152/54

G.P.-S.918—1950-I—2,000. U.D.J. 219.

Dec 151/54

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case. T.P.D.
Appèl in Siviele Saak.

S. P. DIPPENAAR *Appellant,*

versus

AFRICAN GUARANTEE & INDEMNITY Co. *Respondent.*

Appellant's Attorney / *Prokureur vir Appellant* McHardy	*Respondent's Attorney* / *Prokureur vir Respondent* Jorris & S
Appellant's Advocate / *Advokaat vir Appellant* A. Fraser, Q.C. & A.M. Hoffenegger	*Respondent's Advocate* / *Advokaat vir Respondent* Hg. Hansen, Q.C. & C. Thorne

Set down for hearing on
Op die rol geplaas vir verhoor op TUESDAY 8TH MARCH, 1955

1/3/55 9.45 — 12.50
2.15 — 4.30
9/3/55 → 9.45 — 12.20. } — C.A.V.

Order: 17th March, 1955.
Appeal dismissed with costs.

Registrar

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the latter between :-

1. Dippenaar Appellant

and

African Guarantee and Indemnity Co.Ltd. Respondent

2. ETTIN Appellant

and

Tollman Bros. and Davis,Ltd. Respondent

Coram: Centlivres C.J., Greenberg et Fagan, JJ.A.

Heard: 8th. & 9th. March, 1955. Delivered: 17th March, 1955.

J U D G M E N T

GREENBERG J.A. :- These are appeals against the decision of RUMPFF J. granting absolution from the instance with costs, in two actions instituted in the Transvaal Provincial Division by the appellants against the respective respondents; it was agreed in the trial court that evidence and argument in both cases should be heard together and they were argued together on appeal.

The claims arose out of a collision that occurred between ten and eleven at night on

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the 25th. March 1952 on the tarred road between Heidelberg and Balfour. Of the two vehicles concerned, a motor delivery van belonging to the appellant Ettin, was driven by the appellant Dippenaar, who was acting in the course of his employment by Ettin; this vehicle was going from Heidelberg to Balfour. It was carrying as a passenger one van Wyk and the van was loaded with furniture belonging to him. The other vehicle, a motor lorry belonging to the respondent Tollman Bros. and Davis Ltd., was being driven in the opposite direction by Johannes Maloi, acting in the course of his employment by the owner of the lorry. As a result of the collision, Dippenaar sustained injuries to his right arm, necessitating its amputation and damage was caused to the van and furniture; ~~certain~~ some damage was also caused to the lorry, but no claim was made in this respect.

The first action was on a claim by Dippenaar for compensation for loss of earnings and diminished earning capacity and for pain and suffering and loss of amenities of life; his total claim, as amended, amounted to £12,628. On this claim the ~~first~~ respondent in the first appeal was sued as the insurer of the ~~second~~ respondent in the second appeal in terms of the Motor Vehicle Insurance Act of 1942. In the other

action,/.....

action, Ettin claimed payment for the damage to the van and, on a cession of action by van Wyk, for the damage to the furniture; these amounts were agreed upon respectively at £350 and £150. It appeared to be common cause that the decision in the first of the appeals would be decisive ~~and~~ in the second, except that a defence of contributory negligence on the part of Dippenaar would not avail the ~~second~~ respondent in the second appeal on the claim in respect of the furniture.

The declaration sets out negligence on the part of Maloi under nine heads, both in the trial court (as far as can be judged from the reasons for judgment) and in this Court the only ground relied upon by the appellants was that immediately prior to and at the time of the collision Maloi drove the lorry on the incorrect side of the road.

From a plan handed in at the trial it appears that the tarred portion of the road over the relevant area is 20 feet ø 1 5/8 inches wide with what is described on the plan as a graded dirt apron on either side, 9 feet wide on the van's correct side of the road and 8 feet 3 inches on the other side. These aprons have

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happened shortly after the leading vehicle had passed him. He says that all three vehicles dimmed their lights when they were some distance apart, that at this stage and until the time of the collision he kept his left wheels within 18 inches of the left-hand edge of the tarmac, and kept a look-out on this edge, both to ensure that he maintained this distance and to watch for cyclists proceeding in his direction. At no stage did he become aware of the fact that the lorry was on a part of the road that would be a danger to him until he was passing it when the nea rear part of it struck the van. The width of the van was 5 feet 10 inches. I shall refer later to his evidence and to where his right elbow was and how he was steering the vehicle. van Wyk's evidence on the points I have mentioned in terms corroborated that of Dippenaar.

Maloi says that he turned into the road at a spot which is over a mile to the East, that is the Balfour side of the place of the collision, and proceeded on the road towards Heidelberg. He denies that there was any vehicle in front of him from the time he turned into the road until the collision, a dispute which was not resolved in the trial court and must be so left. He says that from the time he became aware of the oncoming vehicle (i.e.the van)

until the time of the impact he drove with his left wheels just off the tarmac and that he always does this on that road, by night and by day, when he is about to pass an oncoming ~~xx~~ motor vehicle. He says that he did not realise that the lorry and the van were in any danger of colliding before they met but as he was in the process of passing it he saw the van veering towards him and he felt a blow on his vehicle, also, ~~but~~ that at an earlier stage, he had seen the van first incline towards his side of the road and then right itself. He denies that he swerved to the left at the moment just before the impact. The greatest width of the lorry is 7 feet 7 inches. It has a body (bak) which at its front part has an overhang of 9 inches on each side and at the back an overhang of about 4 inches. It is clear from the evidence that there was no head-on collision. The damage to the van caused by impact with the lorry was on its right side and appears to have been caused by the protruding back part of the body. In my opinion it is probable that the two vehicles came into contact with each other through a swerve by the lorry to its left when the vehicles were opposite each other.

As the learned trial judge said, the evidence on the question as to the part of the road

where the collision happened fell under three heads, viz. (1) the evidence of Dippenaar, van Wyk and Maloi (2) the evidence of the damage to the vehicles (3) the evidence of marks and tracks on and at the side of the road. He came to the conclusion, on the first head, that the evidence of Dippenaar and van Wyk did not warrant his rejection of Maloi's evidence and this did not prove that the lorry was on its incorrect side and that the evidence under the other two heads did not strengthen the evidence of Dippenaar and van Wyk. He therefore granted absolution from the instance with costs.

In regard to Dippenaar's demeanour the learned judge said :-

"Dippenaar het in die algemeen nie die indruk geskep, "deur die manier waarop hy getuienis afgelê het, dat hy " 'n oneerlike getuie is nie. Hy het nie die indruk "geskep asof hy 'n hoë mate van intelligensie besit "nie, maar hy het nie voorgekom as 'n oneerlike getuie "nie. Ten opsigte van 'n ander deel van sy getuienis, "naamlik aangaande sy pyne wat hy ly, kan dit ook nie "gesê word dat hy vergroot het nie. In daardie verband "het hy 'n indruk op my gemaak van matigheid."

He made no reference to van Wyk in this connection, and it is clear that he did not regard the evidence of this witness as adding substantial corroboration to the

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evidence of Dippenaar. In spite of the impression based on Dippenaar's demeanour, the learned judge found difficulty in accepting his evidence and it is necessary for me at this stage to refer, as I indicated I would do, to Dippenaar's evidence as to his conduct shortly and immediately before the collision. With the learned judge, I feel a difficulty in understanding how both Dippenaar and van Wyk could have been unaware of the approaching lorry if it was bearing down on the van in the manner stated by them if they were paying any attention to the road in front of them and this gives rise to the question whether they ~~here~~ have told the true story.

There was no reference by Dippenaar, during his examination-in-chief, to the position of his right elbow while he was driving, but in cross-examination, after denying that this elbow was outside the window at the time of the collision, he said it was against the window which was raised about 4 inches, that it ~~xxxxxxxx~~ was resting on the inside ledge and that he was holding the steering wheel only with his left hand; there then followed this question and answer :-

"Omdat jy jou arm so gehad het soos jy beweer jy het

"hom gehad het jy alleen die voertuig behartig met jou "linkerarm en was die gebruik van jou regter arm vir "die bestuur van jou voertuig van nul en geen waarde nie? "..... Dit is reg. "

The learned judge made no comment on Dippenaar's evidence that he was driving with his left hand only and if this admission is accepted, it is indicative of a somewhat casual method of driving in the circumstances and would be some justification for thinking it not unlikely that Dippenaar was equally casual in his attention to what was happening on the road; RUMPFF J. however rejected Dippenaar's evidence that he did not have his elbow outside the window - this in spite of his demeanour. In my opinion, this evidence if it be untrue (and there is no justification for disagreeing with this finding) warrants a sceptical view of the honesty of the evidence of the witness as a whole. The injury that he suffered was by an impact in the region of his elbow and his denial that his elbow was protruding may well have been due to fear of a risk that an admission may have had an adverse effect on his claim. On the whole, this Court would not be justified in finding that the learned judge was wrong when he summed up the position, in regard to these two witnesses, by saying :-

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"Op hulle getuienis alleen is ek nie bereid te bevind, "sonder verder stawende getuienis dat hulle op hulle "korrekte kant van die pad was tydens die botsing."

Dealing with Maloi, the learned judge, after commenting on the appearance of the witness and other incidents relative to his manner of testifying, said:- " Sy houding in die getuiebank het ook nie by my "die indruk geskep dat hy 'n oneerlike getuie is nie." Reference was made to points of criticism of the witness; in regard to one, that in the reasons was considered of importance, I disagree, with respect. It was based on the fact that in his evidence at the trial he had given details which did not appear either in his evidence as a Crown witness in a prosecution of Dippenaar in a magistrate's court, arising out of this collision, heard in June 1952, or in a statement he made to the police on the 27th. March 1952. But if one bears in mind the more thorough manner that a precognition is usually taken by the legal advisers in a supreme court trial than by the Crown officials in a magistrate's court prosecution, the greater detail is of no sinister significance. In spite of regarding this factor as one adverse to Maloi, the trial court came to the conclusion that, although it could not accept his evidence without corroboration, it could not

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reject it.

If the evidence was confined to these witnesses, it would be impossible for this Court to say that it was satisfied that the trial court was wrong in holding that it had not been proved that the lorry was on its incorrect side of the road.

The evidence on the other two heads relates to the damage to the vehicles and the marks and tracks on and at the side of the road. With regard to the damage to the vehicles, it can be assumed that the immediate cause of the collision was that the lorry swerved to the left and so brought its rear into contact with the van, but it was not sought to be contended on behalf of the appellants that this constituted negligence on the part of Maloi. The signs in the road were all to be found on Maloi's correct side of the road and the contention by counsel for the appellants was directed to showing that they did not constitute a corroboration of the evidence of Maloi, not that they served to support what was said by Dippenaar and van Wyk. The fact that Maloi did not point out his tracks, before the impact, on the gravel on the side of the road to the police officer Visagie, was taken

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into account by the learned judge in his appraisal of Maloi's evidence before he came to the conclusion that he could not reject the evidence of this witness. The result is that the trial court's view that it was not proved that Maloi was driving on the wrong side of the road is a finding on the credibility of the three witnesses I have mentioned and, on the well-known principles which a court of appeal must follow in these cases, there is no warrant for interference.

It was not contended that in this state of affairs the claim for the damage to the furniture stood on a different basis. In my opinion, the judgment of absolution must stand and the appeals must be dismissed with costs.

Leo Greenberg

Centlivres, C.J.)
) Concur.
Fagan, J.A.)