31.8.70

G.P.-S.33967—1968-69—1,000.

J. 219. 93/70

93/70

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

(Appèl) Provincial Division.) Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

ADELINA DOROTHEA WESSELS (Geb.Maritz) *Appellant,*

versus

STADSRAAD VAN JOHANNESBURG *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* v.d.Wall,L.P.& C.

Respondent's Attorney / *Prokureur vir Respondent* Stadsraad

Appellant's Advocate / *Advokaat vir Appellant* I.A.NORTJE

Respondent's Advocate / *Advokaat vir Respondent* J.H.COETZEE

Set down for hearing on / *Op die rol geplaas vir verhoor op* 13-11-70

23.7.11

Coram: Ogilvie Thompson, Wessels, Jansen A-R.R.
de Villiers et Muller JJA. ARR.

(W.P.A.) 9.45 vm —— 10.45 am

C.A.V.

Order 30.11.70 - per de Villiers AJA.
appeal dismissed with Costs.

APPEAL DISMISSED WITH COSTS.

REGISTRAR.
30.11.70

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

A.D. WESSELS Appellant

and

THE MUNICIPALITY OF JOHANNESBURG Respondent

CORAM: OGILVIE THOMPSON, WESSELS, JANSEN, JJ.A.,
DE VILLIERS et MULLER, A.JJ.A.

HEARD: 13.11.1970. DELIVERED: 30.11.1970

J U D G M E N T

DE VILLIERS, A.J.A. :

This is an appeal from a judgment of Galgut, J., in the Witwatersrand Local Division.

Appellant instituted action in the Court a quo against respondent for damages for personal injuries sustained by her when a car driven by one Vermeulen in which she was a passenger, collided with a double decker bus driven by one Bigwood and belonging to respondent and in respect of which respondent was its own insurer. In the particulars of

claim/....

claim she alleged that the collision, which occurred at about midnight [redacted] of the 4th/5th June, 1966, in the intersection of Collins and Guilford streets, Johannesburg, was the result of the negligence of Bigwood in, inter alia, not keeping a proper lookout, failing to apply his brakes timeously or at all, and failing to avoid the collision when it was reasonably possible for him to do so.

In its plea respondent admitted the collision but added that at the time it occurred the bus was travelling from east to west along Collins Street and Vermeulen's car was reversing from west to east in the same street. Respondent denied any negligence on the part of Bigwood and alleged that the collision was exclusively due to the negligence of Vermeulen in reversing his car as aforesaid when in the circumstances it was dangerous for him to do so, and while not keeping a proper lookout for traffic coming from behind, and without giving any warning of his intention to do so.

At the trial it was common cause that Collins Street is a one-way street, 30 ft. wide from kerb to kerb, running from east to west, that Guilford Street is

a two-way street, 27 ft. wide from kerb to kerb, running from north to south, that the sidewalks on all four corners of the intersection of the said streets are 9 ft. wide from kerb to building line, that there are overhanging streetlights in the intersection, and that there is a bus stop on the southern side of Collins Street 23 yards west of the intersection.

The main witness on behalf of appellant was Vermeulen. He said that on the night in question he drove his Opel car on the northern side of Collins Street. He intended turning north into Guilford Street in the direction of his home and had his flicker light on to indicate his intention. He inadvertently overshot the intersection by about a car's length, stopped when he realised that he had done so, and looked into his rearview mirror with a view to seeing whether there was any traffic coming from behind preparatory to reversing and thereafter proceeding north into Guilford Street as originally intended. He could, however, not see through the rearview mirror because it was drizzling slightly, so he lowered the window on his right side and looked back but saw no traffic

approaching from behind. He then reversed along Collins Street still on the northern side thereof, until the front of his car was in line with the eastern building line of Guilford Street and the right side of his car 3 feet from the northern kerb of Collins Street and stopped. Because his car was strange to him - having bought it only a few days previously - he had difficulty in changing from reverse to first gear and he struggled to do this for a minute or more. While doing this and while his car was still stationary, with the flicker light on, and his foot was on his brake pedal, the bus collided with the left rear of his car, causing it to come to rest on the north-west corner of the intersection with its nose in Guilford Street and almost on the pavement and its rear partly in Collins Street. The bus came to a standstill about in the middle of Collins Street facing in a south-westerly direction. He heard no hooter from the bus. After appellant had been removed to hospital, one Marshall, a traffic officer, and one Rheeder, a traffic inspector, arrived by car. They spoke to Bigwood but ignored him and were unfriendly towards him. Even Bigwood

did/.....

did not speak to him. They said he was under the influence of liquor and bundled him into their car and took him to the Auckland Park Police Station. On arrival at the Police Station the Sergeant in charge said he was not under the influence to justify a prosecution and ordered them to take him home and they took him back to the scene of the collision. He said that he had had only one beer earlier that evening which did not affect him. On further questioning he denied that his car was in the way of traffic after the collision and that it was moved off the road before he was taken to the Police Station. According to him he found it so moved on his return from the Police Station. He denied also that either he or Bigwood pointed out the point of collision to anybody as being immediately in front of the stationary bus, that measurements were taken by Marshall in his presence and that he gave either his or appellant's name and address to anybody.

Vermeulen's evidence was corroborated by appellant. More particularly she said that she saw Vermeulen looking into his rearview mirror, that because of the weather

conditions he could not see through it, and that he lowered the right-hand window of his car and looked back before reversing. She also noticed that he still had his foot on the brake at the time of the collision.

The main witness on behalf of respondent was Bigwood, the driver of the bus. He said he was travelling from east to west on the southern half of Collins Street at not more than 30 m.p.h. because the bus could not in fact travel faster. When he was approximately 100 yards from the intersection he saw the taillights of a car, which subsequently turned out to be that of Vermeulen, beyond the intersection in the vicinity of the bus stop already referred to and near the kerb. It was drizzling at the time. At first he did nothing and continued on his course. When he was a short distance from the intersection he moved over more to the centre of the street in order to pass the car at the bus stop which he thought was stationary and took his eye off it. As he was about to go into the intersection he saw the car reversing at high speed diagonally across the street in an erratic manner in his direction and about to enter the intersection. He said he could not

turn more to his right because he would then have swerved into the very path of the reversing car. He accordingly sounded his hooter, swung to the left while applying his brakes - not very forcibly because of the danger to his passengers - but was unable to avoid the collision. The right front of the bus struck the left rear of the car. The bus stopped immediately and the car was flung slightly towards the northern side of Collins Street. He stated that the point of impact was about in the centre of Collins Street immediately in front of the stationary bus where there were broken bits of glass and that he pointed this spot out to Marshall who plotted it. The vehicles involved in the collision interfered with the movement of traffic. The bus could not be moved because its right front wheel was locked but the car was moved "virtually" on to the north-western pavement of the intersection. This happened before Marshall arrived and was done under the instruction of a person who arrived on the scene shortly after the collision and said he was a traffic officer in plain clothes. He added that he spoke to Vermeulen and asked him for his name and

address but Vermeulen became abusive and refused to do so. He said Vermeulen's breath smelt of liquor. He further said that both Marshall and Rheeder spoke to Vermeulen and that Vermeulen gave them his name and address.

Bigwood's evidence was supported by one Groenewald, the conductor on the bus in question, Marshall and Rheeder. Groenewald could not assist in regard to the collision itself but stated that he heard the hooter and felt brakes being applied. Marshall refreshed his memory from notes made at the scene of the collision and stated that the car was already partly on the north-western pavement when he arrived, but that the bus could not be moved because the right front mudguard was jammed up against the wheel. He said he spoke to Vermeulen who gave him his name and address and that of appellant, all of which he noted in his notebook. He could not remember seeing brakemarks of the bus. The point of impact was pointed out to him by both Vermeulen and Bigwood as being immediately in front of the stationary bus where there were bits of broken glass. He thereafter took measurements and plotted this point as being about 15 ft. from the northern

kerb of Collins Street and virtually in line with the centre of the eastern pavement of Guilford Street. He said that he smelt liquor on Vermeulen and decided he was under the influence of liquor and took him to the police station, but the Sergeant in charge was not prepared to prosecute and Vermeulen was released. He denied, however, that he took Vermeulen back to the scene of the collision. Rheeder corroborated Marshall and confirmed that Marshall spoke to Vermeulen, and that Vermeulen supplied the names and addresses of himself and appellant to Marshall.

The learned Judge in the Court a quo, after weighing up the evidence tendered on behalf of the parties, rejected the evidence of Vermeulen and appellant and accepted that of Bigwood, as corroborated by Groenewald, Marshall and Rheeder. In doing so he made adverse comments in regard to the agressive attitude of Vermeulen and the unlikelihood that appellant would have seen Vermeulen do everything she said she saw. On the other hand he was impressed by the honesty of Bigwood and the evidence of Marshall, supported as it was by

his notebook, and that of Rheeder. He also rejected a contention that Bigwood was negligent on the basis of his own evidence and that appellant was on that account entitled to succeed in her claim for damages. He accordingly made an order dismissing appellant's claim with costs.

Mr. Nortje, who appeared on behalf of appellant in this Court, firstly contended that the learned Judge erred in accepting the evidence tendered on behalf of respondent in preference to that tendered on behalf of respondent. He criticised the reasons of the learned Judge in some detail. Inter alia, he said that the learned Judge laid too much emphasis on the alleged agressiveness of Vermeulen and that his reasons for rejecting appellant's evidence were unconvincing. In regard to Bigwood he contended that the learned Judge should have found that he was lying when he stated that Vermeulen's car was moved in the circumstances alleged by him. He also attacked the evidence of Marshall and Rheeder, more particularly in relation to their testimony that they did not bring Vermeulen back to the scene of the collision from the Police Station. On the probabilities he contended that it was

unlikely that Vermeulen would have stopped on the southern side of Collins Street, after he overshot the intersection. In all the circumstances he asked this Court to reverse the findings of the learned Judge.

I do not intend traversing the points of criticism advanced by Mr. Nortje in detail. Some are not without some substance. Suffice it to say that the learned Judge had the advantage of seeing and hearing the witnesses in question, and that it is trite law that a court of appeal will only interfere with the findings of a trial judge, based on credibility, if it is convinced that such findings are wrong. (See Bitcon v. Rosenberg, 1936 A.D. 380 at p. 396). In my view the learned Judge did not err. This is not a case, as was contended by Mr. Nortje, where the testimony of respondent's witnesses is so ludicrous and improbable as to be entirely incredible, (cf. Mabe v. Santam Insurance Co. Ltd., (A.D.) 30th March 1965, unreported), and where this Court would be bound to interfere.

Mr. Nortje next contended that on the basis

of the correctness of the evidence tendered on behalf of respondent, the learned Judge should have found that Bigwood was negligent and that such negligence, even if slight, entitled her to judgment in the sum of R1750.00, the amount of damages agreed upon at the trial. He argued that Bigwood was negligent in not keeping a proper lookout and that, had he done so, he would timeously have seen Vermeulen's car reverse, as he said it did, and been able to avoid the collision.

I cannot, however, agree.

Bigwood was travelling at a reasonable speed in the circumstances. When he was about 100 yards from the intersection he saw the taillights of Vermeulen's car which appeared to be standing in the vicinity of the bus stop on the southern side of Collins Street. He continued on his way, as he was obviously entitled to do, until he was a short distance - the exact distance was not elicited in evidence - from the intersection and when Vermeulen's car still appeared to be stationary. He then moved over to the centre of the street in order to pass it and momentarily took his eye off it. As he

was about to go into the intersection he saw Vermeulen's car again also about to enter the intersection, reversing diagonally across the street at high speed and in an erratic manner in his direction. Thereafter the collision occurred. In my view it has not been shown that Bigwood was negligent in momentarily taking his eyes off Vermeulen's car at the stage he says he did. Collins Street is a one-way street, and he had obviously moved sufficiently towards the right in order to safely steer the bus past Vermeulen's car. He was under no duty at that stage to take precautions against the extremely unlikely contingency that Vermeulen would, in the circumstances disclosed, reverse his car in the manner he did and without warning. On the contrary he was entitled to assume that Vermeulen would act as a reasonable person. His duty vis-à-vis Vermeulen extended no further than keeping a watchful eye on Vermeulen's car and taking evasive action should it become apparent that Vermeulen was not so acting and that a collision was imminent. (See Solomon v. Mussett and Bright Ltd., 1926 A.D. 427 at p. 433). It must be remembered that he had at that stage a similar duty

in regard to all other traffic in the street. For what period of time Bigwood lost sight of Vermeulen's car and what distances were covered by the car and the bus before he again saw the car reversing in the manner it did, is difficult to determine on the evidence with any exactitude. Bigwood had travelled from a point a short distance east of the intersection to a point where he was about to enter the intersection, which does not indicate that he lost sight of Vermeulen's car for an unduly long time. It was suggested that the length of time could be gauged from the fact that Vermeulen's car must have travelled a distance of at least 23 yards during the same period. This I cannot agree to. Bigwood never said that Vermeulen's car was exactly at the bus stop when he first saw it. On the contrary he made it clear that he thought it was in the vicinity of the bus stop. Conceivably it could have been some distance east of the bus stop at that stage. He also said that when he again saw it, it was about to enter the intersection. Consequently the corresponding distance covered by Vermeulen's car could have been considerably less than 23 yards. It was next suggested

that Bigwood ought on the basis of his own version of how Vermeulen's car reversed, have seen it sooner than he did. I cannot agree to this either. It is true that the erratic behaviour of Vermeulen's car was calculated to draw Bigwood's attention but, as already pointed out, the evidence is completely vague as to the distance it must have reversed from where it had been standing until it was seen by Bigwood. Furthermore there is nothing to indicate that Vermeulen's car started reversing in that manner from the point where it had been standing. It might conceivably initially have reversed in a direction parallel with the southern kerb of Collins Street, and only at some later stage and when it was much nearer the bus, suddenly have swung diagonally across the intersection. Furthermore it must be remembered that in the circumstances prevailing on the night in question, and more particularly the circumstance that the rear of Vermeulen's car was facing in his direction which would normally have indicated to him that it was either stationary or moving forward, some time must have elapsed before it would have become apparent to him that it

was in fact reversing. On the aforesaid basis it certainly cannot be said that it has been established that Bigwood should in any event have avoided the collision. He was called upon to act in an emergency not of his own making, at a stage when the distance between the two vehicles was not very much more than the width of Guilford Street, namely 27 feet. He could not swerve to the right. He swerved to the left and put on his brakes but could not avoid the collision. Even if it could be said that he might have applied his brakes more firmly, his failure to do so cannot be described as negligent in the circumstances. There is nothing to show that, had he done so, he would have been able to avoid the collision. On the contrary it would appear that the collision would probably have occurred in exactly the same way.

The appeal is accordingly dismissed with costs.

DE VILLIERS, A.J.A.

OGILVIE THOMPSON, J.A.
WESSELS, J.A.
JANSEN, J.A.
MULLER, A.J.A.

Concur.