

22/96

Case No 539/94

**IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)**

In the matter between

MASHUDU EDWIN TSHIKOMBA

APPELLANT

and

**MUTUAL AND FEDERAL INSURANCE
COMPANY LIMITED (INCORPORATING
NATIONAL EMPLOYERS' GENERAL
INSURANCE COMPANY LIMITED**

RESPONDENT

**CORAM: BOTHA, VIVIER, NIENABER, SCHUTZ JJA et
PLEWMAN AJA.**

HEARD: 14 March 1996.

DELIVERED: 26 March 1996.

J U D G M E N T

VIVIER JA/

VIVIER JA:

On 28 May 1989, and in an unnamed street in Diepkloof, Soweto, the appellant ("the plaintiff"), who was a pedestrian at the time, sustained severe head and other injuries when he was knocked down by a motor vehicle driven by one Xaba. In due course the plaintiff instituted action in the Witwatersrand Local Division against the respondent ("the defendant") as the duly appointed agent in terms of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 ("the Act"), alleging that the collision had been caused by the negligence of Xaba, and claiming compensation in terms of the Act for loss and damage suffered and to be suffered by him as a result of his injuries. By agreement between the parties the trial Court (Bliden J) was asked to decide only the issue of negligence, leaving the issue of the quantum of damages to stand over for later determination. At

the commencement of the trial counsel for the plaintiff applied in terms of Article 54 of the Agreement which is contained in the Schedule to the Act for an order that the defendant furnish to the plaintiff's attorney a copy of a statement made by Xaba to an insurance assessor which the defendant admitted having in its possession and which it claimed was privileged. **Blieden J** refused to order the production of the statement on the basis that it was privileged. After hearing evidence on the merits of the action **Blieden J** found that the plaintiff had not discharged the onus of proving negligence on the part of Xaba and granted absolution from the instance with costs. An appeal, with the leave of the trial Court to the Full Bench of the Transvaal Provincial Division was unsuccessful, and with the necessary leave the plaintiff now appeals to this Court against the judgment and order of the Court *a quo*.

The unnamed street in Diepkloof where the collision occurred, to which I shall refer as the collision road, runs downhill from south to north and crosses Immink Drive which runs from west to east. Both have tarred surfaces and carry traffic in either direction. There is a gravel pavement on either side of the collision road. There is a stop sign for traffic approaching the intersection along the collision road from the south. One street block south of the intersection a side street joins the collision road from the west and forms a T-junction with the collision road.

Due to his injuries the plaintiff himself had no clear recollection of how the collision occurred. He seemed to recall that just prior to the collision he and one Petrus Mosala were walking uphill from north to south on the eastern pavement of the collision road south of Immink Drive towards a Trek Filling Station which was situated just off the eastern pavement of the collision

road. He also seemed to recall seeing the insured car travelling downhill from south to north just before it hit him on the eastern pavement.

The plaintiff's evidence was in material respects contradicted by that of his own witness, Petrus Mosala, who testified that at about 4 o'clock on the afternoon of the day in question he was in the company of the plaintiff and one Thomas. They were on their way to the Baragwanath taxi rank which is situated along the collision road some distance south of its intersection with Immink Drive. He and Thomas were walking ahead of the plaintiff and when they had crossed Immink Drive from north to south they proceeded along the eastern pavement of the collision road to a point where they stopped, turned around and waited for the plaintiff. He saw the plaintiff crossing the collision road from west to east, south of Immink Drive. At the same time he

heard the screeching of tyres and saw the insured vehicle proceeding from west to east in Immink Drive and turning south into the collision road. It hit the plaintiff just as he was about to reach the eastern pavement of the collision road. His foot was already on the pavement. The driver, Xaba, stopped his car and Mosala asked him to take the plaintiff to hospital which he did, accompanied by Mosala.

Xaba's evidence was that on the afternoon in question he was on his way home from Alexandra, where he had attended a funeral. He was driving his brother's car. He lives in Meadowlands. He was travelling from south to north along the collision road at a speed of about 45 kilometres per hour, when the plaintiff suddenly emerged from the side street on his left forming the said T-junction with the collision road and ran into his line of travel, pursued by two other persons. Xaba said that he hooted, applied his brakes

and swerved to his right. The plaintiff, however, continued to run across the road and he could not avoid hitting him on the eastern side of the collision road. The plaintiff was about eight paces away from him when he saw him for the first time. The two people who had chased the plaintiff ran away after the collision. A bystander told him where the plaintiff lived and he took the plaintiff to his home and from there to hospital. Xaba said that the Trek Filling Station as well as the grey brick wall just south of the T-junction on the western side of the collision road which appear on some of the photographs taken some time after the collision were not there at the time. Where the wall is now there were shrubs and trees which impaired one's vision.

After the trial Court had reserved judgment an application for leave to lead further evidence was made on behalf of the plaintiff. The effect of the additional evidence which was sought to be led

was that the brick wall referred to by Xaba had not been built at the time of the collision, and that there was instead a low wire fence which did not obstruct the view of a driver travelling north in the collision road. There was nothing further to obstruct a driver's view. The application was refused by **Blieden J** on the ground that the evidence proposed to be led was not material. The learned Judge pointed out that Xaba had himself said that the brick wall was not there at the time.

In granting absolution from the instance the learned trial Judge held that the two versions of how the collision occurred which were put forward by Mosala and Xaba were totally irreconcilable. He found himself unable to decide which of the two witnesses to believe or disbelieve and described both as satisfactory witnesses whose versions were equally probable. He could find no objective facts which supported one version above the

other. He further held that on Xaba's own version he had not been shown to have been negligent. He found that it would be wrong to have any regard to the plaintiff's own evidence of how the collision occurred.

In dismissing the appeal the Court *a quo* agreed with the trial Court that the plaintiff was not entitled under Article 54 to be furnished with a copy of Xaba's statement. It also upheld the trial Court's decision on the application to lead further evidence. On the issue of negligence the Court *a quo* said that it had carefully considered all the points of criticism levelled against Xaba's evidence but that it was unpersuaded that the trial Court had erred in finding that Xaba was a satisfactory witness. It found some aspects of Mosala's evidence unlikely and agreed with the trial Court that on Xaba's own evidence no negligence had been established.

In this Court it was submitted on behalf of the plaintiff that on a proper construction of Article 54 of the Agreement, read with Articles 53 and 48 (f), the privilege attaching to a witness's statement had been excluded by the Agreement so that the defendant was obliged to furnish a copy of Xaba's statement to the plaintiff's attorney.

Summons in this matter was issued and served during July 1991. It was common cause that Xaba's statement was obtained long afterwards ie on 26 January 1993 for the purpose of preparation for trial which started on 8 March 1993. It was further common cause that the statement would, but for the provisions of the Agreement, have been privileged from disclosure. The Articles relied upon read as follows :

" Article 53

When, as the result of the driving of a motor vehicle, any person other than the driver of that motor vehicle has been

killed or injured, the owner and the driver, if he is not the owner, of the motor vehicle shall (if reasonably possible, within fourteen (14) days after the occurrence) furnish the MMF on the prescribed form with particulars of the occurrence and also the prescribed statements, who in turn shall furnish such information to the appointed agent who in terms of Article 13 shall be responsible for any claim arising out of the occurrence.

Article 54

The appointed agent or the MMF or the owner mentioned in Article 12 (b) shall within a reasonable period after the third party has complied with the provisions of Article 48 (f) (i), furnish the third party or his agent with a copy of the information and statements which the said owner or driver furnished in terms of Article 53, as well as all statements which were or are obtained from witnesses to the accident.

Article 48

The MMF or an appointed agent, as the case may be, shall not be obliged to compensate any person in terms of Chapter XII for any loss or damage -

.....

(f) if the claimant concerned refuses or fails -

- (i) to submit to the MMF or the appointed agent, together with his claim form, as prescribed by the Board, or within a reasonable period thereafter and if he is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out; or
- (ii) to furnish the MMF or the appointed agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof;

..... "

(For the purposes of the appeal Article 48 (f), as it now reads, does not differ in any material respect from its wording at the relevant time).

In terms of Article 53 the driver, if he is not the owner of the vehicle concerned, is required within 14 days after the collision to furnish the Multilateral Motor Vehicle Accidents Fund ("the MMF") on the prescribed form with particulars of the collision and also the prescribed statements. The form prescribed is form

MMF 3 (reg 5 of the regulations made under sec 6 of the Act).

The MMF is, in turn, required to furnish such information to the appointed agent responsible for any claim arising out of the collision. It was common cause that Xaba did not comply with the requirements of Article 53 and that the statement in question was not one furnished to the defendant pursuant to that Article.

Article 54 provides, so far as is relevant, that the appointed agent or the MMF must, within a reasonable period after the claimant has complied with the provisions of Article 48 (f) (i), furnish the claimant or his agent with a copy of the information and statements which the owner or driver furnished in terms of Article 53 "as well as all statements which were or are obtained from witnesses to the accident". Article 54 thus distinguishes between the driver's statement furnished in terms of Article 53 and witnesses' statements. The statement in question does not fall

under the first category, as I have indicated. The question is whether it qualifies as a statement under the second category. If not, there is an end to the matter and the defendant was not obliged to furnish a copy thereof to the plaintiff. In what follows I shall assume that the statement in question qualifies as a statement under the second category.

It is significant that Article 54 refers only to Article 48 (f) (i). The latter Article applies to the situation which obtains before litigation commences and to that situation only. This is clear from the provisions of Article 48 (f) (i), read with Article 63 (b). Article 48 (f) (i) requires the claimant to submit to the MMF or the appointed agent, together with the prescribed claim form or within a reasonable period thereafter, an affidavit setting out particulars of the collision. Article 63 (b) provides that no claim shall be enforceable by the institution of legal proceedings before all the

requirements of Article 48 (f) have been complied with. It follows that Article 54 also applies only to the situation which obtains before litigation commences. Its purpose is clear. Once the claimant has complied with his obligations under Article 48 (f) (i) the appointed agent or the MMF should reciprocate to enable the claimant to consider his position before embarking upon litigation. I can find no indication in Article 54 that it imposes the ongoing, continuous obligation to disclose contended for on behalf of the plaintiff. The words "statements which were or are obtained" relied upon by counsel for the plaintiff, *refer merely to statements which were obtained by the appointed agent or the MMF before the claimant complied with Article 48 (f) (i) and those which are obtained after such compliance.* It does not, in my view, refer to statements obtained after the institution of action.

I am accordingly of the view that, according to the clear

wording of Article 54, read with articles 48 (f) (i) and 63 (b), the statement in question, having been obtained after the commencement of legal proceedings, did not have to be furnished to the plaintiff. Had the Legislature intended to exclude in Article 54 so fundamental a rule as the privilege attaching to all witnesses' statements obtained by the defendant, subject only to the requirements of the law of evidence, it would have done so in express and clear terms. Finally on this aspect of the case I should point out that the question whether privilege was excluded in respect of witnesses' statements obtained by the appointed agent or the MMF prior to the commencement of litigation but in anticipation of litigation, does not arise for decision. Neither does the question whether privilege was excluded in respect of some or all of the statements referred to in Article 48 (f) (ii).

It was next submitted on behalf of the plaintiff that the trial

Court had erred in not granting the application to lead further evidence. I do not agree. The proposed evidence was in conflict with the evidence of the plaintiff's only real witness, Mosala, who said that the brick wall had been in existence long before the collision. It would further have necessitated recalling Mosala and Xaba, and its effect was entirely speculative. There were thus good reasons for the trial Court's refusal to grant the application.

I finally turn to the attack on the trial Court's finding that negligence had not been established on the part of Xaba. It was submitted that Xaba's evidence was unsatisfactory, inconsistent and contradictory in a number of respects and that his evidence should have been rejected as false by the trial Court. The contradictions etc relied upon, which I need not specify, all relate to matters of minor detail and not to any of the essential features of Xaba's

evidence. As the Court *a quo* has said, the contradictions etc can be explained on the basis that Xaba was reconstructing with regard to detail. I refer in this regard to details such as the movements of the two persons who chased the plaintiff and to the other vehicle which arrived at the scene after the collision. I am not persuaded that the points of criticism levelled against his evidence detract from his credibility and reliability, and there is no reason to disturb the trial Judge's findings in this regard.

With regard to Xaba's evidence it was submitted on behalf of the plaintiff that the trial Court wrongly refused to allow counsel during the course of his cross-examination of Xaba to use a certain map depicting the townships in the area in order to show that Xaba was not on his way to Meadowlands when the collision occurred. I need say nothing more about this aspect than that a reading of the record shows that after initially mentioning the map counsel for the

plaintiff did not pursue the matter and did not ask the trial Judge for a ruling as to whether or not he could make use of the map. The clear inference is that counsel considered using the map and decided against it.

On the question of whether Xaba was negligent on his own version the main contention advanced in this Court was that he should not have swerved to his right but should have carried straight on. There is no merit in this submission. How was Xaba to know that the plaintiff would not stop? In my view Xaba could not in any way be blamed for swerving to his right. I agree with the trial Court that he has not been shown to have been negligent.

In the result the appeal is dismissed with costs.

BOTHA JA)
NIENABER JA)
SCHUTZ JA)
PLEWMAN AJA) Concur.


W. VIVIER JA.