

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

A A MUTUAL INSURANCE ASSOCIATION LIMITED

Appellant

and

ELIZABETH NEMBE

Respondent

CORAM: JOUBERT, HOEXTER, JJA et VIVIER, AJA

HEARD: 10 September 1984

DELIVERED: 27 September 1984

J U D G M E N T

HOEXTER, JA

This is an appeal against a finding of

negligence

negligence on the part of an insured driver in an action for damages based on the provisions of the Compulsory Motor Vehicle Insurance Act, 56 of 1972. The plaintiff, a woman then aged 64 years, was a pedestrian when she was struck from behind by a motor car insured under the said Act by the defendant. The insured car was being driven at the time by a Mrs de Villiers, to whom I shall refer as "the driver". As a result of the accident the plaintiff sustained a fracture of both bones of her right lower leg and head injuries.

Alleging that her bodily injuries had been caused by the negligence of the driver, the plaintiff sued the defendant in the Witwatersrand Local Division for damages. The defendant resisted the action. In its plea the defendant denied that the driver had been negligent in any way; and, in the alternative, it pleaded that the plaintiff's own negligence had contributed to the accident.

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The trial was heard by McCREATH, J., who assessed the plaintiff's total damages at R15 000. The learned trial Judge found (1) that the driver had been negligent in that she failed to keep a proper look-out and in that she drove at an excessive speed; (2) that the accident had been caused by the negligence both of the driver (to the extent of 30%) and the plaintiff (to the extent of 70%). The Court a quo apportioned the damages accordingly and awarded the plaintiff R4 500 and costs. Against that judgment the defendant appeals. The quantum of the total damages assessed by the trial Court is not in issue. The defendant appeals against the finding that the driver was negligent at all, or alternatively, against the apportionment.

The plaintiff was a domestic worker in the employ of a family living in Bryanston. After dark on the evening of Sunday 15 March 1981 the plaintiff was returning

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from a church service to the home of her employers. At the same time the driver was on her way to attend a church service. She was driving a Peugeot motor car and her daughter was her only passenger. The width of the Peugeot was 1,65 metre. Both the plaintiff and the Peugeot were proceeding in Bryanston Drive from west to east. I should add that as it approached the plaintiff the Peugeot was travelling on a downward slope in the road; and that any cars which might have been travelling towards the plaintiff from the opposite direction would likewise have proceeded downhill. The accident appears to have taken place in somewhat of a valley between two sloping sections of Bryanston Drive. Bryanston Drive has a tarred surface which at the time of the accident was some six metres wide. The tarred portion of the road was flanked on either side by a sidewalk nine or ten metres wide. These sidewalks were uneven and overgrown with grass. Shortly before the accident it had rained heavily

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and the sidewalks were wet. Although Bryanston Drive carried a considerable volume of traffic it was an unlit thoroughfare.

The plaintiff was walking in the company of two other women, one of whom was a Miss Lekalakala. At the trial three eye-witnesses to the accident testified: Miss Lekalakala, the plaintiff and the driver. The evidence for the plaintiff is that when she was struck by the Peugeot she and her two companions were walking in single file on the northern edge of the tarred portion of Bryanston Drive. The third member of the party was walking in front, followed by Miss Lekalakala, with the plaintiff bringing up the rear. The formation in which the three women were walking at the time of the accident is in dispute. The evidence of the driver is that these three women were walking abreast on the tarred surface, taking up half of the driver's lane of the road. Also in dispute

dispute is the issue whether, as the Peugeot approached the three women from the west, a motor car travelling in the opposite direction was nearing the three women from the east; which oncoming car went past the Peugeot at or about the time of the latter's collision with the plaintiff. The evidence for the plaintiff is that there was no such oncoming car. On the other hand the driver testified that there was such an oncoming car and that its headlights "were not completely blinding, but bright". A further matter in dispute is the state of the weather at the time of the accident itself. Mention has already been made of the fact that shortly before the accident it had been raining heavily in Bryanston Drive. The plaintiff's version is that at the time of the accident the rain had stopped completely, whereas the driver contends that when the collision occurred the earlier rain had no more than "eased off slightly".

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A detailed and accurate analysis of the evidence of each of the three aforementioned eye-witnesses is to be found in the judgment of the trial Judge. For present purposes a very brief summary of their respective versions in the witness-stand will suffice. Miss Lekalakala explained that initially the three women walked on the northern sidewalk of Bryanston Drive, but that because of the muddy and uneven condition of the sidewalk, and being afraid of slipping on the wet grass, they left the sidewalk and proceeded to walk on the tarred surface of the road when they reached the vicinity in which the accident later took place. It had stopped raining but the tarred surface of the road was still wet. They walked in single file just next to the sidewalk. Miss Lekalakala was clad in a white blouse, a black skirt and a black hat. The plaintiff, who was a stranger to her, walked behind her and the third member of the party walked in front of her. As they were walking in this fashion Miss Lekalakala saw

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the lights of a car approaching from behind them and she suggested to her companions that they should get off the road. Both Miss Lekalakala and the woman walking in front of her did so and got back on the sidewalk; but Miss Lekalakala did not see what the plaintiff did. She heard a noise - whether it was produced by the application of brakes she could not say - and the next thing she observed was the plaintiff hurtling through the air some two or three feet above the ground. Just before she heard the noise in question, so testified Miss Lekalakala, no cars were approaching them from the east. The plaintiff confirmed the evidence of Miss Lekalakala that shortly before the accident the three women were walking in single file along the verge of the tar, she being at the rear. She was not aware at all of the approach of the Peugeot from behind. Nor did she hear the warning uttered by Miss Lekalakala that they should get off the road. According to the plaintiff it was no longer raining.

Save

Save for a white head-cloth the plaintiff was clad entirely in black or dark clothing. She denied that there was an oncoming car from the east.

I turn to the evidence of the driver. She told the trial Court that she was familiar with Bryanston Drive which for a period of 15¹/₂ years she had used regularly on Sundays on her way to church. On the evening in question, and with the church service about to begin, there was "quite a lot of traffic" on Bryanston Drive, which she described as "a very narrow road". The weather conditions prevailing at the time were, in the words of the driver "very bad". It was still raining ("a steady drizzle"). It was very dark at the time. The headlights of the Peugeot were dipped but threw a considerable beam of light in front and to the left of the Peugeot. She said that when she first saw the oncoming car she was travelling downhill and in the opposite direction the oncoming car was likewise travelling downhill. The oncoming car had

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its headlights on bright. They made her vision "a bit more difficult" but they did not "blind me completely." She estimated that the Peugeot had been travelling at a speed of 50 km per hour. When she saw the headlights of the oncoming car she reduced her speed to approximately 40 km per hour. Suddenly she saw ahead of the Peugeot, possibly at a distance of seven or eight metres, three dark figures walking abreast on her side of the road. She was virtually on top of the three women when she noticed them for the first time. She braked hard and swerved somewhat to the right, taking into consideration the approach of the oncoming car. The oncoming car passed the Peugeot "at the time I hit the African woman." The left front portion of the Peugeot struck the plaintiff whom she described as the person walking closest to the middle of the road. According to the driver none of the three women moved off the tarred surface of the road before the collision.

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In its judgment the Court a quo recorded that neither Miss Lekalakala nor the plaintiff had made an unsatisfactory impression but stated that there were certain unsatisfactory aspects in their evidence. It is noteworthy, however, that in detailing such unsatisfactory aspects the learned Judge seems to have confined himself entirely to the plaintiff. He pointed out that the plaintiff had been "most unobservant and unaware of what was going on around her", in not noticing the approach of the Peugeot; in not hearing the suggestion made by Miss Lekalakala that they should move off the road; and in not noticing that her companions in fact left the road. Of the driver's merits as a witness the learned Judge remarked:

"Mrs De Villiers, likewise, did not make a bad impression on me, although there are certain unsatisfactory features about her evidence. More particularly her evidence is not in accordance with her statement which she made to her

comprehensive

comprehensive insurers, nor does it accord entirely with the statement which she made to her third party insurers' assessors In so far as her other statement is concerned, she does state therein that the lights of the oncoming vehicle were very bright, which according to her testimony was a statement put into this particular portion of the report by her husband. She, however, did sign the statement and had read it before it was returned to the insurers. There is also a measure of discrepancy between her evidence and the statement in so far as the question as to whether it was raining heavily at the time or whether, as testified by her in Court, it was drizzling at the time of the collision. This discrepancy she also attributed to her husband being responsible for the completion of the form."

Having weighed the two rivalling versions of the accident respectively advanced on behalf of the parties the learned Judge concluded that there were no significant probabilities favouring the plaintiff's version; and that he was unable to accept the version given by the plaintiff and her witness in preference to that of the driver. The trial Judge nevertheless decided that the driver

driver had been negligent in the respects indicated earlier in this judgment.

Turning to the arguments advanced in this Court it is convenient to deal first with a contention strongly urged upon us by counsel for the plaintiff (respondent) to the effect that the trial Judge had erred in adjudicating upon the merits on the assumption that the driver's version of the facts was the correct one. In support of this latter argument the plaintiff's counsel called attention to the fact that Miss Lekalakala's testimony appeared to be free from blemish; and it was further contended that the trial Court had failed to appreciate a distinct improbability inherent in the driver's story.

On the driver's version the three women encroached upon half of the Peugeot's side of the road but, despite its swerve to the right in an attempt by the driver

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to avoid the collision, the Peugeot remained on its correct side of the road. Bearing in mind the width of the road and the width of the Peugeot, so the argument proceeded, a collision not only with the plaintiff but also with at least one of the plaintiff's companions must on the driver's version have been inevitable. Although there is force in these contentions on behalf of the plaintiff, I find it unnecessary to express any firm opinion upon them. As will appear in what follows the driver, in my view, was negligent on her own version of the facts. As there is no cross-appeal by the plaintiff against the apportionment decreed by the Court below I shall assume, for the purposes of the present appeal, that the trial Court correctly considered the merits on the basis that the driver's version of the accident was the correct one.

In the course of his judgment the learned Judge expressed the view that the driver -

"... should

"... should have regulated her speed so as to be able to contend with any emergency in the form of pedestrians either crossing the road or being on the road, albeit on the verge thereof and have been able to take avoiding action" (I underline.)

Counsel for the defendant (appellant) argued that in requiring the driver to contend with "any emergency" the trial Court misdirected itself. The approach indicated in the above-quoted passage admittedly places too onerous a duty on the driver: she was required to guard only against harm to pedestrians on the road which was reasonably foreseeable. In the present case, however, the statement of which counsel complains represents no more than a temporary lapse on the part of the learned Judge, and nothing turns upon it. Reading the judgment as a whole it is clear, so I consider, that in fact the trial Court applied to the facts of the case the true test of reasonable foreseeability. It was further contended on behalf of the defendant that on the driver's evidence there was insufficient ground for holding that she ought reasonably

reasonably to have anticipated the combination of circumstances which culminated in her collision with the plaintiff. I am unable to accept this argument. In this connection the Court a quo reasoned thus -

"It is clear on her own testimony that she (the driver) was well acquainted with the road in question That being so, she must in my view have been aware of the condition of the sidewalk in the area in the vicinity of the church. She must have been aware that on the evening in question that sidewalk would as a result of the rain, have been wet and that there would have been puddles of water on the pathways that traverse the sidewalks. In these circumstances, and by virtue of the further fact that the sidewalk was overgrown with grass to a very large extent, which would have made walking conditions even more difficult, she should in my view have anticipated the possibility of persons using the tarmac surface of the road in preference to the pavement, more particularly in conditions where there was no lighting whatsoever."

With the above observations of the trial Judge I agree.

Having regard to all the conditions prevailing just prior
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to the accident a reasonable person in the position of the driver of the Peugeot would, in my view, have foreseen the possibility of pedestrians using the road rather than the sidewalk; and would moreover have foreseen that such pedestrians might be dressed in dark clothes unlikely to show up against the black background of the tarred surface of the road.

Postulating the correctness of the driver's evidence it seems to me further that no real criticism can be levelled at the finding of the trial Court that in the particular circumstances of this case the speed of the Peugeot was too high and that the driver failed to keep a proper look-out. As to whether the driver maintained a sufficient look-out, the learned Judge in my opinion summed up the matter correctly in the following paragraph of his judgment -

"There is the further fact that if her evidence is to be accepted these persons were walking abreast and would therefore be more visible than had they been walking

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in single file. There is her own evidence that, although her lights were on the dip position, they did shine ahead of her for some considerable distance. There is her own evidence that the oncoming vehicle did not blind her vision, but with the lights being on bright that those lights did in fact to some extent cast light on her side of the road. This notwithstanding she did not see these three persons until, as she herself testified, she was almost upon them."

For the event that this Court might not be disposed to upset the trial Court's finding that the driver was to some extent at fault in relation to the damage suffered by the plaintiff, counsel for the defendant submitted in conclusion that the apportionment determined by the learned Judge was unduly liberal to the plaintiff. It was said that her negligence was so gross as to have merited an apportionment assigning 90% of the fault to the plaintiff. Apportionment, however, involves the exercise of an individual discretion by the trial Court.

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Where, as here, the trial Court has correctly decided on the facts and has made no error of principle, this Court will be slow to meddle with an apportionment decreed by a trial Court. In the instant case there is, in my judgment, no sufficient reason for disturbing the trial Court's assessment of the respective degrees of fault.

In the result the appeal is dismissed with costs.

G G HOEXTER, JA

JOUBERT, JA)
VIVIER, AJA) Concur