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G.P.-S.33967—1968-69—1,000.

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J. 219.

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

(APPELLATE ~~Provincial~~ Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

JOB MASEKO *Appellant,*

versus

PROTEA ASSURANCE COMPANY LIMITED *Respondent*

Appellant's Attorney McIntyre & v.d.Post *Respondent's Attorney* Bowen Smuts & Gowans
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate J. J. T. Opp *Respondent's Advocate* J. J. T. Opp
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op 22-3-971

2.4.6.7.9

Leave to appeal in forma pauperis granted on 22.3.1971:

WLD 27-8-1971 : 3 5 6 8 9

C. A. V.

E.F.P. Petition dropped on 9-10-70 (unopposed)

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:

JOB MASEKO .....Appellant.

AND

PROTEA ASSURANCE COMPANY LIMITED .....Respondent.

Coram: BOTHA, POTGIETER, JANSEN, RABIE ET MULLER, JJ.A.

Heard: 27th August, 1971. Delivered: 21st September, 1971.

J U D G M E N T.

POTGIETER, J.A.:

This appeal arises out of bodily injurues suffered by appellant in a motor collision on 31 October 1966. In the Court a quo appellant instituted action against the respondent, which was the insurer of the motor vehicle in question, for damages in the amount of R10.591,85. Before the commencement of the trial the parties had agreed that the quantum of damages be fixed at the amount of R6.000,00. Consequently the trial Court was called upon to determine only the question of liability.

It is alleged in appellant's particulars of claim that on 31 October 1966 at approximately 8 a.m. appellant was

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walking along the sidewalk of John Page Drive, Johannesburg, when a mechanical horse and trailer, which was the insured motor vehicle aforementioned, and driven by one Koos Letoana, ran into and collided with him. In reply to a request for further particulars it is alleged that the collision occurred on the sidewalk in the vicinity of an electric pole. It is further alleged in the particulars that the collision was caused solely by the negligence of the said Letoana and certain particulars of negligence are set out.

In his plea respondent alleges that the collision was occasioned solely by the negligence of appellant who was negligent in that he failed to keep a proper lookout; that he suddenly and without warning emerged onto the road into the said vehicle's line of travel; that he entered the road without due regard to the right of other traffic, including the insured vehicle; and that he failed to avoid a collision when by the exercise of reasonable care he could have done so.

The trial Court granted absolution from the instance and against that judgment appellant is now on appeal before us.

Appellant's evidence was that on the day in question at approximately 7.30 a.m. he alighted from the train at Jeppe

3/ station .....

station and from there proceeded to walk towards his place of employment. He stated that he walked along the eastern side of John Page Drive on the sidewalk. He further testified that while he was walking ~~on~~ along the pavement he was struck by something on the back of his head as a result of which he fell down on the pavement and became unconscious. According to his evidence at the trial he only regained consciousness ~~only~~ in hospital. His evidence was that he was struck after he had passed an electric standard which was in the evidence described as pole 20. This standard is shown on a photograph handed in. On this photograph two standards are visible, namely pole 19 and pole 20. Pole 19 is clearly shown on the photograph to be very near the kerb on the pavement where appellant alleged that he was walking. Pole 20 is not so clearly visible, but I think it can be accepted that this pole is more or less the same distance from the kerb. Appellant stated that he was walking in the middle of the pavement when he was struck. On account of the fact that there were many cars in that road at that time of the morning, he did not hear the truck before hew was knocked down by it. Appellant also stated that the accident happened near ~~this~~ pole 20 and that at that time there was no bus stop at that

4/ spot .....

spot. The photograph mentioned above indicates that when it was taken there was a bus stop, and a bus stop shelter is also visible on that photograph.

A specialist surgeon, Dr. Lotzof, gave evidence on behalf of appellant. He confirmed that the latter had a vertical scar four centimetres in length behind the right ear at the back of his head and he stated that a blow of that nature could have rendered appellant unconscious. The surgeon further testified that he examined appellant in 1968 and that appellant then reported to him that he had regained consciousness at the scene of the accident. This statement is inconsistent with his evidence at the trial that he had regained consciousness only in hospital.

One Absalom Sedibe, who was employed at Temple Motors, a garage on the western side of John Page Drive and very near the spot where the collision occurred, testified on behalf of appellant. He stated that on the morning in question at about half past seven he was walking along the eastern pavement of John Page Drive. He said that he saw appellant walking on the same pavement approximately fourteen yards in front of him, and while he was walking he saw the wheels of the trailer ~~were~~ running

5/ over .....

over ~~his~~ appellant's legs. This witness's evidence was somewhat vague as to whether he actually saw the trailer mount~~ing~~ the pavement or whether he only saw the wheels running over appellant's legs when the latter was already lying on the ground. He was, however, emphatic that he saw the trailer running over appellant's legs while the latter was lying on the pavement. He also emphasised the fact that he did not actually see how appellant was knocked down and that he was therefore unable to state what portion of the vehicle struck appellant. He stated that the spot where he saw the wheels of the trailer running over appellant's legs was about fourteen yards from pole 20.

According to the evidence the mechanical horse and trailer, involved in the accident, belonged to The Premier Milling Company. One Mr. Grant, employed by this firm, gave evidence and stated that the overall length of the said mechanical horse and trailer was thirty-nine feet. The wheel-base of the horse was eight feet and one inch and the width of the trailer was eight feet two inches. It also appeared from his evidence that the horse had two single wheels in front and two sets of double wheels at the back. The trailer was coupled to the horse by means of a fitwheel with a king pin so that when the horse took a turn the front part of the trailer rotated on this fitwheel and king pin.

The trailer had only one set of double wheels which was situated at the rear thereof.

One Snoyman, the emplyer of appellant, also testified on the latter's behalf. This witness testified that when he arrived at the scene of the accident someone pointed out to him where appellant had been lying on the pavement after the accident. He stated that he saw blood at the spot pointed out to him. Snoyman was asked to estimate the distance from pole 20 to the spot where he found the blood and where it was pointed out to him that appellant had been lying. Initially he stated that he was unable to estimate the distance but after having been pressed in cross-examination he finally, somewhat hesitantly, expressed the opinion that it could have been approximately four paces from pole 20.

For the defence the driver, Letoana, stated in evidence that on the morning in question he was driving the mechanical horse and trailer. He said that he was driving along John Page Drive when he heard people shouting from the back. He stopped, got out of his vehicle and proceeded to the rear thereof. When he got there he found appellant lying in the gutter next

7/ to .....

to the kerb. Letoana denied that the horse which he was driving ever mounted the pavement. He added that if the horse did not mount the pavement it would have been impossible for the trailer independently to go onto the pavement unless there was a sudden swerve.

This witness also stated that the only people he saw when driving past were people walking on the pavement on his left-hand side. He said that there was a bus stop there.

During the course of his cross-examination it was put to the driver that he had made a statement to Snoyman, to the effect that a car came from the opposite direction and that his own vehicle mounted the pavement. This statement to Snoyman was denied and appellant was allowed to call Snoyman in order to testify that the driver had made such a statement to him. This evidence was not tendered to prove the truth of the contents thereof but merely to show that the driver had made a statement to Snoyman which was inconsistent with his evidence in Court and for that purpose the evidence was found by the learned Judge a quo to be admissible; and he accepted that Letoana made an inconsistent statement.

It was also put to Letoana that he told the traffic

inspector that he was pushed over onto the side by another truck overtaking him. In cross-examination he admitted that he had made such a statement to the traffic officer and he virtually admitted at the trial that the combined effect of the car which came from the opposite direction and the truck that was overtaking him caused him to move towards the eastern pavement. That was not the tenor of his earlier evidence.

Consequently the trial Judge found that Letoana made two inconsistent statements and that his evidence must therefore be regarded with great circumspection and that it cast grave doubts on his credibility. This finding of the trial Judge was on appeal not attacked by counsel for respondent.

The only other witness called on behalf of respondent was one Solomon Manana. He testified that he was a passenger on the back of the trailer being drawn by the horse driven by Letoana. He said that he was sitting in the middle of the trailer facing the cab. The cab is, according to the evidence, much higher than the front portion of the trailer so that his view as to what happened some distance in front of the horse would to some extent have been obscured. At one

stage of his evidence it was clear that this witness, when he referred to the middle of the trailer, ~~he~~ meant the middle in relation to the width thereof. Later in his evidence it also appeared that he was sitting in the middle of the trailer in relation to its length. In this respect his evidence was as follows:

> " Where the trailer hit him, which part of the trailer hit him? — Well he went into the middle of the trailer. The middle. Just opposite where you were sitting? — Yes."

It may be appropriate at this stage to quote Manana's evidence in chief in order to show how he described in what way this accident happened. It ran thus:

> " Now will you tell us how this collision happened? — This person went into the trailer.
>
> Just before he went into the trailer, did you see him? — Yes. I saw him running on the pavement.
>
> And then what happened? — There was a queue of people. Then he went around this queue. In doing so, he went into the trailer.
>
> When he went around this queue of people, was he still on the pavement? — Yes, he was still on the pavement and then, to avoid pushing through these people, he went around the pole, around the queue, into the street.
>
> He went around the pole and into the street? — Yes.

When the cab in which Koos was sitting, passed this man, was he then on the pavement or in the street? -- The horse had already passed him, and then he ran into the trailer.

So, in other words, he was still on the pavement when the horse passed him? -- Yes.

Did you then shout to Koos and stop the horse and trailer? -- Yes. I shouted, but he could not hear me."

In cross-examination this witness repeated several times that appellant was running on the pavement and that he ran into the trailer and that he was still on the pavement when the horse passed him.

The photograph referred to above shows that John Page Drive is capable of taking two lines of traffic in ~~either~~ both directions and that it is straight and flat in the vicinity of the collision. It can also be noticed on this photograph that there is a gutter on the eastern side of the road, formed with a kerbstone on the side of it. It is clear that the pavement is higher than the street but there is no evidence as to the precise height. The photograph in question does not, to my mind, create the impression that this kerbstone is very high. This also appears from two other photographs handed in which show John Page

Drive at or near the scene of the accident.

The learned Judge a quo criticised appellant's evidence on two grounds. First, because he found that he made an inconsistent statement "on a matter of some importance in the proceedings." He then stated as follows:

> " He testified that he regained consciousness only at the hospital and disclaimed any knowledge, in cross-examination, as to where he lay after the collision. He stated to Dr. Lotzof, however, in an examination some time afterwards, that he regained consciousness at the scene of the accident. This reflects adversely also on his credibility."

Second, because of an alleged inconsistency in the evidence of appellant and Dr. Lotzof and that of his witness Absalom Sedibe. He described this alleged inconsistency as follows:

> " The manner as to how the plaintiff was knocked down was not borne out by Absalom. He proffered a different version in this regard, namely that plaintiff was knocked over by the rear wheels of the trailer."

A further statement of the learned Judge which was apparently made as a criticism of appellant's and Sedibe's evidence, merits consideration. This statement is as follows:

" The description by Absalom of how the collision took place, crisply put, is that there was a quick swerve of the left rear wheels of the trailer on to and off the pavement, during the course of which plaintiff was struck by the wheels. As set out above, no extraneous evidence whatsoever was led as to the feasibility of the collision having taken place in this manner, having regard inter alia to the gutter, the kerbstone, the length of the horse and trailer, the method by which the trailer was coupled to the horse, the overhang of the trailer and the overhang of the trailer on either side of the wheels. There was no evidence as to any marks or other indications on the sidewalk or the street of the trailer having mounted the sidewalk in this manner, or at all."

In dealing with this appeal I have regard to the fact that the overall onus was on appellant finally to satisfy the trial Court that the driver of the vehicle was negligent, and that ~~this~~ such negligence caused his injuries. I also do not lose sight of the fact that there is a duty upon appellant in this appeal to satisfy us that the trial Court was wrong.

I deal firstly with the trial Judge's criticism of appellant's evidence. As to the first ground mentioned

above the trial Judge was, in my judgment, not justified in making any adverse comment on appellant's credibility for the grounds stated by him. To my mind this discrepancy in appellant's evidence did not amount to a conflicting statement on an important issue in the proceedings. It was never in issue that appellant was rendered unconscious. The learned Judge a quo should have taken into consideration the fact that this inconsistency was never put to appellant who was not given an opportunity of explanation. The trial took place four years after the occurrence and it is reasonably possible that confusion could have been present in appellant's mind on this point, having regard to the severity of his injuries.

As to the second ground I consider that the learned Judge was wrong when he found an inconsistency in appellant's and Sedibe's evidence. It seems quite clear that the learned trial Judge understood the evidence to be that, according to appellant and Dr. Lotzof, some part other than the wheels of the trailer struck appellant whereas, according to Sedibe's evidence, the wheels of the trailer hit appellant and knocked him down. This however, shows a misconception of Sedibe's evidence. I quote the relevant portion of Sedibe's evidence:

14/ "Now .....

" Now, what did you see happening to Job Maseko? — He was walking and he was hit. He was hit by the trailer. He fell down and the rear wheels ran over his legs.
Now, could you see what part of the trailer hit him? — I did not actually see the trailer hitting him. What I saw was the wheels, the rear wheels, riding over his legs.
Now where was this? In the street or on the pavement? — On the pavement ..... Now, did you see the trailer before it hit the plaintiff? — No, I did not see it until I saw its wheels riding over his legs."

This evidence shows that there is no inconsistency at all in the evidence of appellant and that of Sedibe and the learned Judge's adverse comments on appellant's evidence on the grounds stated by him are therefore, in my judgment, unjustified.

The learned trial Judge's main attack on Sedibe's evidence is that his evidence was improbable. He remarks as follows:

" Absalom's testimony that he saw the horse and trailer only when the rear wheels of the trailer struck plaintiff is somewhat strange, having regard to the fact that Absalom was walking some 14 paces behind plaintiff. One must allow for the fact that a collision

occurs in a flash and it is not always possible to describe with accuracy what actually took place and there is inevitably a certain amount of reconstruction."

After then dealing with the absence of extraneous evidence as to the feasibility of the collision having taken place in the manner described by Sedibe - on the learned Judge's understanding of that evidence - the judgment proceeds:

" In my opinion, the description of the collision by Absalom is so improbable as to reflect adversely on his credibility. In any event, there is nothing more (sic) improbable in the version of Absalom as to how the collision took place than there is in the version of Solomon, who claims also to have seen how the collision took place."

It was suggested in argument that the word "more" in this passage should read "less". It seems to me obvious that it must be so, otherwise these remarks would be meaningless.

In conclusion the learned trial Judge said:

" On the evidence placed before me the version of Solomon as to how the collision took place is a more probable version, and at least equally as probable ~~was~~ as the version as to how the collision took place which was advanced by Absalom. If there is doubt, the probabilities

in my view favours the version of Solomon."

It was urged in argument by respondent's counsel that, having regard to the fact that the accident occurred a pace and a half to two paces from pole 20, the vehicle could not have failed to collide with it. It was further submitted that on the probabilities, a horse and trailer thirty feet in length could hardly have failed to miss the other pedestrians - of whom there were a number - on the side-walk. In an attempt to accommodate these improbabilities, so the argument ran, Sedibe proffered a version according to which only the rear wheels of the trailer mounted the side-walk and collided with appellant.

I deal firstly with the suggested improbability in Sedibe's evidence, namely, that it is improbable that Sedibe who walked only fourteen paces behind appellant, saw the horse and trailer "only when the rear wheels of the trailer struck plaintiff", having regard to the fact that the former was walking only fourteen paces behind appellant. I have already pointed out that Sedibe's evidence was not that he saw the trailer actually strike appellant, but merely that he saw the wheels of the trailer run over him when he was already lying on the ground. I do not think that there

17/ is .....

is any improbability by reason of the fact that Sedibe walked only fourteen paces behind appellant. The evidence was clear that the street carried very heavy traffic at that time of the morning and it is quite probable that Sedibe's attention would not have been drawn to a particular vehicle. It is also quite probable that he did not always look directly ahead of him, and that although he ~~mi~~ might have observed ~~this~~ the horse and trailer pass him, he did not keep it in view immediately after it had passed him, but only observed it again when it ran over appellant's legs while the latter was lying on the pavement. The clear inference from his evidence is that the trailer must have been on the pavement when the vehicle struck appellant. No adverse criticism can therefore be ~~drawn~~ levelled ~~from~~ of Sedibe's evidence that he only saw the trailer on the pavement. His evidence is not inconsistent with the possibility that the horse could have been on the pavement, momentarily; that the trailer followed the horse and that the trailer went off the pavement after the horse was already in the street again. He said in evidence that he did not see whether the horse also mounted the pavement.

Counsel's contention that Sedibe's evidence is improbable because if the vehicle mounted the pavement, it would,

having regard to the distance from pole 20 where the accident occurred, have collided with the pole, is unacceptable. The evidence as to the distance from the pole where the accident happened is according to the evidence rather vague. Sedibe stated it to be fourteen paces from the pole. Snoyman, as I have pointed out above, after being pressed, eventually ventured an estimate of approximately four paces. Appellant said it was a short distance. What that means we do not know. Manana's evidence is very vague on this point. He was asked to point out the distance appellant was lying from the pole after the accident. He pointed out a distance and counsel for respondent apparently asked counsel for appellant whether he agreed that it was one and a half to two paces. It does not appear from the record that he agreed. But even on the assumption that Manana actually pointed out a distance of a pace and a half to two paces, I can find no reason why his estimate should be accepted and that of Sedibe rejected. And it is only if the distance of one and a half or two paces is accepted that it becomes improbable that the vehicle would not have collided with the pole.

Similarly, the fact that other pedestrians were not hit by the vehicle, even on the assumption that the horse

also mounted the pavement, would only render Sedibe's and appellant's evidence that he was struck on the pavement improbable if it appeared from the evidence that there were pedestrians in the path of the horse and trailer while it was on the pavement. There was no evidence to that effect except that of Manana. I deal at a later stage with his evidence.

Counsel's submission that Sedibe proffered a version ~~where~~ that only the rear wheels of the trailer mounted the side-walk is obviously incorrect. I have pointed out above that he never said that. His evidence was that he did not see whether the horse also mounted the pavement.

I come to the conclusion that appellant's and Sedibe's evidence that the former was knocked down by some part of the vehicle on the pavement is not so improbable as to reflect adversely on their credibility.

Furthermore, to my mind, when one reads through the evidence of Sedibe, it has the ring of truth in it. He did not contradict himself and he did not waver under cross-examination. He showed under heavy cross-examination that he was not susceptible to suggestions put to him. It would, as suggested by counsel for

appellant, have been a simple matter for Sedibe to testify that he saw the vehicle mount the pavement, knock the appellant down, and run over his legs. The fact that he testified that he did not see the whole incident is, in my judgment, more consistent with honesty than with dishonesty.

If the evidence of these two witnesses is accepted then, in my judgment, negligence on the part of the driver is the most probable inference to be drawn. It is an abnormal occurrence for a vehicle to be on a pavement and on the basis of res ipsa loquitur an inference of negligence against the driver of a vehicle may, in the absence of an explanation, be drawn. (cf. Arthur v. Bezuidenhout and Mieny, 1962(2) S.A. 566 (A.D.) at p. 573 E.)

If, then, the evidence of appellant and Sedibe is on the face thereof acceptable and credible, a prima facie case of negligence on the part of the driver of the vehicle is, in my view, established. The burden of producing evidence ("weerleggingslas") therefore shifted. (See: Erasmus vs. Davis, 1969(2) S.A. 1 (A.) at p. 12; Marine & Trade Insurance Co. Ltd. v. Van der Schyff, 1971 A.D., 14 September 1971 at p. 19; not reported yet). This duty to produce evidence must not be confused with an onus in its true sense. If no evidence was led at all, the

prima facie evidence would become conclusive proof and the onus resting on appellant would have been discharged. If evidence is led, as it was in the instant case, but such evidence is not acceptable and does not at least create a doubt, then the prima facie case is not disturbed and the onus would equally be discharged.

That brings me then to the evidence led on behalf of respondent. Before I consider the general probabilities of Manana's evidence, the only eye witness called on behalf of respondent to describe how the accident happened, I wish to deal briefly with the trial Judge's remarks quoted above, namely, that no extraneous evidence was led as to the feasibility of the collision having occurred in the manner described by Sedibe. The overall impression created in the learned trial Judge's judgment was that Manana's evidence was considered to be more probable than that of Sedibe because inter alia appellant did not lead extraneous evidence that the accident could have taken place on the pavement. In my judgment, if prima facie evidence was led by appellant, which I hold did happen in this

22/ case .....

case, that the accident took place in a certain way, there was no duty on appellant to go further and lead evidence to show that the accident could indeed have occurred in the way stated. If, in order to discharge its duty to ~~rebut~~ disturb the prima facie case, respondent's case was that the accident could not have happened in the way described, then it was for ~~him~~ it to lead evidence to show that the collision could not have happened in the way described by appellant and Sedibe. If respondent, therefore, relied on the fact that, having regard to the gutter, the kerbstone, the length of the horse and trailer, etc., the collision could not have taken place on the pavement, it was the duty of respondent to lead the extraneous evidence referred to by the learned trial Judge.

Coming to Manana's evidence, I am of the view that his version is unacceptable. It seems to me wholly improbable that appellant would have ~~run on~~ run along the pavement and that he would, with his eyes open, have run straight into the trailer after the horse had passed him only two feet from the side of the kerb. Obviously he must then have seen that vehicle. Although persons sometimes do act abnormally, we are dealing here with probabilities

23/ and .....

and it seems to me wholly improbable that appellant would have acted in the way described by Manana.

Apart from that, Manana's evidence was given on the footing that there was bus queue and that appellant behaved in this strange way in order to get around the bus queue and not force his way through it. Both appellant and Sedibe stated that at the time of the accident there was no bus queue. It is to be observed that Sedibe had worked at a garage near the scene of the accident for thirteen years and he would have been in an excellent position to testify as to whether there was a bus stop or not. Respondent virtually based its whole case on this bus queue and it could easily have called someone from the municipality to testify that at that time there was a bus stop, if indeed there was one. It is to be observed that Letoana stated that, while driving along, he looked at the pavement in the vicinity of the alleged bus stop and saw people walking along the pavement. He did not notice a bus queue there, but after he alighted from his vehicle he went to the scene of the accident and saw people waiting at the bus stop.

Although not conclusive, there is another criticism which could validly, I think, be levelled at Manana's evidence. Appellant as well as Sedibe stated that appellant walked along the

pavement. Manana said he was running and gave the impression that that was the reason why appellant did not want to pass through the queue. It was never put to appellant or Sedibe that the former was running. It is true that counsel for respondent put to appellant that he was "hurrying along". If counsel indeed meant "running" it is difficult to understand why it was not put to appellant that he was "running". It is noteworthy that on the same page of the recorded evidence it appears that counsel put to appellant that he "walked" into the trailer and was injured. It was at no stage put to Sedibe that appellant was running along the pavement and that he ran into the trailer. In my view an inference would be justified that Manana's evidence that appellant was running was an afterthought and that he never gave that version to counsel for respondent.

For the aforegoing reasons I come to the conclusion that the prima facie case established by appellant by acceptable evidence was not disturbed and that appellant has consequently shown on appeal that the Judge a quo was wrong in his finding that ~~appellant~~ he did not discharge the onus resting on him.

25/ The .....

The appeal is accordingly allowed with costs.

The judgment of the Court a quo is altered to read: "Judgment for plaintiff in the amount of R6.000;00 with costs."

POTGIETER, J.A.

BOTHA, J.A.)
JANSEN, J.A.) concur.
RABIE, J.A.)
MULLER, J.A.)