20-1-71

G.P.-S.33967—1968-69—1,000.

169/70
J. 219

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

{ Appellate Provincial Division.)
{ Provinsiale Afdeling.)

In forma pauperis Application.

Appeal in Civil Case.
Appèl in Siviele Saak.

FRANS SAMPIES *Appellant,*

versus

BAY PASSENGER TRANSPORT LTD. *Respondent*

Appellant's Attorney G.A. Hill, McHardy & De Bruyn *Respondent's Attorney* Webber & Son
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate A.P. Beckley *Respondent's Advocate* No appearance
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op 18. 5. 1971

1. 3. 5. 9. 10

Coram: Ogilvie Thompson C.J. Rumpff, Jansen J.J.A.
Corbett & Kotzé A.JJ.A.

F.I.F.P. Application: 9.45 am — 10.50 am
ECD

C.a.v.

Order 26.5.1971 per Corbett A.J.A. —
application is Dismissed with Costs.

Writ issued Lasbrief uitgereik	Bills Taxed.—Kosterekenings Getakseer.		
	Date. Datum.	Amount. Bedrag.	Initials. Paraaf.
Date and initials			

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

FRANS SAMPIES .....Appellant.

AND

BAY PASSENGER TRANSPORT LIMITED .....Respondent.

Coram: OGILVIE THOMPSON, C.J., RUMPFF, JANSEN, JJ.A., CORBETT ET KOTZÉ, A.JJ.A.

Heard: 18th May, 1971. Delivered: 26th May, 1971.

J U D G M E N T.

CORBETT, A.J.A.:

This is an application for leave to appeal to this Court in forma pauperis. The applicant was plaintiff in an action instituted in the Port Elizabeth Circuit Local Division whereby he claimed from repondent (as defendant) compensation in terms of the Motor Vehicle Insurance Act, No. 29 of 1942, as amended. For convenience I shall continue to call the parties plaintiff and defendant respectively. The claim arose from certain bodily injuries suffered by the plaintiff as a result of being knocked down by an omnibus belonging to the defendant. The latter held a certificate of exemption in respect of the

2/ aforementioned ..

aforementioned omnibus, in terms of sections 19 and 21 of the Act, and accordingly plaintiff sought to hold defendant liable in terms of section 19(3) of the Act. The trial took place before Kannemeyer, J., who in the end ordered judgment for the defendant with costs.

The present application is opposed by the defendant, who filed a replying affidavit but chose not to be represented at the hearing. The only ground of opposition - and, therefore, the only issue before this Court - is the contention that the plaintiff has no reasonable prospect of success on appeal; and it is to this issue that I immediately turn.

At the outset it is perhaps appropriate to mention that the only material placed before this Court are the Plaintiff's petition, to which are attached a copy of the judgment of the Court a quo and two of the documentary exhibits, viz. the police plan and the key thereto; and the defendant's aforementioned replying affidavit. This Court has thus, unfortunately, not had the benefit of reading the record of the viva voce evidence and the other documentary exhibits which are referred to in the judgment of the trial Court, but in view of the nature of the application this is understandable. The application must,

accordingly, be judged on the limited material available.

The collision which gave rise to the plaintiff's claim occurred in the late afternoon of 7 November 1967. The omnibus in question was being driven in Ntshekisa Road, New Brighton, Port Elizabeth by one Saul, who was acting within the course of his employment as a servant of the defendant. This road is a busy, main thoroughfare leading from the City of Port Elizabeth into New Brighton. In the vicinity of the place where the collision occurred the road is straight and runs roughly north/south. It is tarred and the tarred portion is approximately 24 feet in width. On either side there is a gravel verge. On the western side this verge is some 3½ paces wide, while on the eastern side it is 6½ paces wide. The omnibus was proceeding in a southerly direction and it collided with the plaintiff, who was on foot, shortly after it ~~led~~ had passed (i.e. at a point to the south of) the intersection between Ntshekisa Road and Ngesi Street. The latter street enters Ntshekisa Road from the eastern side but, according to the police plan, does not continue to the west of Ntshekisa Road.

As to the circumstances under which the collision

occurred, sharply divergent versions were placed before the Court by plaintiff and defendant respectively. The trial Court, having heard the evidence and argument, came to the conclusion that, on a balance of probabilities, the version of the defendant was to be preferred and that this version established that the collision was due solely to the negligence of the plaintiff. Judgment was entered accordingly. In support of the present application it is contended that the trial Judge erred in preferring defendant's version and that, in any event, even if defendant's version was correctly preferred, the trial Judge erred in holding that upon those facts Saul was absolved from negligence. These contentions must now be examined.

The plaintiff himself gave evidence in support of his claim. It appeared from his testimony that at the time of the accident he was approximately eighty years old. Despite his advanced age he still worked as a gardener in the City and on the afternoon in question he was walking home from the place of his employment. The house in which he lived and to which he was heading, was situated on the western side of Ntshekisa Road some 200 yards to the North of the place when the accident

occurred. At the time plaintiff was walking along the eastern verge of Ntshekisa Road about 1½ paces away from the edge of the tarred carriage-way. He stated that as he approached the intersection with Ngesi Street, he noticed the omnibus in question approaching him from the north. He then saw the omnibus leave the tarred portion of the road and travel towards him where he was on the eastern verge. There was a fence running along the eastern edge of this verge which prevented him from taking action to any extent by moving to that side. According to him he did try to escape by "walking backwards from the bus towards the fence" but while doing so he was struck by the omnibus and thrown backwards.

The defendant's version of the collision was furnished by one Zakoza, the driver of another omnibus, which was in the vicinity at the time of the collision but was not directly involved therein. I may ~~just~~ at this point interpolate that Saul, the driver of the omnibus which struck the plaintiff was not called as a witness - by either party. According to Zakoza, he was driving his vehicle in the opposite direction, i.e. from south to north. There was another omnibus ahead of him, pulling away from a bus stop. He noticed considerable pedestrian

activity on both sides of the street but vehicular traffic was not heavy. As the oncoming omnibus, driven by Saul, was crossing ~~the~~ Ngesi Street, he saw the plaintiff run into the street in front of it. He first saw the plaintiff when the latter was 1½ paces off the tar. When the plaintiff ran onto the tarred portion, the oncoming omnibus swerved to the right and the witness caused his own vehicle to swerve to the left in order to give the oncoming omnibus more leeway. The oncoming omnibus failed, however, to avoid the plaintiff and the latter was struck by the vehicle's left mudgaurd and thrown to the left. The omnibus continued for some distance and then stopped to the south of the point of impact, at an angle to the road, so that its rear was on the tarred portion and its front on the gravel verge.

The only other witnesses to throw any light upon the circumstances of the collision itself were a Bantu woman, Vuyelwa Mdlankono (referred to generally in the judgment of the Court a quo as Vuyelwa), and constable Khambi, who investigated the accident and produced the police plan. Vuyelwa was travelling as a passenger in the omnibus driven by Zakoza. In evidence she stated that she saw the plaintiff lying in front and to the

7/ left .....

left of a stationary omnibus. This vehicle was standing half on the gravel verge and the plaintiff was lying on the gravel. Khambi's plan (read with the key thereto) shows the general locality of the intersection of Ntshekisa Road and Ngesi Street, the point of impact as pointed out by Saul, the position in which he found the plaintiff lying and the position in which the omnibus driven by Saul was found standing. Inasmuch as Saul was not called as a witness, no reliance can be placed upon the point of impact indicated on the plan. I mention it only because it provides some indication of the distance of the general area of the collision from the intersection, namely 24 paces. The position where the plaintiff was found lying is indicated by a point on the gravel verge some distance to the south of the alleged point of impact and 6 feet 8 inches away from it. Unfortunately no measurement is given of the distance between where plaintiff was lying and the edge of the tarred portion of the road and, inasmuch as the plan is not drawn to scale, the distance cannot be calculated. The position of the omnibus driven by Saul, as found by Khambi, was that it was standing at an angle to the edge of the tarred carriage-way, pointing roughly south-east,

on defendant's behalf

8/ with ....

with its front portion off the tar and its rear on the tar. The distance from the omnibus to the alleged point of impact was approximately 89 feet.

In concluding that the version of the collision proffered by defendant was more probable than plaintiff's, the trial Judge relied both upon the impression created by the witnesses and also upon the probabilities. His reasons may be briefly stated as follows:

(1) It was improbable that Saul would have driven his omnibus off the tarred surface of the road in the manner described by the plaintiff. In this connection it is pertinent to note that it appears that at the inspection in loco conducted by the trial Judge the plaintiff pointed out the spot where he was standing at the moment of impact. This was about 3 paces from the edge of the tarred carriageway and 3½ paces from the fence previously referred to.

(2) The plaintiff had to cross Ntshekisa Road in order to reach his home and, this being so, it was not improbable that he should attempt to do so before reaching Ngesi Street as by doing so he would have only one road to cross instead of two.

9/ (3) Despite ...

(3) Despite his age the plaintiff was "a sprightly old man" and admitted to being able to run. Zakoza's evidence that he commenced to run across the road was accordingly not in itself improbable.

(4) Zakoza was a more satisfactory witness than Vuyelwa, the latter having given "the impression of one who had seen the aftermath of an accident but was very vague as to what had happened." Here the trial Judge referred to two previous written statements made by Vuyelwa which were inconsistent with her testimony in Court in various material respects. He also appears to criticise her statement that immediately after the accident the omnibus which collided with the plaintiff stopped to the north of where the plaintiff lay. This was in conflict with the evidence of Zakoza, who was in turn supported by Khambi, unless one postulates that the omnibus was moved a distance of approximately 90 feet some time prior to Khambi's arrival on the scene.

Before this Court plaintiff's counsel advanced certain criticisms of these reasons and generally of the trial Judge's acceptance of the evidence of Zakoza. In the first place,

the trial Court's finding that if the plaintiff had crossed the street where defendant contends he attempted to cross, he would have had only one street to cross instead of two, was challenged as being factually incorrect. This construction is based upon an averment in the petition that in fact had the plaintiff crossed the street where he is alleged to have attempted to do so, he would have had to traverse three streets, not one, to reach his home. This is disputed in the replying affidavit, in which it is stated that there was no evidence given to this effect at the trial and that the trial Judge's finding was based upon his observations at the inspection in loco. Prima facie the replying affidavit appears to correctly state the position - as was conceded by plaintiff's counsel - and in the circumstances there is no foundation for this contention.

Secondly, it was argued that it was improbable that plaintiff, an old man, would run into the street in the path of an omnibus. This of course is improbable only to the extent that one postulates that persons in the position of the plaintiff always behave sensibly and reasonably. Experience shows that unfortunately they quite often do not do so: hence the

11/ prevalence .....

prevalence of claims such as, ~~a~~ or similar to, the present one. Moreover, it seems to me that when weighing the probabilities, or improbabilities, one must place on the other side of the scale the improbability of Saul having driven his vehicle onto the verge in the manner described by the plaintiff. If the point of impact pointed out by the plaintiff at the inspection in loco be accepted, it would mean that probably the entire omnibus (its width being 8 feet) would have been on the verge at the time of the collision. The evidence was that pedestrian traffic in the vicinity was considerable, although the papers do not disclose where these people were walking. But, in any event, the plaintiff's version necessarily involves so drastic a deviation by the omnibus from its appointed path as, in the absence of some justification, to point to very reckless behaviour on the part of its driver, Saul. No compelling reason for such a deviation was adduced. It was suggested that the omnibus pulling away from the bus stop might have compelled Saul to swerve to his left. In view of the fact that the two vehicles are apparently each 8 feet wide and the tarred carriageway is over 24 feet wide, I do not find this suggestion at all convincing. Generally, in

my view, the improbability of Saul having acted in the manner alleged by plaintiff tends to outweigh the improbability of plaintiff having acted in the manner alleged by defendant.

Thirdly, counsel challenged the trial Court's rejection of the evidence of Vuyelwa. It seems to me, however, that the criticisms of her evidence advanced by the trial Judge - and to which I have already made brief reference - are well founded. It is also of critical importance that the trial Judge saw her in the witness-box and was in the best position to determine how much of the accident itself she really observed. In my view, no cogent ground has been advanced for disturbing his finding that she saw the aftermath rather than the accident itself.

Fourthly, counsel contended that it was improbable that Zakoza would have been in a position to observe how the accident occurred. I fail to see this argument. According to Zakoza, the collision happened in the street in front of him and it does not in the least surprise me that he was in a position to describe what took place.

Accordingly, plaintiff has failed to satisfy me that there is a reasonable prospect of the Court of Appeal coming

13/ to .....

to a different conclusion from that of the trial Judge as to which of the two versions of the accident should be accepted.

I turn now to plaintiff's alternative contention to the effect that, even on the version ~~prescribed~~ presented by the defendant, causal negligence on the part of the omnibus - driver Saul was established.

In this regard it was submitted that the proven facts justified the inference that Saul drove at an excessive speed. In this regard emphasis was laid upon the fact that the omnibus came to a halt approximately 90 feet beyond the point of impact; that Saul was returning an empty vehicle to the terminal; and that defendant had refrained from calling Saul as a witness. This argument must be seen against the background of the evidence of Zakoza upon this topic. This is summed up by the trial Judge as follows:

> " Zakoza has described how the driver of the omnibus was confronted by the plaintiff leaving the gravel verge and running in front of the omnibus. He describes the avoiding action taken. He, a bus driver himself, says that braking would not have prevented the accident but would, in his view, have had fatal consequences. Nor is it his evidence that the bus was being driven at an excessive speed. His version, if accepted, exonerates the defendant

and in the circumstances no inference favouring the plaintiff arises."

Thus according to Zakoza the omnibus was not being driven at an excessive speed and braking would not have prevented the accident. In making this latter assertion Zakoza may to some extent have stepped beyond his domain as a non-expert witness but his opinion does at any rate serve to emphasize the suddenness of the emergency which he witnessed. The ~~sure~~ mere fact that the omnibus came to a halt 90 feet beyond the point of impact is, in my view, inconclusive. According to Zakoza the driver, Saul, endeavoured to avoid the collision by swerving, not braking. This was unsuccessful and after impact there was no particular reason why Saul should bring his vehicle to an immediate halt. That being so, it cannot be inferred that because his vehicle continued another 90 feet he was travelling too fast. Nor do I think that any adverse inference can be drawn from the fact that Saul was driving an empty vehicle back to the terminal.

Finally, there is the argument based upon the failure to call Saul, the driver, and in this connection reference was made to the well-known case of Galante v. Dickinson, 1950(2) S.A. 460 (A.D.), and others which have followed it (see Minister

of Justice v. Seametso, 1963(3) S.A. 530 (A.D.); Botes v. Van Deventer, 1966(3) S.A. 182 (A.D.)). The trial Judge referred to these decisions and stated:

> " In my view those decisions are not applicable to the present case. This is not a case where the driver of the vehicle concerned is the only person who can explain what occurred and fails to do so. Here there are diametrically opposed versions of how the collision occurred; it is not a question of the driver failing to give evidence of the steps he took to avoid an imminent accident, it is a decision as to which of the two versions is correct."

It was argued that the approach of the trial Judge-as indicated in the above-quoted extract from his judgment - was erroneous in that the principle enunciated in these decisions was applicable and that, accordingly, in the absence of an explanation by Saul, an inference of negligence on his part should be drawn.

As I read the principle, as stated by Schreiner, J.A., in Galante v. Dickinson, supra, at p. 465, and as developed in subsequent decisions of this Court, it lays down that where the defendant in a case such as the present ~~one~~ fails to call evidence - including that of the driver - to explain why the accident occurred -

> " ...the court is entitled, in the absence of

16/ evidence ...

> evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant."

In the present case the defendant did lead evidence - that of Zakoza - as to how and why the accident occurred. This evidence was in general accepted by the Court a quo. Upon the hypothesis that the Court was correct in doing so, there was only one ground of negligence suggested by the plaintiff, viz. that Saul drove too fast. This suggestion was negatived by Zakoza and his evidence upon this point was specifically accepted by the trial Judge. In the circumstances I see no room for the application of the principle in Galante's case, supra, inasmuch as the explanation which favoured the plaintiff, viz. that Saul drove too fast, was no longer "equally open on the evidence."

I might just add that I do not wish to be understood as implying that in a case such as the present, the failure by a defendant to call the driver of the vehicle in question is never to be taken into account as a relevant factor. Depending upon the circumstances, such a failure may substantially weaken the cogency of a defendant's case, where it appears that the driver

is available and there is nothing to indicate that he is unable to testify to his version of the accident. In such a case, however, the ultimate result of such a failure must necessarily depend upon the relative strength of the case otherwise made out by the defendant, when viewed in the light of the proof adduced by the plaintiff.

For these reasons, I have come to the conclusion that the plaintiff has failed to establish a reasonable prospect of success on appeal. The application is accordingly dismissed with costs.

M.M. Corbett

CORBETT, A.J.A.

OGILVIE THOMPSON, C.J.)
RUMPFF, J.A.) concur.
JANSEN, J.A.)
KOTZÉ, A.J.A.)