

IRENE SWANEPOEL

Appellant

and

CITY COUNCIL OF JOHANNESBURG

Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

IRENE SWANEPOEL

Appellant

and

CITY COUNCIL OF JOHANNESBURG

Respondent

Coram: RABIE, CJ , JANSEN, JA et BOSHOF, AJA

Heard: 21 August 1986

Delivered: 4 September 1986

J U D G M E N T

BOSHOF, AJA :

This is an appeal from the judgment of

Schabert, J in the Witwatersrand Local Division granting

absolution...../2

absolution from the instance with costs in an action instituted by the appellant against the respondent as a self-insurer for damages suffered by her when she as a pedestrian was run over by a bus of the respondent, the appellant alleging negligence on the part of its employee, Frans Moremi, the driver of the bus.

The evidence can be briefly stated. On the 31st December 1980 at about 16h10 the appellant and one, Venter, with whom she was at that time cohabiting and whom she subsequently married walked from north to south along the Hoek Street mall on their way to the OK Bazaars in the central business area of Johannesburg. That part of Hoek Street where

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they walked is a mall and on the northern side gives access for Blacks to the railway station and to a terminus for buses used by black passengers. It is near the central business area of Johannesburg and is consequently an important and busy thoroughfare for Blacks going to or leaving the railway station and the terminus. Venter stopped to purchase some fruit from a street vendor just before they reached de Villiers Street. The mall was crowded and the appellant decided to cross de Villiers Street and wait for Venter on the other side.

De Villiers Street runs from east to west and has a kerbed pavement on both sides even where it

crosses...../4

crosses the mall. There are pedestrian crossings on both the eastern and western sides of the mall which cross de Villiers Street and they are controlled by pedestrian traffic lights. The appellant crossed de Villiers Street along the western pedestrian crossing and waited for Venter on the pavement on the southern side of de Villiers Street approximately 8 feet (2,43m) from the edge of the pavement. Where she stood a crowd moved up from behind her and became boisterous causing her some anxiety with the result that she moved forward and stood on the edge of the pavement opposite the western pedestrian crossing. She could not cross to the northern side of de Villiers Street where Venter was because the pedestrian traffic...../5

traffic lights were showing red. She however noticed Venter on the opposite side waiting for the pedestrian traffic lights to change in his favour. The appellant remembered standing there on the edge of the pavement and waiting for Venter to cross to her side of the street but had no idea of what happened to her immediately after that. The next thing she remembered was that Venter lifted her head where she lay seriously injured partly under a stationary bus. She did not remember seeing the bus before she was injured and she had no idea how she came to be partly under the bus.

Venter reached the western pedestrian crossing when the pedestrian lights were red and had to wait for

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them to change. He did not see anybody crossing or trying to cross against the pedestrian traffic lights while he was waiting. Vehicular traffic passed in de Villiers Street in both directions and he noticed a single-decker bus a little distance away to the east approaching that area of the street which crosses the mall and which for the sake of convenience may be called the intersection. He looked in front of him and noticed the appellant standing near the kerb of the pavement on the other side of the street. He then looked to his right, the side from which vehicular traffic could be expected, when the pedestrian traffic lights changed in his favour. The single-decker bus entered the intersection,

Venter heard the sound of something being hit followed by people screaming and the bus then came to a stop just outside the intersection with its rear end just past if not on the western boundary line of the pedestrian crossing. He crossed the street and saw the appellant between the front and rear wheels partly under the bus between the southern pavement and the bus. Her left shoulder was against the kerb, her left leg was pulled up and partly on the pavement and her right leg was on the street, the left front wheel of the bus had evidently run over it. Her head was on the street next to the kerb.

The bus belonged to the respondent, a self-

insurer,...../8

insurer, and was driven by its employee Frans Moremi.

The appellant instituted action against the respondent and claimed damages for bodily injury. In the action it was common cause that the appellant was seriously injured and certain amounts claimed under the different heads as damages were agreed upon. It was left to the court to determine inter alia the amounts of the damages claimed in respect of the wages of a full-time domestic servant, necessitated by her injury, and her past and future loss of earnings. The court determined these amounts by using in the one case the agreed and in the other case the actuarially calculated figures and in each case making a percentage deduction as a contingency allowance.

On the question of liability the case for the appellant was conducted and presented on the basis that Moremi was negligent in one or more of the following respects: he failed to keep the appellant and the group of pedestrians who were on the pavement and waiting for the pedestrian traffic lights to change under proper observation; he travelled too close to the kerb and he failed to hoot on approaching the appellant and the group of pedestrians.

The court held that the appellant failed to discharge the onus resting upon her to establish the alleged negligence and granted absolution from the instance with costs.

The appellant is now appealing against this judgment in effect on the ground that the court a quo erred in making the percentage deductions, or alternatively, in making excessive percentage deductions in respect of the wages of the full-time domestic servant and her past and future loss of earnings, and also erred in holding that it was not established that Moremi was negligent.

De Villiers Street is a two-way street with bus routes in both directions. It carries heavy vehicular traffic and there are vehicular traffic lights where it crosses the mall. Just short of the intersection the width of de Villiers Street is reduced over a distance of a little more than the width of the mall by the pavement

on the southern side which extends into the street towards the north. The reduced width of the street is 9,9 m.

The street is divided into three traffic lanes which are demarcated with painted lines. The northernmost

and centre traffic lanes are for vehicular traffic travelling from west to east of which the northernmost one is

reserved for buses but is in fact also used by other

vehicular traffic. The southernmost traffic lane is

for vehicular traffic travelling from east to west. The

lines of the traffic lanes stop short of the intersection

with the result that there are no demarcated lanes in

the intersection itself. The two pedestrian crossings

from north to south across de Villiers Street are demarcated

with white lines and are each 2,1m wide. The inner lines

of the pedestrian crossings in the intersection are 12m apart. Judging from the lines outside the intersection the bus lane is 3,12m and the centre lane 3,06 m wide. The southernmost lane in which the bus in question travelled is 3,36 m wide east of the intersection and 3,55m wide west of the intersection. It is common cause that where the bus collided with the appellant the lane is 3,55m wide. The bus in question is 2,55m wide; that means that the bus had a leeway of 0,81m at the entrance of the intersection and 1m where the collision took place.

The respondent called Moremi as a witness.

He had been employed by the respondent as a busdriver

since 1971 and is the holder of several road safety awards from the National Road Safety Council and the respondent for accident-free driving. He had often driven buses on routes along de Villiers Street through the Hoek Street mall intersection and knew the intersection well. He was aware of its dangerous nature because of the propensity of pedestrians sometimes to disregard the pedestrian traffic lights. On the day in question he drove a special bus on the route between the Parktown hospital and the Breë Street terminus in the city. He entered de Villiers Street at the Wanderers Street intersection approximately 70 paces east of the Hoek Street mall intersection. According to him he approached

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the Hoek Street mall intersection at his usual speed which was approximately 15 km p h - he did not look at his speedometer - and noticed many people on the pavement on his lefthand side, that is to say the pavement in the mall on the southern side of de Villiers Street, waiting to cross de Villiers Street. It was during the peak hour, the traffic was heavy and there were motor-vehicles approaching him from the opposite direction. There were no jay-walkers in the street and nobody tried to cross de Villiers Street in the intersection against the pedestrian traffic lights. The vehicular traffic lights in the intersection had changed in his favour when he was still far away from the intersection, almost opposite the

cathedral...../15

cathedral. When he was pressed to give the distance in terms of bus lengths - the bus being 10,85 m long - he said he was about 2 bus lengths away. He entered the intersection and when he passed the second crossing that is to say the western pedestrian crossing, he heard people scream and he stopped the bus without changing its course to the right or to the left. He was able to stop the bus immediately because he was travelling at a moderate speed and the bus became stationary just outside the intersection. He got out of the bus and saw the appellant partly under the bus almost halfway between the front and the rear wheels. According to him her back was on the pavement and her legs were in the street. The bus was about $1\frac{1}{2}$ ft (45 cm) from the kerb. He did not see the bus collide with her and

he also did not hear the collision because of the noise of the engine of the bus. He noticed a dent on the left front side of the bus between the front corner and the door where she could have collided with the bus. He indicated on a photograph of the bus that the dent was on the left front side below the number of the bus.

According to Moremi the southernmost lane is narrow and he usually travelled approximately 2 ft (60 cm) from the kerb. He was accustomed to driving the bus along that street and regarded it as a safe distance. On that day he did not take particular notice how far from the kerb he was travelling and conceded that he may have travelled less than 2 ft (60 cm) from

the kerb because of the heavy traffic which could have prevented him from keeping his usual distance from the kerb. Although the traffic lanes are not demarcated in the intersection and the width of the southernmost lane east of the intersection is not the same as it is west of the intersection he was in cross-examination pressed to give an estimate of the distance he was travelling from the imaginary northern boundary of the lane in which he was travelling. He was constrained to give or to concede to distances which he understandably stated were merely guesses on his part.

Fred Cranko, who was a traffic officer in the employ of the respondent at that time arrived at the

scene when the appellant was already removed to hospital and found Moremi there. The bus was still where it had become stationary after the collision. He prepared a plan which is not of any real assistance. He measured the distance between the bus and the kerb and found it to be one pace. His pace was measured in court and is 29 inches (0,72 m). The court a quo accepted his evidence on this point. It should be mentioned here that the appellant brought the bus to a stop immediately after he heard people scream and succeeded in doing so within a distance of a little more than the length of the bus which is 10,85 m , because on the evidence the appellant was standing on the pavement more or less

halfway between the two lines of the pedestrian crossing and the bus stopped with its rear near or on the western line of the crossing. Indeed Cranko put the rear of the bus in the intersection. There was no evidence or even a suggestion on behalf of the appellant that Moremi swerved away from the pavement when he heard the screams and before he brought the bus to a stop.

Roelof Pottas an assistant area-superintendent in the employ of the respondent visited the scene in order to prepare a report on the condition of the bus. According to him the bus was a fair distance away from the kerb. He checked the left front wheel of the bus for kerb marks and also checked the kerb for wheelmarks

and found none. He found a dent on the left front corner of the bus about 1 m from the ground. The bus has a rounded corner and the dent was right on the corner.

It is common cause that the bus did not mount the pavement when it struck the appellant. There was nothing on the side of the bus which protruded from the bus that could have overlapped the pavement. There was also no acceptable evidence that the appellant stepped of the pavement into the intersection before the collision. The only evidence to that effect was that of Dorah Ramathopa which was rejected by the court a quo because of a prior inconsistent statement she had made in this regard and other valid reasons.

On the evidence accepted by the court a quo

a number of pedestrians including the appellant were standing

on the edge of the southern pavement facing north with the intention

of crossing de Villiers Street and waiting for the pedestrian traffic

lights to open in their favour, there was no one at that stage

crossing the street or making any attempt to do so, while

the vehicular traffic lights were green in favour of

traffic in de Villiers Street and Moremi entered the intersection

with the vehicular traffic lights green in his favour. This

appears from the evidence of the appellant, Venter, Moremi

and Nelson Qasha, the driver of a bus which had followed

behind the bus in question and who had seen the bus in

question enter the intersection and stop after the

collision. It was none the less common cause between the parties that the collision took place in the street and that the appellant must have entered the street at some stage before the collision to cause the collision to occur in the street. It is however not clear how she came to be in the street and there is consequently no evidence of when or where the bus was when she moved into the street.

The question which now falls for consideration is whether the appellant established negligence on the part of Moremi.

At the outset it is necessary to note that according to our legal system accountability based

on negligence is generally speaking restricted to harm which is foreseeable; harm that should reasonably have been foreseen and prevented. Negligence can therefore never be disentangled from the facts. Its existence is best ascertained by applying to the facts of each case the standard of conduct which the law requires. That standard is the degree of care and skill which a reasonable man would exercise under the circumstances. In the case of Cape Town Municipality v Paine 1923 AD 207 at p 217 Innes C J said:

"The question whether, in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in

each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the diligens paterfamilias, the duty to take care is established, and it only remains to ascertain whether it has been discharged."

In the light of what has been said above the court will have to decide whether a reasonable man situated in the position of Moremi would in the circumstances that prevailed in the intersection have foreseen the likelihood of harm to the appellant and would have taken reasonable steps to guard against the occurrence of such harm.

Mr Israel for the appellant argues that

Moremi was negligent in that he failed to keep the group of pedestrians including the appellant under proper observation, travelled too close to the kerb and failed to hoot, but he is unable on the evidence to relate the harm that the appellant had suffered to this conduct. He is at this disadvantage because there is simply no evidence as to how she came to be in the street. The court a quo in its judgment correctly stated: "It is undeniably so that the plaintiff (appellant) must have entered the street in the slightest split second before the collision if it is to be assumed that she had been standing where she claims to have been ... Mr Israel has quite correctly in my view not

contended that there was an opportunity for Moremi to avoid the collision once the plaintiff had moved into the street."

Moremi had been driving buses accident-free in Johannesburg since 1971. He knew this particular route through the intersection well and was aware of the propensity of pedestrians to disregard pedestrian traffic lights. He travelled at a moderate speed of 15 km per hour and maintained the same distance from the kerb as he usually did. Although he did not notice the appellant in particular, he was well aware of the pedestrians on the pavement waiting for the vehicular traffic in de Villiers Street to pass and

the pedestrian traffic lights to change. There were no pedestrians in the intersection and he did not then expect anyone to cross. He was asked in cross-examination whether he did not watch the pedestrians as he approached or passed them and he replied that he only saw them as persons and usually looked for anyone who might "disturb him ... I am only looking for anyone who can happen to jump into the road and not others." Although he at one stage said that he did not look at the pedestrians on the pavement, he explained in re-examination that he looked in front of him in the road and was nevertheless aware of the pedestrians on the pavement. If one of them had made a sudden move off the pavement when he

was in the intersection he would have seen him. Until the time he went through the intersection he saw nobody make a move as if he was going to go into the street.

Moremi entered a controlled intersection and all the indications were that the pedestrians on the pavement were heeding the vehicular traffic in the street and were observing the law as far as the pedestrian traffic lights were concerned. According to Venter who was watching the intersection preparatory to crossing the street, there was nothing untoward in the manner in which the bus was travelling and there was no reason for the bus to hoot.

There is consequently nothing in the evidence

to suggest that Moremi could or ought to have foreseen the likelihood of the appellant moving into the street when she did or that he could have taken reasonable precautions to prevent her being harmed by the bus at the stage when she happened to move into the street into the bus or the path of the bus. There is no evidence that the collision occurred because the bus travelled too close to the kerb. Indeed the court a quo was perfectly justified in holding "that it had not been established that howsoever the plaintiff (appellant) got into the street, the collision would have been avoided had the bus travelled 6, 12, 18 or even 24 inches further to the right," that is to say further from the kerb.

The argument that Moremi should have hooted is in the circumstances also without merit. The court a quo correctly held:

"There is also no evidence that she in fact intended to enter the street at the crucial time or that she appeared intent upon doing so. There is further no evidence that the person or persons who pushed, shoved or bumped into the plaintiff (appellant), if that happened, was not aware of the oncoming bus and that any such action by any such person was something that was reasonably foreseeable by Moremi at a time when hooting could still have made a difference. It is not even certain that no such action by any such person would have occurred if Moremi had hooted."

There was clearly no evidence upon which the

court...../31

court a quo could have found that the injuries sustained by the appellant were caused by the negligence of Moremi.

Mr Israel has not persuaded this court that the judgment of the court a quo was wrong and that an order for absolution from the instance with costs should not have been granted.

Having arrived at this conclusion it is not necessary to deal with the arguments relating to the amount of damage suffered by the appellant.

In the result the appeal is dismissed with costs.

BOSHOFF, A J A

Rabie, C J)

concur

JANSEN, J A)