

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A150/2007

In the appeal between:

J. J. SEPTEMBER
P. M. BEUKES

1st Appellant
2nd Appellant

and

R. R. HENNEY

Respondent

CORAM:

C.J. MUSI, J *et* MOLOI, AJ

HEARD ON:

2 FEBRUARY 2009

JUDGEMENT BY:

C.J. MUSI, J

DELIVERED ON:

4 MARCH 2009

[1] On 9 June 2005, on Meadows Road Bloemfontein, a motor vehicle collision occurred between two minibus taxis. The plaintiff¹ (owner of vehicle with registration no CFB 806 FS) instituted an action in the Bloemfontein Magistrate's Court against the second defendant (driver) and the first defendant

1. I will refer to the parties as they were referred to in the Court a quo.

(the owner of the vehicle with registration number CNY 979 FS). The magistrate found that the collision was caused by the exclusive negligence of the first defendant. The counterclaim was dismissed. This appeal is aimed at those findings of the magistrate.

[2] It was common cause that both drivers acted within the cause and scope of their employment. The quantum of both the main claim and the counterclaim were admitted.

[3] The facts of this matter are relatively simple, and can be summarised as follows. Mr Dikgang Joseph Sonjeca testified that he was driving a motor vehicle with registration number CFB 806 FS at 5H45 on the morning of 9 June 2005 on Meadows Road. His taxi was full of passengers and he was driving in the direction of the City. Meadows Road has a single lane in each direction. Whilst driving at approximately 40km/h he noticed a bus approaching from the opposite direction. The bus driver indicated right and stopped, whilst waiting for his vehicle to pass. As he was approaching the bus, he suddenly noticed a vehicle coming from behind the bus in his lane and direction. He attempted to avoid a

collision by veering to his left towards an open piece of land. Unfortunately, his evasive action could not avoid the collision and the collision occurred on the vacant piece of land. The right front corner of his vehicle was damaged in the middle, slightly towards the left front. After the collision he climbed out of his vehicle and confronted the second defendant. He asked him

“wat maak hy, hoekom het hy so gery, wat het hy gedink”.

The second defendant did not answer he just shook his head.

- [4] Mr George Ntakazana testified that he is a taxi driver. On 9 June 2005 at approximately 05H45 his taxi was stationary on a vacant piece of land adjacent to Meadows Road. He was waiting for commuters / passengers to get into the car. He saw a bus indicating to turn right. He looked in his rear view mirror and saw a motor vehicle's lights. He saw a white thing moving behind his vehicle and the next moment he heard a bang and saw how the car driven by the second defendant moved across the road to where it came to a stand still. He

was of the opinion that the second defendant wanted to execute a U-turn when the collision occurred. He did not know the second defendant or Sonjeca.

[5] Ms Patricia Windvoël testified that she was a commuter in the plaintiff's vehicle. She was seated in front next to the driver. She corroborates Sonjeca's evidence in all material respects. They differ in relation to the point of impact. I will deal with aspect later in this judgment. Ms Windvoël was the last witness to testify on behalf of the plaintiff.

[6] The second defendant, Mr Moses Beukes, testified that at the time in question he was driving from the city towards Bergman Square with three passengers and his assistant. He saw a bus 100 metres before him travelling in the same direction. The bus was standing still and indicating to the right. He then drove across the road, towards his right, to the open field. It was safe to do so because there were no oncoming cars. When he reached the vacant piece of land still facing in his original direction he drove approximate 50 metres and stopped. Whilst standing there for a few seconds, he suddenly saw the plaintiff's vehicle in front of

him. He could do nothing to avoid the collision. That vehicle then collided with his vehicle. The impact was so hard that his vehicle turned, faced the opposite direction and moved across the road to the other side of the road. He was not in control of the vehicle when it so moved.

[7] Mr Jacobus September (first defendant) testified that he is the owner of the vehicle that was driven by the second defendant. Mr Beukes called him, telephonically, and he went to the scene. There he spoke inter alia to Sonjeca who told him that he was trying to avoid an accident when he went off the road and collided with his vehicle. He saw debris on the ground approximate 4 metres from the tar surface and deduced that that must be the point of impact.

[8] The learned magistrate was of the view that the only issue to be decided was whether the vehicle driven by the second defendant was stationary or moving when the collision occurred. The magistrate found that the plaintiff's version is more probable and credible and therefore correct i.e. that first defendant's car was moving when the collision occurred.

[9] This finding is hotly contested by Mr Esterhuyse on behalf of the two defendants. Mr Grobler, on behalf of the plaintiff supports the magistrate's findings.

[10] It is trite that a Court of appeal will not easily interfere with the credibility findings of a trial court. The principles which should guide an appellate court in an appeal purely upon fact has been set out in **Rex v Dhlumayo and Another**.² If I find that the magistrate misdirected herself or that she was wrong with regard to the credibility findings that she made I will be at large to interfere therewith³. I must also be mindful of the fact the overemphasis on the advantages which the trial court enjoyed should be avoided. It has also been said that credibility findings cannot be judged in isolation, but they must be considered in the light of proven facts and the probabilities of the matter under consideration.⁴

[11] Mr Esterhuyse argued that the evidence of Sonjeca and

2. 1948 (2) SA 677 (AD) at 705 – 706.

3. See Mohammed and Another v Jassien 1996 (1) SA 673 (AD) at 701 D – F.

4. Santam BPk v Biddulph 2004 (5) SA 586 (SCA) at paragraph [5].

Windvoël indicated that the point of impact was on the tar surface. He was of the view that they changed their respective versions to indicate that the point of impact was on the vacant piece of land. He contents that this discrepancy which he calls an irregularity was never explained. The evidence of Sonjeca was clearly that the point of impact was on the vacant piece of land. He testified in chief and during cross examination that the point of impact was on the vacant piece of land. The magistrate made the following finding in this regard:

“die volgende feite blyk gemeensaak tussen die partye te wees... dat die punt van impak grootliks op die grondgedeelte; langs die teeroppervlak plaasgevind het.”

I simply can't understand Mr Esterhuyse's criticism of the magistrate's finding. Ms Windvoël also indicated that the point of impact was on the vacant land.

[12] Mr Esterhuyse referred us to parts of Sonjeca, Ntakazana and Windvoël's evidence to point out what to him are serious discrepancies. I must confess I don't share his enthusiasm.

It does not help to quote portions of witnesses' evidence out of context and then say that they are unreliable or that their evidence is untruthful. What is required is to show that the essential features of the witnesses' story or recollection is on a balance of probabilities not true. It is not the number of discrepancies between witnesses that is of paramount importance in making credibility findings, it is the impact of such discrepancies on the witnesses' evidence, its impact on other witnesses' evidence and whether it is in sync with the probabilities of the case. The magistrate was mindful of the contradictions in the state witnesses' evidence and said the following in this regard:

“Klein weersprekings het wel voorgekom, maar was dit myns insiens nie van so ‘n wesenlike aard dat dit ‘n verwerfsing van hul weergawes noodsaak nie”.

The magistrate was also thoroughly aware that the evidence must be evaluated in the light of the probabilities too. She came to the conclusion, rightly so, that the defendant's version is improbable.

[13] The evidence of Sonjeca was indeed corroborated by Windvoël and Ntakazana. Sonjeca's evidence that he confronted the second defendant immediately after the accident and that the second defendant only shook his head was never disputed. The question that invariably arises is: why did the second defendant not there and then say to him but you are talking nonsense you drove into my car whilst it was stationary. He does not do that; instead he keeps quiet and shakes his head. When the first defendant came on the scene Sonjeca told him that he was trying to avoid an accident when the collision occurred. Again he was not confronted with the second defendant's version. Strange enough the first defendant does not ask his own driver (the second defendant) what happened. It is clear that the second defendant gave no explanation because his fabrication was still in its infancy. This also shows that Sonjeca's evidence is not a recent fabrication. Ntakazana and Windvoël are independent witnesses. They had no axe to grind with the second respondent. Windvoël was slightly injured. I find it strange and improbable that she would protect the very person who caused her injuries.

[14] It is in my view also highly improbable that Sonjeca's vehicle collided with the second defendant's vehicle with such force as to turn the vehicle to face in the opposite direction and then move across the road, unassisted. What is more probable is that the second defendant was still in control of the vehicle after impact and drove it whilst trying to control it to the place where it came to a halt.

[15] The magistrate correctly pointed out that the first and second defendant's hypotheses (speed and blinding by the bus's lights) in relation to what caused Sonjeca to drive into the first defendant's vehicle is improbable. The hypotheses do not tally with the probabilities.

[16] Although the magistrate found that the second defendant contradicted himself in relation to whether the bus was indicating to the right whereas I could find no such contradiction, nothing much turns on this point. This misdirection – if it is one – is negligible and has no impact on the totality of the magistrate's reasoning and findings. Mr Esterhuyse emphasised that the second defendant did not contradict himself. This is cold comfort. The second

defendant's version is so out of kilter with the probabilities that the lack of contradictions in his version barely counts for anything.

[17] Much has been made of the first respondent's reconstruction of the accident scene. The first defendant is by no stretch of the imagination an expert when it comes to accident reconstruction. His evidence is opinion evidence and therefore inadmissible because he is not an expert. The first defendant's evidence is only relevant and admissible in relation to what he saw at the scene and not in relation to what inferences he drew from what he saw.

[18] I find that the magistrate's reasoning is solid, correct and in line with the probabilities.

[19] I agree with Mr Grobler that Sonjeca found himself in a position of imminent danger and had to do his best under the circumstances. By veering to the left he took reasonable evasive action – if not the only evasive action. I can't imagine any other steps that Sonjeca could have taken under the circumstances. There is in my view no

contributory negligence on the part of Sonjeca. The appeal ought to be dismissed.

[20] There is no reason why the costs should not follow the success.

[21] **I accordingly make the following order.**

The appeal is dismissed with costs.

C.J. MUSI, J

I concur

K.J.MOLOI, AJ

On behalf of Appellants:

Mr J.L. Esterhuyse

Instructed by:

Esterhuyse & Lunch

BLOEMFONTEIN

On behalf of the Respondent:

Adv. S Grobler

Instructed by:

McIntyre & Van Der Post

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