

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

DAVID ANTHONY CHARLES APPELLANT

and

SOUTH AFRICAN EAGLE INSURANCE
COMPANY LIMITED RESPONDENT

CORAM: JANSSEN, VILJOEN et JACOBS JJA

HEARD: 6 MAY 1986

DELIVERED: 23 MAY 1986

J U D G M E N T

VILJOEN, JA

The/.....

The respondent was at all material times the insurer, in terms of the provisions of Act 56 of 1972 of a "combi" motor vehicle with registration BPH 888T. On 15 July 1980 at about 00h15 a collision occurred at the intersection of 11th Avenue, Oxford Road and Cotswold Drive, Saxonwold, Johannesburg, between the insured vehicle driven by one Miss Gosnell, and a motor cycle, registration CHC 698T driven by the appellant, as a result of which the appellant sustained fairly serious injuries. The damages suffered by the appellant were agreed to be the amount of R50 716,25 and the only issue before the Court a quo was:

whose/.....

whose negligence caused the collision? The intersection concerned was at the relevant date controlled by traffic lights. The appellant was travelling from east to west down 11th Avenue in the direction of Oxford Road and Miss Gosnell was proceeding from north to south down Oxford Road when they entered the intersection. The issue referred to resolved itself into an inquiry which one of the two drivers entered the intersection against the red traffic light. The Court a quo, after having dealt with the demeanour of the witnesses, their credibility in general and the probabilities, decided as follows:

"It is/.....

"It is clear, therefore, that I have before me two versions, by two witnesses, the evidence of both of whom I cannot reject on their demeanour and both of whom give me the impression of being truthful. I have to be satisfied that the plaintiff, on whom the onus rests, has established that his evidence is truthful, and that of Miss Gosnell is false. There are no probabilities to assist me - the discrepancies in their evidence are such that they do not assist me to come to a conclusion to find that either one or other of the witnesses is not a credible witness, and in those circumstances I must find that the plaintiff has failed to discharge the onus resting upon him to show that the collision was caused due to the negligence of Miss Gosnell; in entering upon the intersection when the robot was red against her, and that that was the cause of the collision.

In those circumstances I grant absolution from the instance with costs, excluding the costs of today, which are to be borne by the defendant."

Against/.....

Against this decision the appellant
now appeals.

In view of the contention that the
evidence by Miss Gosnell that the traffic
light was green when she entered the inter-
section is, when valued in the light of her
testimony generally, so vague and uncertain
that the Court erred in finding that any reliance
could be placed upon it, it is necessary to
deal with her evidence and the facts in some
detail.

Beyond the intersection in question
11th Avenue become's Cotswold Drive which from
the intersection is offset at a slight angle

to the/.....

to the south. But nothing turns on this fact.

The appellant entered the intersection intending to turn right into and to proceed northwards along Oxford Road. He was a drama student studying at the Witwatersrand University

at the time. He had been to a rehearsal at a house in 6th Street, Lower Houghton, and was returning home on his 250 cc motor cycle when the collision occurred. He told the Court a quo that it was cold and that it was drizzling.

When he was approximately 60 metres from the intersection he noticed that the traffic light was green for him and it was still green when he entered the intersection at a speed of

30 - 40 k p h. As he crossed the barrier line and proceeded to cross the pedestrian crossing,

he saw a vehicle approaching from his right

at a speed which indicated to him that it was

not going to stop. He attempted to steer his

vehicle through the "gap" between the motor

vehicle and the eastern side of Oxford Road

but did not succeed in avoiding the vehicle.

He collided with it in the north-eastern

quadrant of the intersection. He was flung

off the motor cycle and landed on the tar in

the south-eastern quadrant. He immediately

realised that he had sustained a broken leg.

Miss Gosnell, an employee of the

Performance/.....

Performing Arts Council, and a number of passengers returned from the Breytenbach theatre, Pretoria at approximately 23h00 after a performance which had been staged there. It was her duty as stage manageress to take the actors home. Her route was via the Arena Art Theatre, PACT's Transvaal base, which was situated in Rosebank, where certain of the actors disembarked to proceed home from there by means of their own transport. Of the actors one James and one Wallace lived in Parktown and Houghton respectively. She had to take them home.

On/.....

On her way there she turned right into
Oxford Road from Bolton Road and was travelling
in a southerly direction towards the inter-
section. When she approached the intersection
concerned the traffic light which was red
turned to green, she said. She was not sure
what distance she was from the intersection
when this happened. She was then travelling
at about 50 k p h. As she entered the
intersection with the green light in her
favour she saw out of the corner of her eye
the appellant's motorbike coming up from her
left. She instinctively turned the wheel to

her/.....

her right but could not avoid a collision which occurred more or less in the centre of the intersection. The combi turned over and slid to the other side of the road. Asked whether it was a head-on collision or whether the motor cycle ran into the side of the vehicle, she answered: "No, it was the front of the vehicle, judging by the damage that was done." The weather was dry and clear and cold. There was no party after the show, she said under cross-examination.

It was largely Miss Gosnell's evidence under cross-examination which was attacked, both in the Court a quo as well as in this Court.

It is/.....

It is desirable, therefore, to reproduce such portions of her evidence as were subjected to severe stricture and which were said to render her entire evidence unreliable:

"When you saw that the robot was red for you at Eleventh Avenue, did you apply your brakes or slow down in any way?
--- I think I decelerated. I cannot remember those details.

Well, why do you think that you decelerated? --- Because that is the normal thing I would normally do.

Then at a certain stage the robot turned green for you, not so? -- Yes.

What did you then do? Did you accelerate?
--- I am not sure - that I cannot remember.

What distance were you from Eleventh Avenue when the robot turned green for you? --- I also do not know that. It was as I was approaching.

Is it/.....

Is it impossible for you to give the Court any indication at all? --- I am afraid it is, yes.

Can you tell the Court whether it was a distance the length of this Court, or was it further than this - is it possible for you to give any indication? --- No, I am afraid not - my sense of distance is not very good.

Well, when the robot turned green for you, is your recollection that you maintained speed, or that you accelerated in order to go safely through the intersection? --- I just maintained the speed, I think,, I am not sure - that I am not sure of. .

If you are not sure of what you did in relation to speed that night, how do you know that you were travelling at 50 kilometres an hour at any time that night? --- That - I do recall that that is what I said the next day, to the Police, and that was a shorter time after - it was plus/minus fifty, anyway.

Did you/.....

Did you make a statement to the Police?

Yes, I did."

The statement made by her to a policeman was handed in. Her evidence continues as follows:

"Right. Miss Gosnell, I do not expect you to be meticulously correct about what you are about to say, I want impressions of what happened in that intersection. Now you are coming down towards the intersection, the robot is in your favour - in which lane are you travelling? --- I think I was in the middle of the road.

COURT: Does that mean in the middle of your half of the road? --- Yes.

Now is it correct that there are two lanes demarcated on the road, for traffic travelling south in Oxford Road?
--- That is correct, yes.

So were you straddling those two lanes?

--- I think I was in the outside lane of

my side of the road.

You mean your right-hand lane? --- Yes.

And you say you think, does that mean you do not know? --- I cannot recall - I cannot remember exactly.

You will recall that there are pedestrian lines across Oxford Road ...? --- Yes.

At Eleventh road, for pedestrians to cross the road, on the northern side of Eleventh Avenue? Can you picture that? --- Yes.

Do you know what I mean by the northern side? It is the side closest to you? --- Yes.

Those pedestrian lines? --- Yes.

Right. When you crossed those pedestrian lines, was the intersection still clear of all traffic - there was nothing in the intersection? --- I think so, yes. As you say, I cannot be too sure about it.

Yes. So, at that time, the motor cyclist had not entered the intersection, is that correct? --- I did not think so. I am not sure.

Well, you give evidence of your impression

today/.....

today, of what happened then. Is your evidence today, that as far as you remember, when you crossed the pedestrian lines, the motor cyclist had not entered the intersection? --- I do not think so, ja.

So when then - where were you when you first saw the motor cyclist? ... I cannot be too sure about that.

Do you think, as you testify today, that you were over the pedestrian lines? --- I am not sure - I might have been over them, I might have been half-way over them.

Your evidence in chief was that:

'As I entered the intersection, I saw out of the corner of my eye, the motor cyclist.'

Is that your impression today, of what happened? --- Yes.

Did you see that it was a motor cyclist? --- I certainly saw one set of lights coming towards me.

One light - is that what you saw? --- Yes.

Could you see what that set of lights was

doing?.....

doing? Was it going straight - turning-
not turning? --- No, I could not.

You could not tell? --- No.

What was your impression, was that light
doing, going across the intersection?

--- At that stage, it was coming straight
for me. That was my impression.

That is the only impression you have got?

--- Yes.

So your evidence today really is, of
something happening very quickly - it is
an impression you have of a light coming
from your left, coming towards you - is that
what you recall today? --- Yes.

What did you then do, to avoid the
collision? --- I pulled the wheel to my
right, which was an instinctive thing to
do - I do not know why.

Yes. --- I just pulled the wheel to my
right, and I applied brakes.

Did you apply brakes? --- I think I did -
I am not sure.

Is it possible for you today to say what
your speed was at the time that the crisis
occurred? --- No. I am afraid not.

Was/.....

Was your vehicle, that is the Kombi, in the process of moving to its right, at the time of impact? --- I cannot recall. It happened so quickly, that I do not remember.

In other words, the question is, had you commenced the right-hand swerve that you attempted to carry out, when you struck the motor cyclist? --- I think so, I am not sure, I am afraid.

You cannot say? --- I cannot say.

Miss Gosnell, is what you said in the Police statement a more accurate reflection of what happened that night, than what you have testified to today? --- That I cannot be sure of - I cannot remember what the testification said, to the Police.

But at the time that you made the statement, as I understood your earlier evidence, was you remembered what had happened at the intersection then? --- More or less, yes.

Yes. --- It was closer.

Now what you said in your statement, was this - you have said that the robots turned green for you, and then you go on:

'...and/.....

'... and I was travelling approximately 50 kilometres an hour - I noticed a motor cycle coming through the red robot, and turned to his right, in a northern direction, into Oxford Drive.'

You obviously did say that to the Policeman, did you not? --- Yes, I did.

Did you see that happen? --- I must have, if it is down there, but I cannot recall - I cannot remember it.

Well, today your evidence is, that your impression is that he came suddenly from your left, you saw a light coming towards you - you cannot say whether that motor cyclist was turning right or not.

Which is your evidence - what is in your statement, or what you testified to today?

--- What is in my statement.

Well, let us accept for the moment that that is correct, that that is your evidence, that you saw the motor cyclist turn to his right. Do you agree with me that the impression that is created in your Police statement, is that you were not in the

intersection/....

intersection at the time when you first saw him? Do you agree with that? --- Yes.

Do you still - do you agree with me, that the impression created by your statement, is that you were not in the intersection when you saw the motor cyclist, because you could see him turn to his right - you saw him execute a manoeuvre, which must have taken him some time to do. Do you agree with that? --- Yes.

Well, were you in fact to the north of the intersection when you saw the motor cyclist? --- I do not know - I do not remember where I was.

What makes you think today, that you were somewhere in the region of the pedestrian lights when you saw him? Why do you give that evidence today, if you cannot remember? --- I withdraw the evidence - I do not know - I am ...

COURT: Could you just speak a bit louder?

--- I say, I withdraw the evidence then, because I do not remember where I was when I saw him - saw the motor cyclist.

MR MYBURGH: Miss Gosnell, why are you

prepared to withdraw evidence that you have just given earlier today? Why does it come so easily to you to withdraw evidence? --- I do not know.

Do you not know what happened in this collision? --- It happened so quickly. It happened very quickly.

Can you be sure what the colour of the robot was when you entered that intersection? --- Yes. It was green.

That you can be sure of? --- Yes.

Let us put to you - let me put to you what you are not sure of. You are not sure of what speed you were travelling at any time, in Oxford Road, is that correct? --- That is correct.

You do not know what distance you were from the intersection when the robot turned green for you? --- No, I do not.

You do not know where you were when you saw the motor cyclist for the first time, is that correct? --- Correct.

MR MYBURG: You do not know whether he was turning right or going straight,

or/.....

or what he was doing, other than that he was entering the intersection, not so? You know none of that today? ---
No.

So, other than that you were in a collision, and that the robot was green, you really cannot say what happened that night, is that correct? ---No, I cannot."

Even though Miss Gosnell's two passengers could not contribute anything worth while towards resolving the dispute, they were nonetheless called as witnesses by counsel for the respondent. Neither of these gentlemen could drive a motor vehicle. James occupied the front passenger seat next to Miss Gosnell and Wallace occupied the left-hand position on the centre seat behind the front seat. James was holding Miss Gosnell's dog, a Maltese poodle,

on his/.....

on his lap. The two gentlemen were conversing with each other when the collision occurred and they were unable to tell the court what the colour of the traffic light was when Miss Gosnell entered the intersection. Wallace "imagined" there must have been some reception after the performance but he could not tell the Court whether Miss Gosnell was present. She probably was, he said. Wallace "seemed to recall that there was a reception" and it is probable, he said, that Miss Gosnell was present. Neither gentleman could testify to the speed at which Miss Gosnell was travelling down Oxford Road. James declined to even venture an estimate of her speed. Wallace said she was driving at a

normal speed which, translated into kilometres per hour, he "would say [was] 60/70 at that particular moment."

As a witness the appellant made a very good impression upon the learned trial Judge. He gave him the impression of being very articulate and he gave his evidence in a straightforward manner, the learned Judge said. Miss Gosnell, on the other hand, might not have been as articulate as the plaintiff, said the learned Judge, but he could not on her demeanour find that he should reject her evidence. She gave him the impression of being a truthful witness. It should be borne in mind that they were testifying to

events/.....

events which took place over four years previously the learned Judge commented.

He came to the conclusion, for the following reasons, that, in respect of circumstances preceding the collision, there were no inherent improbabilities to assist him in the matter:

"Both the plaintiff and Miss Gosnell had every reason to get home in a hurry. Both had had a long day. The probabilities, prior to the collision, do not favour the version of either one or the other".

Dealing with the probabilities relating to the actual collision, the learned Judge reasoned:

"At a road intersection case, where both parties allege that they entered with the red light in its favour, there are normally

no inherent probabilities in the version. It is the version of the one against the other."

He dealt with the criticism by counsel on both sides of the evidence of the appellant and Miss Gosnell as follows:

"There has been criticism of the evidence of the plaintiff. It has been suggested that his evidence that he swerved to the right cannot be true, because if it were true, there would not have been a collision, and it would have involved him making a ninety degree turn. It is also said that his evidence is not acceptable as to the state of the road, whether it was dry or wet, and to this extent it is contended that the evidence of Miss Gosnell is supported by the evidence of Mr James.

The evidence of Miss Gosnell is criticised on the basis that she did not give evidence about a reception to which Mr James and Mr Wallace testified. There is no evidence

that/.....

that she was there and it was a very small affair. She does not remember where she was when the robot turned green - she concedes that her sense of distance is not good - her speed of 50 kilometres per hour - today, four years after the collision, she does not have an independent recollection thereof. She withdrew her evidence on certain facts. When faced with the statement she had made to the police, she gave her evidence (in the witness-box) on what she recollected and it appears that her recollection was not as accurate as she thought. She changed her evidence in the light of her statement to the police when she (quite fairly) considered that at that stage she would have had a better recollection of what had happened than today.

It was suggested that her speed must have been faster than 50 kilometres per hour, and that on that basis her evidence is not credible. There is no basis on the evidence for such a submission, and the fact that she did not mention that she applied her brakes in her evidence in chief is not material as this was said in the police statement."

It was/.....

It was submitted by counsel for the appellant that the trial Court was too generous in its assessment of Miss Gosnell's evidence.

It should have found, contended counsel, that Miss Gosnell was an unsatisfactory witness in a number of material respects and should have held that the appellant had discharged the onus resting upon him.

The main attack levelled at Miss Gosnell's evidence was based on the withdrawal of her evidence that she was in the region of the pedestrian lines when she first saw the appellant. She withdrew the evidence when, as appears from the extract from her evidence above, she realised that this was not consistent with the impression created by the statement/.....

ment to the police that she had not yet entered

the intersection when she saw the appellant.

What Miss Gosnell withdrew, it was submitted,

was all the material evidence in chief which

she had given in relation to how the collision

occurred. I do not agree. Upon my reading of

the relevant passages the only evidence she

withdrew related to the position she occupied

when she first saw the appellant. As the learned

Judge has pointed out, she gave evidence

approximately four years after the event. She

had to cast her mind back to an event which

"happened so quickly" four years previously,

that she was unable to tell the court exactly

where/.....

where she was when she saw the appellant. This withdrawal does not, in my view, affect her entire evidence. It appears on paper to be a candid admission that she might erroneously have reconstructed the events which occurred immediately prior to the collision. The learned Judge who had the opportunity of observing her in the witness box and of forming an impression of her demeanour came to the conclusion that she was a truthful witness.

It was conceded by counsel for the appellant that the fact that Miss Gosnell was prepared to retract her evidence does not necessarily mean that she was a dishonest witness, but, it was

submitted, it does mean that she was an unreliable witness. I do not agree. Her retraction related to her evidence as to where she was when she first saw the appellant. This was mainly a matter of reconstruction. It was an estimate in respect of which, as she admitted, she could be wrong. Any uncertainty in this regard does not, in my view, necessarily affect her evidence that the traffic light was green in her favour when she entered the intersection. About this there was no uncertainty in her mind. The same considerations apply to her vagueness and uncertainty in other respects relating to events preceding and surrounding the collision.

I have/.....

I have carefully considered all the arguments addressed to us on behalf of the appellant but I am not persuaded that the learned trial Judge erred in absolving the defendant (present respondent) from the in-stance.

The appeal is dismissed with costs.

JUDGE OF APPEAL

JANSEN JA)
) 7 Concur
JACOBS JA)