

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

Case No.: 2865/2006

In the matter between:

SANNA SUZEN OLIPHANT

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT: EBRAHIM, J

HEARD ON: 14, 15 & 17 MARCH 2006

DELIVERED ON: 24 MARCH 2006

[1] The plaintiff sued the Road Accident Fund (“the fund”) for damages in the sum of R449 500,00 in respect of injuries she sustained when she was struck by a motor vehicle, bearing registration number CC6753 (“the insured vehicle”). The accident occurred on the 5th of December 1999 at approximately 9h00 at or near the farm Kleinmagersfontein, in the district of Jacobsdal.

[2] Neither the plaintiff’s capacity to institute these proceedings

nor this court's jurisdiction to adjudicate this matter was placed in issue. At the start of the trial, in response to an application for a separation of the issues, I ruled that the trial would proceed on the merits only. The only issue canvassed in these proceedings therefore was the question of negligence. It was common cause that the insured vehicle was under the control of the plaintiff's husband Ndeleni Isaac Oliphant ("the insured driver") at the relevant time. The manner in which the accident occurred may briefly be stated as follows:

1. The insured driver testified that he parked the insured vehicle, a 1.4ℓ Chevrolet outside and parallel to the front door of the house he shared with the plaintiff.
2. The plaintiff was a pedestrian. She came out of the front door of the house and walked around the front of the vehicle, where she saw her husband (the insured driver) bending over and looking into the bonnet, which was open. She said the engine could have been idling because the very next thing she knew was that the car reversed into her, she fell to the ground and was pinned

between one front wheel and one rear wheel of the insured vehicle against a tin shanty built on the same premises.

[3] The insured driver was called to testify in support of the plaintiff's case.

3.1 He told the court that he was busy trying to tighten the nut of the petrol pump of his vehicle when the spanner he was using slipped out of his hand and fell between the solenoid and the starter motor, bridging the two electrical wires, (i.e. the electrical conductors) and resulting in a flow of power which had the effect of kick-starting the vehicle. The vehicle immediately moved away from him in reverse. He said the right drivers door was open and he attempted to get into the vehicle through it and stop the vehicle moving, but it ran away from him, the door struck the tin shanty and stuck to it. He then saw his wife, the plaintiff, lying under the vehicle with the right front wheel between her legs. Her back was bent.

3.2 He said there was a problem starting his vehicle, it could not usually start at any time because the ignition was faulty and worn out. He said that he did use a key to switch on the ignition, he would turn the key, it would switch on the lights on the dashboard but not always start the vehicle. That is the reason he connected a push button to the starter system so that he could use that push button to start the vehicle. According to him the gear lever system of the vehicle was also defective and the vehicle would start in any gear. Although it was an automatic vehicle, it did not have to be put into park to start, if it was in the neutral gear, it would also start. The gear lever was connected to the steering wheel. The handbrake did not work when he applied it and the choke also didn't work. The vehicle didn't need the choke to be opened in order to start. He told the court that on a previous occasion he was working in the front of the car when the car suddenly moved over his feet because the gear lever had slipped from neutral into drive on its own.

[4] Expert witnesses were called by both the plaintiff and the defendant to testify. Both experts examined the insured vehicle in 2003 and 2004 respectively and both were at issue that the vehicle was in a very poor condition. They both agreed that the vehicle could have been kick-started in the manner described by the insured driver. However, both were equally adamant that kick-starting the vehicle would not cause it to move and both agreed that the vehicle would only move if the ignition had been switched on and the vehicle was put into gear. It was common cause between them that the ignition must have been

switched on, feeding power to the engine, and the vehicle must have been put in gear, in this case in reverse gear when the vehicle moved. Although plaintiff's expert Barry Grobbelaar, would not speculate on the condition of the gearlever because he had not examined it, the defendant's expert, Dan van Onselen, did examine the gearlever and commented thereon as follows in his report, handed in as exhibit D:

i°(4) The vehicle had a steering-mounted gear lever with severe play in the various positions – the lever had to be manipulated before positive gear engagement could be achieved. According to Mr. Olifant this situation manifested itself some time before the accident.

(5) The neutral position had been electrically bridged to enable the vehicle to be started in all gears through a starter button which had been mounted on the dashboard.

Before this modification had been done the vehicle could only be started in “park” or “neutral”.”

Both experts also conceded that the damage to the door of

the vehicle was consistent with the door having struck the tin shanty in the manner testified to by the insured driver.

- [5] On analysis of the evidence, it appears to me to be common cause, that the insured driver was in control of the vehicle at the relevant time. See FLYNN v UNIE NASIONAAL SUID-BRITSE VERSEKERINGS-MAATSKAPPY BPK 1974 (4) SA 283 (NC).

Indeed this was never challenged, either in the pleadings or in oral testimony. What needs to be addressed is whether or not the plaintiff has proved her case on the evidence given. Certainly her evidence takes the matter nowhere near discharging the onus she carries because she doesn't know what happened. There is only the version of the insured driver to contend with and the plaintiff's case must rise or fall by his testimony. In this regard, I have no reason to fault the testimony of the insured driver. He was a credible witness, both as regards the content of his testimony and as to the manner in which he gave it. It is true that he contradicted himself and the plaintiff in certain

respects, namely:

1. As to when last he drove the vehicle prior to the accident, he gave conflicting answers, first saying it was 6 days prior and then 3 days prior.
2. Plaintiff testified that the ignition was on and the engine was running at the time the car reversed and struck her. The insured driver testified similarly but according to Van Onselen at the time he examined the vehicle the insured driver told him that he had switched off the ignition and pocketed the key.
3. The plaintiff told the court the insured driver was working on the vehicle at the left front side whereas he testified that he was working on the right front side of the vehicle.

[6] In my view, these are not matters which adversely affect the credibility of plaintiff and her husband. They can easily and reasonably be explained on the basis of memory lapse on their part due to the long passage of time since the accident occurred, i.e. 7 years.

[7] The insured driver's version of how the accident occurred is corroborated by expert evidence in two (2) vital respects:

1. The kick-starting of the motor vehicle, which both experts said was possible; and
2. the faulty gear lever, which Van Onselen said could possibly have slipped into reverse gear at the relevant time because of it being defective.

[8] There is only one of two ways in which the accident could have occurred:

- 8.1 Either it occurred in the manner the insured driver testified it did; or
- 8.2 some person physically and manually reversed the vehicle into the plaintiff.

There is no evidence of the second possibility before me and the insured driver being a credible witness, I accept his version unhesitatingly as depicting how the accident occurred. Moreover I find his version to be entirely in line with the probabilities given the objective circumstances of this case. That being so, I find that the insured driver was negligent in causing the accident for the following reasons:

- 1. He must have foreseen the possibility that his wife or someone else would come out of the house and be in the vicinity where the vehicle was parked.
- 2. He knew that if the vehicle was kick-started, and the

ignition was on there was a possibility that the gear lever would slip into gear because of the defective gear lever and cause the vehicle to move, alternatively he must have foreseen this happening as a possibility and yet he neglected to take any precautions to ensure that the vehicle did not move.

3. He must have foreseen the possibility that if the vehicle moved on its own his wife or someone else in the vicinity of the car would be struck and injured.
4. He must have foreseen that there was a possibility that the spanner could fall out of his hand but he failed to take the necessary precaution to ensure that it did not.

The insured driver thus took no precautions whatsoever despite his knowledge of a previous occasion when the vehicle engaged into active gear on its own and moved, to ensure that this did not happen again.

- [9] It is a fact substantiated in evidence by the experts that the vehicle would not and could not have moved without the ignition having been switched on and I have accepted as a

fact that at the material time the ignition of the vehicle was on and the vehicle was idling. Once the gear lever slipped into gear the vehicle then moved and the plaintiff was struck.

[10] Accordingly the insured driver is found to be 100% negligent in causing the accident. The defendant is therefore liable to plaintiff in such amount of damages that she may prove she suffered as a result of this negligence. The costs thus far will be costs in the cause.

S. EBRAHIM, J

On behalf of the plaintiff:

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On behalf of the defendant:

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