

(APPELLATE DIVISION)

In the matter between:

JOSEPH ROLAND MAUJEAN Appellant

AND

THE MARINE AND TRADE INSURANCE

COMPANY LIMITED Respondent

Coram: CILLIÉ, BOTHA et HEFER, JJ.A.

Heard: 10 September 1984.

Delivered: 27 September 1984.

J U D G M E N T

CILLIÉ, J.A. :

This is an appeal against a judgment
given in the Witwatersrand Local Division by Kirk-Cohen J.

in an action for damages which the appellant (herein referred to as the Plaintiff) claimed he had sustained in a motor collision. The collision took place in Johannesburg on the night of 2 November 1975. The trial was heard seven years later. The Plaintiff appealed to this Court and thereafter brought an application in terms of Rule 4 of the Rules of the Appellate Division of the Supreme Court to prosecute his appeal in forma pauperis. The Plaintiff died on 1 May 1984 and the executor in his estate took all the steps necessary for prosecuting the application and the appeal. To avoid a possible duplication of the argument and the incurring of extra costs this Court called on counsel to argue the merits of the petition and of the

appeal at the same time.

The facts of the case are shortly the following: At the time of the collision the Plaintiff was driving his own car with his wife, his son and his three daughters as passengers. The other car involved in the collision was insured by the Defendant (now the Respondent) in terms of the Compulsory Motor Vehicle Insurance Act, no 56 of 1972. On the night in question it was driven by a certain Durr whose wife and daughter were passengers in the car. At the trial evidence was given by the Plaintiff, his wife and son, by Durr and his wife and by witnesses who testified only to the damages suffered by the Plaintiff. The trial Judge made an order.... /4

order of absolution from the instance with costs;

other relief granted is not relevant to this appeal.

The collision occurred in the intersection of Westwold Way and Northwold Drive in Saxonwold. Westwold Way runs from north to south and makes a wide bend towards the south-east. At the northern end of this bend an unnamed one-way street turns off to the west. Further into the bend and almost at its southern end Westwold Way is joined by Northwold Drive. This street runs from east to west and does not cross Westwold Way, thus forming a T-junction. At this junction there are no stop signs or white lines. The Plaintiff was travelling in Westwold Way from the north and intended

driving / 5

driving through the bend to the south. Durr was travelling in Northwold Drive from the east; his intention was to cross Westwold Way and turn to the west in the one-way street. The collision occurred at about 21h30. The street lights were burning and the head lights of both cars were on. There was no other traffic in the vicinity of the intersection.

There is direct conflict in the evidence on, inter alia, the following aspects of the case: Firstly, the position of the two cars immediately before the collision; secondly, whether one of the two cars was stationary at the time of the collision, and if so, which one; thirdly,

the point of impact; and fourthly, the damage to the two cars.

The evidence of the Plaintiff, supported by his son, was that he was driving in Westwold Way at a slow speed and about two to three feet from the left, or eastern, edge of Westwold Way. He continued to drive in this manner into the bend. When he saw Durr's car it was on the northern side, that is Durr's wrong side, in Northwold Drive and was not stopping. He applied his brakes but could not avoid being struck by Durr's car. Durr's evidence, and that of his wife, was that they were travelling with the right-hand side of their car about in the middle of Northwold

Drive. He brought the car to a halt before entering Westwold Way. While the car was stationary they noticed the Plaintiff's car coming into the bend, veer towards its left, and collide with their car.

The Plaintiff and his son testified that Durr reversed his car about two metres immediately after the collision. This Durr denied; his wife could not remember whether he reversed at that stage. The drivers and some of the passengers got out of the two cars. There was an acrimonious argument in which the Plaintiff's son took part. The Durrs gave evidence that the Plaintiff had admitted that his brakes may not have

been in order; the Plaintiff and his son denied such an admission. However, it was admitted that he, in reply to a question, intimated that his car was not insured. Time was wasted at the trial and in this Court on the dispute about who had asked the question, Durr or his wife. The only relevance of the issue was the answer given and not who the questioner was; Durr said that his wife persuaded him to leave after a short while because the Plaintiff was not insured. Time was also unnecessarily spent on statements supposed to have been made by the Plaintiff's son and Durr's daughter. The probative value of these statements is as doubtful as their admissability. The discussion at the

damaged cars did not last long. The Plaintiff did not ask Durr's name and address and Durr did not ask his. No registration numbers were written down. Durr and his wife left first. He reversed his car two or three meters and then drove around the back of the Plaintiff's car into Westwold Way. When the Plaintiff wanted to leave his car would not start, but a passing policeman helped him on his way home.

Because of the contradictions in the evidence - and there were more than those set out herein - the Court a quo could not come to a final decision without taking into account such factors as the credibility of the witnesses, their opportunities / 10

opportunities of observing what was happening and the probabilities of the case. With reference to the credibility of the witnesses the Plaintiff said the following in his petition for leave to proceed in forma pauperis:

"The learned Judge preferred the evidence on behalf of the Respondent/Defendant rather than that given by and on behalf of your Petitioner/Plaintiff. No adverse finding was given against the credibility of your Petitioner/Plaintiff."

Considered strictly and without reference to the whole judgment the final sentence of the statement is correct. However, the following relevant findings by the Judge a quo were not quoted or reflected in the petition.

"The Plaintiff gave much of his evidence concerning the collision through an interpreter. He is obviously a highly volatile person. It is extremely difficult to assess such a witness and in my view the most accurate and fair assessment would be to say that he has made no impression upon me the one way or the other."

The learned Judge said the following about the Plaintiff's son:

"In regard to his son I have grave reservations. I gain the impression that he was partisan and gave evidence of details which I find it difficult to accept he remembers over a period of seven years; bearing in mind that he was not a driver at the time of the collision and was sixteen years of age it is strange that he mentions distances and facts in such detail."

It is not necessary to consider

the trial Judge's opinion of the Plaintiff's wife as a witness of the collision. She testified mainly about her husband's injuries and said that she did not pay attention to the road ahead of them all the time; just before the collision she was looking at her daughter who was sitting next to her; it would appear as if she did not see the collision itself. During argument by the Plaintiff's counsel the Court was asked to reject her evidence where it was in conflict with that of her son. It was conceded that she was not a reliable witness on some aspects of the case.

Of Durr the Judge a quo said that in giving evidence he made a good impression

and appeared to be a careful witness who did not overstate his version. Mrs Durr also made a good impression on the trial Judge. The Court found that there were no material contradictions between Durr's evidence and that of his wife. Finally the learned Judge said:

"When weighing up the contradictory evidence of the Plaintiff and his son against that of the Defendant's two witnesses I am not prepared on credibility to disbelieve Durr and his wife and believe the Plaintiff and his son. In fact I regard the former two witnesses as the more credible."

It will be convenient to say at this stage that after consideration of the evidence placed before the Court and the hearing of argument I agree with

the learned Judge's conclusion.

With regard to the positions of the cars before the collision and the opportunities witnesses had of observing the cars, the following passages in the Plaintiff's petition are relevant:

"Visibility of vehicles to each other.
It was common cause between the parties that the vehicles were visible to each other when they were at approximately a maximum of five metres away from each other, because of the topography of the area where the collision occurred. The insured driver and his wife deposed to the fact that they could see the lights of your Petitioner's vehicle when it was still forty to fifty yards away. This is an impossibility. On the other hand it is an impossibility for them to have estimated what distance the lights

were away if they could not see along the street for more than four or five metres. This was a deliberate lie on the part of the witnesses for the Defence. Having regard to the nature of the terrain it was impossible for them to estimate how far the lights were away ... The fact that the vehicle (Durr's car) was seen at a very late stage is because the vehicle was hidden, this is again common cause, because of the topography ... As another point in his judgment the learned Judge places reliability on the Respondent's witnesses' statement that they could see the lights thirty to forty metres away. This is a deliberate lie and impossibility because of the topography. Such evidence is not reliable."

It is completely untrue that it was common cause at the trial that the drivers of the two cars approaching the T-junction could not,

because / 16

because of the topography of the area or for any other reason, see each other's cars until they were a maximum of five metres away from each other.

It was also not common cause that, because of the nature of the terrain or because of any obstruction, the Plaintiff could not have seen Durr's car before the moment at which, on his evidence, he did see it.

There was no evidence of any natural or artificial feature which could have hidden one car from the view of the other car's driver, or which would have made it impossible for Durr and his wife to "see along the street (Westwold Way) for more than four or five metres."

Durr said that he had observed

the / 17

the Plaintiff's car when it was 40 to 50 metres away from them. According to Mrs Durr she saw the lights of the Plaintiff's car when it was 25 to 30 metres away. The following questions and answers taken from her evidence when under cross-examination are pertinent:

..."and your vehicle's lights, were those shining across the road as you were standing? - That is correct, my Lord.
"So I assume if you could see his lights, he could see your lights as well? - That is correct."

This evidence of the Durrs was never challenged on the ground that there were any particular features which would have obstructed his or her view or that of the Plaintiff.

It was not explained to this Court why these misleading and untrue statements on material issues were made in the Plaintiff's petition. Mr Beckley, Plaintiff's counsel in this Court, did not appear at the trial and was briefed only in the week before the hearing in this Court; he could not explain these serious defects in the petition.

In deciding whether the Plaintiff should be granted leave to proceed in forma pauperis, this Court must bear in mind the following well-known passage in the judgment of Stratford C.J. in Stellenboom v. Bhyat, 1938 A.D. 317 at p. 320:

"Dealing with the application to appeal

in forma pauperis, there are three considerations to be taken into account, viz. (a) the poverty of the applicant, (b) the prospect of success on appeal, and (c) the amount involved in the dispute between the parties."

(See also Putzier and Another v. Union and South West

Africa Insurance Co. Ltd. 1976 (4) S.A. 392 (A) at p.

397 D. - E where it is indicated that the list was not necessarily exhaustive.) In the present inquiry there is no doubt about the poverty of the Plaintiff and the amount involved is substantial; the Plaintiff's claim is for R176 749,72. The question whether the Plaintiff had any reasonable prospect of success on appeal remains to be considered. It is in connection with this last aspect of the inquiry

that the highly misleading and untrue statements were made.

In my view these statements are so objectionable that the Court may well have considered showing its disapproval of their inclusion in the petition by dismissing the application. However, it is not clear how much of the responsibility for these misleading statements, if any, rests on the Plaintiff. And, furthermore, the following passage from the judgment of Schreiner J.A. in Macrose v. Robinson 1946 A.D. 1 at p. 7 is apposite, particularly the first part thereof.

"While this Court is always anxious that a person against whom a wrong decision may have been given should

not, through his poverty, be debarred from obtaining redress, consideration must also be given to the position of the other party who has achieved a favourable decision in the lower Court and who is entitled to some protection against the hardship of having to defend his judgment against one who cannot pay costs if he loses."

In the light of these considerations, of the trial Court's findings on the credibility of the witnesses and of the full arguments advanced on all aspects of the case, I shall now consider further issues material to decisions on the application and the appeal.

The Plaintiff testified that he saw Durr's vehicle for the first time when it was "roughly four to five metres" away from him;

during cross-examination he said that he saw the lights and the car when he was about "three to four metres" away. The Plaintiff's son, who was sitting in the back of the car, testified that when they were at the entrance of the intersection he saw Durr's car. As stated above Durr saw the Plaintiff's car 40 to 50 metres away and Mrs. Durr saw its lights 25 to 30 metres away. The trial Judge made the following observations:

" ... there is no reason why the Plaintiff should not have observed the effect of Durr's lights at a much earlier time and at a greater distance from the junction. Mr. Levy, who appeared for the Defendant, submitted that, in these circumstances, the Plaintiff was not keeping a proper lookout and I agree that this

is so. In my view if the Plaintiff did see Durr's vehicle for the first time so shortly before the collision, as testified to by him, and in the circumstances set out above, it is also probable that he took fright, was unable accurately to assess the position of Durr's vehicle or, more importantly whether it was stationary or not."

These conclusions are, in my opinion, justified.

With regard to the position of Durr's car in Northwold Drive immediately before the collision and whether it was stationary or not, it should be noted that in the further particulars for purposes of trial the Plaintiff alleged that Durr was negligent in that he drove on his incorrect side of the road, that is of Northwold Drive. This alle-

gation could only be relevant if the Plaintiff was correct in his evidence that he would have been able to avoid the collision if Durr was driving his car on the southern half of Northwold Drive and did not stop before entering the intersection. Both Durr and his wife testified that their car was travelling with its right wheels about on the middle of Northwold Drive. When it was put to Durr that he had cut the corner, which would have brought him to the northern side of Northwold Drive, he denied it. Mrs Durr agreed, during cross-examination, that a driver in the position in which her husband was, might cut the corner; her reply to the next question put to her was that her husband did not do so. It was argued,

at the trial and on appeal, that the probability was that Durr had cut the corner in spite of his and his wife's denials. The trial Judge said:

"In my view any inference sought to be drawn by the Plaintiff on this issue must give way to findings of credibility and powers of observation."

On a full consideration he came to the conclusion, in my view correctly, that Durr did not cut the corner. This finding is of the greatest importance on the inquiry as to where the cars collided.

The fact that the trial Court held no inspection in loco made the determination of the point of impact difficult. Witnesses were asked to mark the point of impact, according to their

observations / 26

observations, on a map and on photographs. These marks, as evidence, were unsatisfactory. On the verbal evidence it can be said that according to the Plaintiff and his witnesses the point of impact was in Westwold Way opposite the northern half of Northwold Drive; according to the Durrs it was at the southern half of Northwold Drive where it enters Westwold Way. The following incident is important in this regard. It appears from all the evidence as indicated before that when Durr left he reversed his car two or three metres and then passed behind the Plaintiff's car into Westwold Way. According to the Plaintiff Durr passed between the back of his car and the pavement, that is the north-eastern pavement on the

junction of Westwold Way and Northwold Drive.

This manoeuvre would have been possible on Durr's estimate that at the time of impact the right-hand side of his vehicle was five to six metres from the northern curb. On the evidence of the Plaintiff and his son the back of their car was so close to the pavement that if Durr passed behind it his car would have mounted the pavement, which it did not do.

Finally it should be added that if the cars had collided opposite the northern half of Northway Drive it would be improbable that Durr would have passed behind the Plaintiff's car because the street opposite the southern half of Northway Drive would have been unobstructed. In my opinion the trial Judge clearly

came to the correct conclusion when he found that the point of impact as indicated by the Plaintiff and his son was improbable and wrong whereas that there was "nothing improbable in the place" of collision deposed to by Durr and his wife."

On the question of whose car was stationary at the moment of impact the evidence of the Durrs was preferred to that of the Plaintiff and his son. Mrs Durr said that their car was stationary when she saw the lights of the Plaintiff's car some distance away. Durr said that he had stopped his car when he saw the other car some 40 metres or more away from them. The Plaintiff and his son saw Durr's car at a much later stage, when they were

virtually in the intersection. In the light of the previous findings and inferences it is clear that the version of the Durrs must be accepted on this aspect of the case as well.

Finally I should add that the evidence of the damage to the two cars was so conflicting and inadequate that it does not justify a conclusive or reliable inference as to the manner in which the collision occurred, the point of impact or the position of the cars immediately prior to and after the collision. The trial Court, however, did come to the conclusion "that the damage caused to the vehicles was not improbable on the version given by the Defendant's witnesses."

It is certainly not for the Defendant to offer a reason why the accident occurred.

However, the witnesses, Mr and Mrs Durr, said that after they had stopped the Plaintiff's car veered to its left and thus collided with their car. It was suggested that the brakes of the Plaintiff's car were not in order or that he had a fright when he, at a very late stage, saw Durr's car. It must be remembered that the Plaintiff was negotiating a bend to his left. The son said:

"I wasn't driving, but my dad was following the curve of the road."

This could have caused the Durrs to think that the Plaintiff's car was veering to the left; it could

well / 31

well be that the driver, when he suddenly saw the lights of a car at the junction, had misjudged his position and that of the other car.

Finally, I agree with the following statement of the trial Judge:

"In all the circumstances I am of the opinion that it is not improbable, but probable, that the collision occurred at the place and in the circumstances deposed to by Durr and his wife."

The Court, therefore, correctly found that the Plaintiff had failed to discharge the onus of proof resting upon him and that absolution from the instance had to be granted.

The appeal must therefor be dismissed. I am of the opinion that even if the appli-

cation was decided at the outset of the hearing

it would have been dismissed on the ground that

the applicant had no reasonable prospect of success.

Counsel for the appellant asked that the order for

costs of the appeal, in case it was dismissed, should

not include the costs of two counsel; this request

will be acceded to, particularly because the question

of damages was not an issue in the appeal as it was

at the trial. Therefore:

1. The application for leave to proceed in forma pauperis is dismissed with costs.

2. The appeal is dismissed with costs.

P.M. CILLIÉ, J.A.

BOTHA, J.A.)
 concur
HEFER, J.A.)