a collision. Nabo testified that plaintiff was looking over his left shoulder straight at the approaching vehicle when he moved backwards into the road. All in all plaintiff moved back a distance of about 4 paces. Nabo also observed another motor car coming from the opposite direction. Whilst plaintiff was lying in the road Nabo became....9

became aware that he smelt of liquor.

Constable Dekeda, a member of the South African Police, testified that he visited plaintiff in hospital to obtain a statement from him in regard to the accident and in fact obtained one. Plaintiff appeared quite normal. The statement was read over to plaintiff and he signed it. The contents of the statement are the following:

"On Wednesday 26-10-77 at ⁺ 18 h 15
I was going down "M" street walking
on the left side of the road. I
did not know what took place. I
was only bumped by a m/v and I fell
on the side of the road. I was under
influence of liquor at the time
of accident.

I was unconscious and I regain

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my senses at the Hospital.

The weather was clear and the tarmac was dry. That is all I can say I sustained bruises on the body."

This statement was signed on 28 October 1977. Dekeda admitted that he could not recall the exact answers given to him by plaintiff. In order to be able to testify it was necessary for him to refresh his memory from the statement. He denied however that he was told by plaintiff that he was walking down the right hand side of the road prior to being struck. He denied further that he had put questions to plaintiff and more particularly that he had asked him whether he was under the influence of liquor when

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the accident took place. The statement, he testified, had been volunteered by plaintiff.

It is clear from the above synopsis of the evidence that either plaintiff and his witness Mcekana or Duda and Nabo were deliberately lying. Plaintiff either walked down M street or he crossed the street from south to north. There was no room for a genuine mistake. This was accordingly a case in which the credibility of the witnesses was of prime importance. HOWIE, J, did in fact make strong findings in this regard. Constable Dekeda impressed him as an honest witness. It appears from the judgment of the trial Judge that the defence did not find it possible to argue that

Dekeda had fabricated the contents of the statement and HOWIE,J, held that in his view there was no possibility that this could have happened. It appears further that in the Court a quo plaintiff's counsel did not contend that Dekeda's credibility was open to question. HOWIE,J, states in his judgment that he regarded the quality of Dekeda's evidence as sound and that he also appeared to be completely impartial. Duda made a reasonable and Nabu a satisfactory impression on the Court a quo . Plaintiff's demeanour was, according to HOWIE, J, generally unremarkable. In regard to some issues he gave evidence with great assurance whereas it later

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appeared that he was wrong. One example of this was his evidence that when he saw the taxi for the first time it was in M street beyond S street. Plaintiff's counsel accepted that plaintiff was mistaken in this regard in view of the evidence by Duda and Nabo that their journey had commenced in S street. Mcekana did not make a favourable impression as far as demeanour was concerned.

The trial Judge did not base his judgment solely on demeanour. He correctly had regard to the probabilities and came to the conclusion that the evidence of plaintiff and Mcekana was false and could not be accepted. He was fully aware of the improbability

of a person crossing a street and then immediately moving backwards into the path of an oncoming car whilst looking straight at it. He found, however, that this seemingly improbable conduct was not so improbable and in fact acceptable when once Dekeda's evidence that plaintiff had admitted that he was under the influence of liquor was accepted. I do not intend referring to all the points made against the evidence given by Duda and Nabo. They were all dealt with in the comprehensive judgment of the trial Judge and were accordingly all present to his mind when he rejected the evidence of plaintiff and Mcekana and accepted that of Duda, Nabo and Dekeda.

The onus rests on plaintiff to persuade this Court that HOWIE, J, erred in arriving at the conclusions to which I have referred above in regard to the acceptability of the various witnesses' evidence. .

A weighty factor in this case is Dekeda's evidence of the admission made to him by plaintiff when the statement quoted above was taken down. As I have already stated, it was not contended that HOWIE, J, erred in regarding Dekeda as an honest, sound and impartial witness. There is accordingly no reason to think that he made a mistake when he recorded plaintiff's statement. Acceptance of Dekeda's evidence that plaintiff told him that he was walking down M street on the left hand side of the

road and that he was intoxicated at the time is, in the absence of a satisfactory explanation, practically conclusive against plaintiff. It was contended that the statement was made shortly after the accident had taken place and plaintiff may not have been fully aware of what he was saying. Plaintiff himself did however not testify that he was not aware of what he was doing or saying when Dekeda visited him in the hospital. On the contrary, he testified that he remembered that he in fact told Dekeda that he was walking on the right hand side of the road and that in attempting to avoid the boys who were playing with a tennis-ball the approaching car struck him. He denied telling Dekeda that he was intoxicated.....17

intoxicated. He testified that he told him that he had "drunk before dinner" , "dinner" being a reference to lunch. In re-examination he stated that he was still in pain when Dekeda visited him but admitted that he was aware that the latter was a policeman. In reply to a question by the Court as to the state of his memory when Dekeda spoke to him he first replied that it had not been working well and gave as a reason the fact that he was sleeping on his back. Two questions later he however stated that "even though my body was still painful, I could answer all the questions they asked me" and still later, in answer to a question whether he could at that stage remember the events

well enough to answer the questions put to him, he replied that he could in fact remember the events clearly and that he was able to reply.

It can accordingly not be said that plaintiff made the statement to Dekeda while not completely in command of his senses. On his own evidence he was aware of what had happened at the time of the collision and of what he was saying. The admission that he was walking on the left hand side of the road accordingly refutes his evidence and that of Mcekana that he was walking in the gutter while it at the same time corroborates that of Duda and Nabo. Once it is accepted that plaintiff was under the influence of

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intoxicating liquor the act of walking backwards into the road also becomes understandable. In addition to his admission of intoxication there is also the evidence of Nabo in regard to the smell of liquor on plaintiff.

To my mind plaintiff has failed to show that HOWIE, J, erred in accepting the evidence that plaintiff crossed the street in front of an approaching car and then walked backwards into its path. Plaintiff most certainly did not establish, on a preponderance of probabilities, that he was run over in the fashion described by himself and Mcekana. I do

not intend repeating the criticism levelled at the evidence of plaintiff and Mcekana by the learned trial Judge. Suffice it to say that it appears to me to be fully justified.

It was argued in the alternative that it was proved that Duda was negligent even on an acceptance of the defence evidence. It was contended that Duda ought to have noticed that plaintiff was moving back into the road at the stage when he was still on the pavement and, at the very latest, when he was on the gutter; that had he done so he would have been able to avoid colliding with plaintiff. This argument was also advanced in the Court

a quo. HOWIE, J, held that Duda was in fact negligent in only noticing plaintiff when he was already on the road surface. He found that he should have observed him when he was on the gutter. He held against plaintiff, however, on the question whether it had been proved that had he seen him when he was on the gutter, he would have been able to avoid running him down. I think that the finding that Duda was negligent in not seeing plaintiff immediately before he stepped on to the surface of the road was perhaps more favourable for plaintiff than the facts justify. It is however not necessary to express any view on this issue for reasons which will appear later.

I am unable to accept the argument that Dekeda should have noticed plaintiff at an even earlier stage, viz, when he was still on the pavement, and that his failure to do so constitutes negligence. It is clear that Duda kept plaintiff under observation right up to the time that he had crossed the tarred surface of the road and was on the gutter and still moving away. Up to the stage when plaintiff reached the gutter on the north side of M street, Duda had seen an adult person crossing the street in a normal fashion. In my view there was no duty on Duda to keep an eye on plaintiff once he had seen that he was safely over the road and still moving away. According to Nabo plaintiff in

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fact walked another 2 to $2\frac{1}{2}$ paces further on to the pavement. It follows that even had Duda kept looking at plaintiff a bit longer he would have seen him moving further away from the street. In those circumstances there rested no duty on him to keep a further watch on plaintiff. The fact that Nabo kept on looking at plaintiff up to the stage that he had advanced 2 to $2\frac{1}{2}$ paces on to the pavement cannot justify a finding that Duda was negligent in not doing so. Duda, as the driver of the taxi, was obliged to be aware of what was going on around him and could therefore not be expected to keep his attention rivetted on plaintiff. It was expected of him to be aware

of what the driver of the approaching car was doing and also to be on his guard in regard to children and others who might move into his path. That was no part of Nabo's duties. He was at liberty to look around at whom and what he pleased and for as long as it suited him. The fact that Nabo might have observed plaintiff moving back a second earlier than Duda did does not justify a finding that the latter negligently failed to keep a proper lookout. But even had he seen him on the pavement and moving back he would also have seen that plaintiff was looking directly at his car. There would have been no reason for him to think that plaintiff would nevertheless move into the path of the ap-

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proaching car. I am accordingly not persuaded that Duda was negligent in not seeing plaintiff while he was still on the pavement. Even had he seen him moving backwards on the pavement it could not reasonably have been expected of him to take avoiding action already at that stage.

On the assumption that Duda was negligent in not seeing plaintiff when he reached the gutter, the question is whether it was proved that Duda ought to have been able to avoid a collision had he seen him. HOWIE, J , held that this had not been shown and I agree with him. The only evidence of the distance between the car and plaintiff at that stage was that

of Nabo who estimated it to be 4 metres. According to Duda plaintiff was 3 metres from his car when he noticed him on the side of of the road. Bearing in mind that allowance must be made for time to react, it is quite clear that it cannot be held that Duda had sufficient time, in the circumstances in which he was placed, to act in such a way that a collision could have been avoided. It can therefore not be found that any negligence of which Duda may have been guilty contributed to the collision.

The appeal is accordingly dismissed with costs.

F S SMUTS, A J A.

KOTZÉ , J A.) Concur.

GROSSKOPF, A J A.)