

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

JACK MOTALAAppellant.

AND

UNION AND SOUTH WEST AFRICA INSURANCE
COMPANY LIMITEDRespondent.

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

Heard: 23rd September, 1971. Delivered: 1st October, 1971.

J U D G M E N T.

POTGIETER, J.A.:

In the Court a quo appellant (hereinafter referred to as "plaintiff") claimed damages from respondent (hereinafter referred to as "defendant"), in the amount of R14.350-00 as and for injuries sustained by him in an accident which occurred when he was alighting from a bus of which defendant was the insurer in terms of the Motor Vehicle Insurance Act, No. 29 of 1942. In his particulars of claim plaintiff alleges that on 11 September 1968 and near the intersection of Kerk and Diagonal Streets, Johannesburg, plaintiff was a fare-paying passenger in the insured vehicle. He further alleges that as he was

about to alight from the insured vehicle which was stationary at the time, the driver thereof, one John Pole, caused the insured vehicle to move off suddenly, in consequence whereof the plaintiff

lost his balance, fell into the road and the insured vehicle collided with him. The allegation is that the said collision was caused solely by negligent driving of the said Pole and that he suffered damages in the aforesaid amount.

In its plea defendant denies that the driver of the insured vehicle was negligent and avers "that plaintiff attempted to alight from the moving bus whilst it was in the process of negotiating the turn from Diagonal Street into Kerk Street." The evidence adduced by defendant was, however, to the effect that plaintiff jumped from the bus.

At a pre-trial conference the parties agreed that the quantum of damages be fixed at the sum of R5.990-00. Consequently the Court had only to determine the question of liability.

The Court a quo granted absolution from the instance with costs; hence this appeal.

At the commencement of the trial counsel for appellant, by consent, handed in certain photographs depicting the scene of the collision as well as the appearance of the insured

vehicle. During the course of the trial these photographs were referred to and certain marks were made on them by some of the witnesses who testified at the trial.

According to the evidence adduced by the respective parties there were two directly opposed versions of how the bus collided with the plaintiff. The plaintiff's version was that the bus came round the corner from Diagonal Street into Kerk Street and when it was in Kerk Street, after it had already negotiated the corner, it stopped along the kerbside. Six or eight passengers then alighted. Plaintiff followed them, and when he had one foot on the ground the bus jerked forward with the result that he fell and the front wheel of the bus went over his leg.

According to defendant's version, as deposed to by one Mothibe and one Khumalo, the plaintiff jumped off the bus while it was negotiating the corner and while it was moving. In the process he fell and the wheel of the bus went over his leg.

It was common cause between counsel in this Court ~~that if plaintiff's version is accepted the appeal should be allowed~~ and if defendant's version is accepted the appeal should be dismissed. I have no doubt that the concessions made by both counsel

in this respect are correct. It remains, therefore, only to determine whether plaintiff has discharged the onus resting on him to show that the Court a quo should have accepted his version as deposed to by himself and his witnesses.

I proceed now to set out as briefly as is consistent with perspicuity, the evidence adduced by plaintiff. The latter's evidence was to the effect that on the day in question he was a passenger in a Putco bus travelling in Diagonal Street towards the intersection at the latter street and that of Kerk Street in the city of Johannesburg. The bus travelled slowly into Kerk Street and stopped at the terminus for Diepkloof, zone 4. The rear portion of the bus was about twelve paces from the kerb in Diagonal Street. After the bus had stopped, the passengers stood up in order to alight. About six or eight passengers dismounted before plaintiff followed them. As he put his right foot on the ground and while his left foot was still on the steps the bus suddenly jerked forward, he fell down and the front wheel of the bus went over his right leg. ~~The bus then stopped again some distance away from~~ where it had collided with him. After the accident, so plaintiff testified, he was carried from the street and placed on the

pavement alongside Kerk Street.

Plaintiff made three circles on photograph, exh. "A", and counsel for defendant inserted the numbers 1, 2 and 3 in those circles. These points represented the following according to plaintiff's evidence: point 1 is where the rear portion of the bus was when it stopped for the first time; point 2 is the point of impact; and point 3 is where the rear portion of the bus was when it stopped the second time. It appears from this photograph that the alleged point of impact was opposite the bus shelter for Diepkloof, zone 4 and that the point where the bus had stopped the second time was opposite the bus shelter which is situated further to the west in Kerk Street. (This bus shelter will hereinafter be referred to as "the bus shelter for Diepkloof"). A photograph, exh. "D", was handed in which shows plaintiff sitting at the spot on the pavement where, he said in his evidence, he was carried after the accident. This spot is next to a gateway leading to a school. This gateway is also visible on exh. "A" and, if one compares the two photographs, it appears that plaintiff was removed to a position on the pavement which is almost opposite the point of impact as pointed out by plaintiff. Plaintiff testified that at the time of the accident he was carrying a brief-case in his left hand. He

used his right hand to hold on to an iron bar, which was situated on the platform of the bus, in order to assist him in dismounting.

Three witnesses were called to testify on behalf
of plaintiff viz. Natalia Mashede, Dinah Maja and Elias Matsebe. Mashede said that she was a passenger in the same bus as plaintiff on the day in question when the said bus travelled in Diagonal Street, turned into Kerk Street and stopped at the terminus for zone 4. A few passengers then alighted, but she was not one of them. The bus then jerked away before all the passengers had alighted. She heard an exclamation from people in front of the bus and it stopped. She then dismounted the bus, went back and saw plaintiff lying on the pavement. She noticed that he was injured. She indicated that plaintiff was on the pavement opposite point 2 on exh. "A", i.e. opposite the point of impact as deposed to by plaintiff. This spot is more or less in the vicinity of the gateway next to which plaintiff said he was carried after the accident. This witness said that the distance the bus moved from ~~the point where it had first stopped to the point where it had~~ stopped the second time was about ten to twelve paces.

The witness Maja pointed out on the photograph,

exh. "D", where she was standing on the day in question. This was at the eastern end of the bus shelter for Diepkloof. That ~~is the shelter where it was stated by plaintiff the bus had stopped~~ the second time. She noticed the bus as it was coming round the corner into Kerk Street and saw that it stopped at the first terminus. She pointed out point 2 on exh. "A" as the point where the front part of the bus presumably was when it stopped. A few passengers alighted from the bus and as they were still in the process of doing so the bus suddenly moved forward. As the bus moved forward she saw a person falling out of it. She heard people shouting and the bus stopped. She was unable to tell the Court where the bus stopped the second time.

Matsebe did not actually witness the accident but only saw plaintiff when he was on the pavement near the gateway appearing on exh. "D".

For the defendant one Johannes Mothibe was called. He testified that he was a constable in the South African Police and that on the day in question he was travelling in a bus in Diagonal Street, sitting in the third seat on the right hand side. When the bus turned from Market Street into Diagonal Street he

went to the front of the bus and stood on the platform. As the bus was negotiating the corner from Diagonal Street into Kerk Street plaintiff, who had got up from his seat, came to the front of the bus, brushed past him and proceeded to go down the steps. He then warned him not to jump off the bus whilst it was in motion. Very shortly after that he heard somebody in front of the bus shouting to the driver to stop. The driver did so and the witness alighted from the bus and found plaintiff lying underneath it between the front and back wheels. He said that he and the man who had stopped the bus pulled plaintiff from underneath it and carried him to the pavement. He said that when he came to plaintiff just after the accident he remonstrated with him because he had jumped off the bus whilst it was in motion.

This witness stated that when he warned plaintiff not to jump from the bus the front part thereof was opposite the dust-bin which is shown on exh. "A". He did not actually see plaintiff jumping from the bus but he drew the inference that he ~~must have jumped immediately after he had warned him and that~~ he must have been struck by the front wheel of the bus slightly beyond the dust-bin which is situated almost at the corner.

The next witness, called on behalf of defendant, was one Ernest Khumalo who testified that on the day of the accident he was standing on the pavement in Kerk Street underneath and at the eastern end of the bus shelter for zone 4, when he saw a bus coming along Diagonal Street. As the bus was negotiating the corner in order to turn into Kerk Street, he saw a person jumping out of the bus. This person was carrying a brief-case in his right hand and when he jumped off the bus this brief-case got stuck between the front wheel and the body of the bus. The person, who was later identified as plaintiff, tried to free the brief-case as a result whereof he fell underneath the bus and the left front wheel ran over his leg. He said that he pulled plaintiff from underneath the bus and with the assistance of Mothibe the former was carried onto the pavement underneath the shelter. He marked a point on exh. "A" where plaintiff fell underneath the bus, which point appears to be slightly beyond the dust-bin. This witness also stated that when Mothibe alighted from the bus he went to the spot where plaintiff was lying and re-monstrated with him, saying that he had told him not to jump off the bus whilst it was in motion.

The driver, John Pole, testified that he drove his bus along Diagonal Street and, while he was negotiating his turn into Kerk Street, he heard Khumalo shouting to him to stop, which he immediately did. He proceeded to the rear of the bus and noticed that it had collided with a person. He said that the bus came to a stop slightly beyond the dust-bin. When the traffic inspector arrived on the scene the bus was still in the same position where he left it. He made it clear that the bus stopped before it reached the terminus for zone 4.

A traffic inspector, one Smith, testified that he was called to the scene of the accident and that he took certain measurements which he entered in his note book. At the time of the trial he was unable to trace this note book and therefore could not refer to it. He prepared a plan, however, and he stated that he drew this plan from the information contained in his note book. He stated that the point of impact was indicated to him by one of the people at the scene and because, in his report of ~~the accident the name of Johannes Mothibe was referred to as a~~ witness, he assumed that this witness was the person who pointed out to him where the collision had occurred. When it was put

to him in cross-examination that Khumalo was the person who indicated the point of impact to him, he replied that he could not deny that. He made a mark where this point was and then had the bus removed. He measured the distance from the southern building line of Kerk Street to the point of impact, which was 10 paces. Then he measured the distance from the eastern building line in Diagonal Street to the point of impact, which was 12 paces. Finally he took a measurement from an electric standard, which was a fixed point, to the point of impact, which was 19 paces. At an inspection in loco he took those measurements again and they converged at the same point. This point is slightly beyond the dust-bin and five paces from the pavement.

On his plan he showed the bus at an angle, the front part facing north-west into Kerk Street. He said in evidence that when he found the bus at the scene it was at an angle but conceded that the angle might have been exaggerated on his plan. On his plan he indicated the point of impact near the front left portion of the bus. He denied that, when he arrived at the scene, the bus was where plaintiff and his witnesses testified, viz. at the bus shelter for Diepkloof. His testimony in this regard is to the following effect:

" It was at an angle. Yes. And it has been alleged by certain witnesses in the case that the bus was not, or would not, when you arrived at the scene, have been in that position, but about 25 paces further on, near a gate in the school. --- No, that I beg to differ. That is not so.

Have you any doubts about that? --- No. Where the bus was found, that is where I found it, and that is how I have explained it. It was not further down the street, because I had asked the driver to remove it."

The witness stated that he had the bus removed because it was causing a blockage at that intersection. The Judge a quo recorded that at the inspection in loco it was found "that the point of impact contended for by plaintiff is 25 paces further forward in the street from the point of impact shown on the police plan."

In his brief judgment the Judge a quo did not deal with the testimony of the witnesses at all except to some extent with that of plaintiff. We do not, therefore, have the benefit of an analysis of the evidence by the learned trial Judge, nor his findings as to the credibility of the respective witnesses. He bases his judgment of absolution on three grounds, as will appear from the following extract thereof:

" It seems to me that the matter can be decided on the question where the point of impact was. The two points of impact contended for are about 25 paces apart. The police plan which was put in by the traffic inspector, shows the bus very near to the corner. He found the bus still standing where it had come to a stop after the accident. The fact that the bus was standing there, - and I must accept that as true - militates very heavily in favour of defendant's version as to where the point of impact was. There are other facts which, I think, favour the defendant's version.

The plaintiff said that after the bus had jerked away it continued for a short distance and then stopped again and allowed other passengers to alight. These two points are about 12 paces apart. There was evidence that immediately after the bus had gone over the plaintiff's foot, one or more people shouted: 'Hau, hau', to the driver, calling upon him to stop. That this happened had been proved beyond doubt. Nearly all the witnesses said so, including two witnesses called by the plaintiff. Now it seems to me very unlikely that this driver would have proceeded 12 paces after having been warned and shouted at in this manner. It seems to me much more likely that he would have stopped immediately, and that also fits in better with the version that it

took place while he was rounding the corner.

This is on the general probabilities. There is one factor which is strongly against the plaintiff. Fifteen days after the accident he made a statement to a policeman while he was still in hospital. This statement contains the following passage:

'I then went out from the bus, but I was surprised when I found myself laid down and collided by a motor bus. I don't know what has happened. I only found out that I was already collided and my right leg was broken.'

When he says that he does not know what happened, there is no question of retrograde amnesia, because on the scene he was fully conscious and he knew what he was about. The plaintiff tried to make excuse^s by saying that the person who took down the statement apparently did not understand the language very well which he used and was making a running translation of it into English. What I have read is only a small fragment of a much longer statement and the rest of the statement is admitted by the plaintiff to be completely correct. The plaintiff signed it and I do not accept that this portion was taken down wrongly by the Bantu constable who went to interview him."

Counsel for appellant submitted that the Court

a quo placed undue reliance on Inspector Smith's evidence and

he proceeded to attack the latter's evidence on various grounds.

I will deal briefly with his main points of attack.

His first criticism levelled at Smith's evidence is that the latter was unable to recall who it was who pointed out the point of impact to him. It is true that in his report of the accident he referred to Mothibe as a witness and that is why at the trial he stated that the former indicated to him the point where the collision had occurred. When it was put to Smith in cross-examination that it was Khumalo who had pointed out the point of impact he immediately conceded that it might be so. It may be that Inspector Smith should also have mentioned Khumalo's name in his report. He probably should have requested the driver and plaintiff also to point out where the collision occurred, as was submitted by counsel in support of his second criticism of Smith's evidence. This Smith admitted to be normal procedure. His failure to act in a way which is considered as normal and practical procedure in the investigation of a motor accident, does not, in my judgment, constitute dishonesty or untrustworthiness on his part. The uncontested fact is that someone pointed out a point of impact to him and from that point he took his measurements. At the

inspection in loco he again took measurements and his evidence that he arrived at the same point as indicated to him by someone who was at the scene of the accident was not challenged.

That point was, however, based on hearsay and the question is whether the position of the bus as depicted by Smith on his plan affords corroboration of the point of impact as indicated by the witness. I agree with counsel for plaintiff that the mere fact that Smith's plan indicated that the bus was in the position there depicted, did not afford such corroboration because Smith may have placed the bus in that position on his plan merely because he knew that the point indicated to him was between the wheels of the bus. That may be so, but Smith's evidence went further. He made it quite clear that when he arrived at the scene of the accident the bus was not at the bus shelter for Diepkloof as deposed to by plaintiff, but that it was standing at an angle somewhere in the vicinity of the intersection of Diagonal and Kerk Streets and that it blocked the traffic. That was the reason why he found it necessary to have the bus removed.

It was strongly urged upon us that the point of

impact as shown on Smith's plan in relation to the bus must necessarily be wrong and that it militated against the latter's ~~credibility as to the position of the bus when he arrived at the~~ scene of the accident. Counsel contended that the bus must necessarily have moved some distance after it had collided with plaintiff and therefore the bus could not have been in the position, in relation to the point of impact, as shown on the plan. That may be so. But it may be that Smith on his plan showed the position of the bus as it was at the moment of impact and not necessarily the position after the bus had stopped. If this is so, there is nothing wrong with the position of the bus as shown on the plan in relation to the point of impact as depicted thereon.

Counsel for plaintiff also relied strongly on the following passage in Smith's evidence:

" You see, according to the plaintiff the bus stopped some distance - short distance away from where it collided with him, but the back wheels of the bus was certainly beyond where he was lying. Is that possible? - That is quite possible."

I am not quite sure whether Smith really understood the question because he did not know where plaintiff was lying after the

accident, although he knew that he was lying on the pavement. In any event, it seems impossible that the rear wheels of the bus could have been beyond the spot where plaintiff was lying. Both Mothibe and Khumalo stated that after the accident they pulled plaintiff from underneath the bus. I can find no reason at all for rejecting that evidence. It was not challenged in cross-examination at all. If that is so, the rear wheels could not possibly have been beyond where plaintiff was lying.

The points indicated by Mothibe and Khumalo at the trial as to where the plaintiff fell do not exactly correspond to the point of impact as deposed to by Smith, but they were in that vicinity and certainly not twenty-five paces from that point. Furthermore, the driver corroborated Smith in that he clearly stated that his bus was brought to a standstill before it reached the terminus for zone 4 - in other words, not far from the dust-bin.

If then, the point of impact was near the corner and the bus stopped just after it had completed the turn as the evidence indicated, it affords strong corroboration of Mothibe's evidence that plaintiff jumped off the bus whilst it was negotiating the corner and was still moving.

If this evidence is accepted, then the evidence of plaintiff and his witnesses as to the point of impact must necessarily be rejected. Even though the Judge a quo did not expressly say so, it follows from his judgment that he must have rejected their evidence.

Mothibe's evidence that he warned plaintiff not to jump off the bus whilst it was in motion was, to my mind, also corroborated by that of Khumalo who testified that, when Mothibe came up to plaintiff where he was lying in the street after the accident he remonstrated with plaintiff saying to him that he had told him not to jump off the bus whilst it was in motion. It is of significance that this evidence came out quite incidentally in cross-examination so that it seems improbable that Mothibe and Khumalo had agreed to fabricate this evidence.

Counsel for plaintiff also attacked Mothibe's evidence on the ground that he contradicted himself, that he was evasive and that his evidence was in conflict in certain respects with that of the driver and Khumalo. I agree that there were certain contradictions in his evidence and that, to some extent, although not in material respects, it was in conflict with that of

the driver and Khumalo. One must not lose sight of the fact, however, that the accident occurred some two-and-a half years before these witnesses testified and some contradictions are to be expected. In any event, I have shown that Mothibe's evidence was sufficiently corroborated and there was no reason to reject it.

Counsel's main attack on Khumalo's evidence was that if plaintiff carried his brief-case in his right hand it would have been impossible for it to be caught between the wheel and body of the bus. In his evidence Khumalo said that when plaintiff alighted from the bus the front left wheel of the bus was on his right-hand side. It is obvious that he meant on his (Khumalo's) right-hand side. He was facing plaintiff and he could similarly have made a mistake as to the hand in which plaintiff was carrying the brief-case.

Counsel for plaintiff submitted that the Judge a quo was wrong in relying on the alleged statement made by plaintiff to the police, which is in conflict with his evidence at the trial, inasmuch as the police officer concerned was not called to state that he had correctly taken down the statement. I am not sure whether, in the circumstances of this case, that

contention is sound. However that may be, I do not think that it was necessary in the instant case to rely on that alleged conflict in order to discredit plaintiff's testimony. There were sufficient other reasons, as I have indicated above, why plaintiff's evidence was unacceptable.

In view of what I have said on the acceptability of plaintiff's and his witnesses' evidence it is unnecessary to deal with the finding of the learned Judge a quo that it is unlikely that the bus would have travelled twelve paces after the driver had been called upon to stop.

On the evidence adduced, therefore, I conclude that plaintiff failed to show that his version should have been accepted in preference to that of the defendant. Consequently the learned Judge a quo correctly granted absolution from the instance.

The appeal is dismissed with costs.


POTGIETER, J.A.

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