13/7/72 Tuesday 72/72

P.-S.43575—1969-70—2,000 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

HONEST TEMBA GCAYIVA — *Applicant. Appellant*

versus

MINISTER OF POLICE — *Respondent*

Appellant's Attorney Hill, McHardy & De Bruyn — *Respondent's Attorney* D.P.P.S.A. (13 mpl)
Prokureur vir Appellant — *Prokureur vir Respondent*

Appellant's Advocate G.M. Israel — *Respondent's Advocate* C.H. Cubitt
Advokaat vir Appellant — *Advokaat vir Respondent*

Set down for hearing on 25-8-72
Op die rol geplaas vir verhoor op

1.2.6.8.10.11

Coram: Ogilvie Thompson C.J. van Blerk, Jansen, Rabie et Muller JJ.A.

ECD 9.45 am ——— 11.00 am
11.15 am ——— 12.10 pm.
C.A.V.

Application dismissed with costs.

REGISTRAR.
2.10.1972

Bills Taxed—Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

HONEST TEMBA GCAYIYA.....Applicant

AND

THE HONOURABLE THE MINISTER OF POLICE.....Respondent

Coram: Ogilvie Thompson CJ., van Blerk, Jansen, Rabie et Muller JJA.

Heard: 25 August 1972.

Delivered: 2 October 1972.

J U D G M E N T

RABIE, JA.

This is an application for leave to prosecute an appeal in forma pauperis against an order made by Eksteen, J., in the Eastern Cape Division, decreeing absolution from the instance, with costs, in an action instituted by the applicant against the respondent by virtue of the

provisions...../2

provisions of sec. 19 (3) of the Motor Vehicle Insurance Act, No. 29 of 1942. An appeal was duly noted against the order.

Junior counsel - it was not Mr. Israel, who represented the applicant in this Court - appeared on brief for the applicant in the Court below, but the applicant states in his petition that he has no funds with which to prosecute the appeal he has noted. Despite certain points raised by the respondent, there does not seem to me to be any real reason for doubting that the applicant's financial position, whatever it may have been at the time of the trial, is at present that of a pauper as set out in A.D. Rule 4 (5).

I proceed, therefore, to consider the merits of the petition. The case has some rather unusual features, and in order to appreciate the nature of the stand taken by the respondent in this Court, it will be necessary to

refer...../3

refer in some detail to the pleadings and to counsel's conduct of the applicant's case in the Court below.

The applicant claimed damages in the sum of R22 078-00 from the respondent, alleging that he had sustained injuries in a collision with a vehicle driven by one Kleynhans, a constable in the South African Police, in the course of his duties as a servant of the respondent. In the applicant's particulars of claim the allegation is made that the collision took place on 15 July 1969 "at or near" Wykeham Avenue, Cotswold, Port Elizabeth. This allegation as to where the collision occurred was admitted in the respondent's plea, but the plea was thereafter amended so as to allege that the collision between the applicant and Kleynhans's vehicle took place "on the Western Bypass, and not at or near" Wykeham Avenue as alleged by the applicant. Negligence on the part of Kleynhans was denied, and it was pleaded, also, that the collision

had...../4

had been caused by the negligence of the applicant. In reply to a request for further particulars for trial, the respondent set out a number of respects in which he alleged the applicant had been negligent at the time of the collision on the Western Bypass.

At the commencement of the trial the Court held an inspection in loco of the Wykeham Avenue area and of the alleged scene of the collision on the Western Bypass. The following is an extract from the learned Judge's notes relating to this inspection:

> "Now Wykeham Avenue in which the plaintiff alleges he was run down is a comparatively short street, no more than some 200 yards in total extent, running from south to north, and in a quiet residential area. As one turns out of Cape Road in a northerly direction into Wykeham Avenue, there is a fairly sharp bend and thereafter the street runs straight and level. Two streets run off it at right angles from Wykeham Avenue to the right as one proceeds from Cape Road -

the...../5

the first, Salfert Street, is within 20 yards of Cape Road, and the second, Barton Road, somewhat lower down.....

The plaintiff alleges that he was walking along the pavement on the right side of Wykeham Avenue from Cape Road, and that he was run down in the act of crossing Barton Road.

At the end of Wykeham Avenue, Burt Drive skirts the Great West Way (i.e., the Western Bypass) and runs parallel to it, being separated from the West Way by a strongly constructed diamond mesh fence some 5 feet 6 inches to 6 feet in height. Approximately 200 yards from the spot where Wykeham Avenue abuts on this road and to the east thereof, is a pedestrian footbridge over the West Way from Burt Drive to the other side, and the house to which the plaintiff says he was going is within 20 to 30 yards from this bridge on the northern side of West Way.

The defendant alleges that the plaintiff was knocked down not in Wykeham Avenue at all but in the Great West Way. This West Way is a main arterial road running from east to west; it consists of two wide carriage-ways separated from each other by

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a fairly wide island thickly planted with spreading shrubs, presently some 6 to 7 feet tall. It is alleged that the collision occurred on the southern carriage-way which carries traffic from east to west and that the plaintiff was knocked down on the right hand side, that is the northern side of this carriage-way, about one foot from the edge of the trafficable part of the tarred road.

.....

This spot is approximately 500 yards to the east of the footbridge to which I have already referred".

When giving evidence, the applicant, who had no witnesses, testified to a collision which allegedly took place on Wykeham Avenue, and he denied the suggestion, put to him in cross-examination, that he had been injured not on Wykeham Avenue, but on the Western Bypass. After the applicant's case had been closed, the respondent's counsel, Mr. Cubitt - who also appeared for the respondent in this Court - applied for absolution from the instance, but the

application...../7

application was refused. He then proceeded to call evidence on the respondent's behalf. Several witnesses testified that Kleynhans's vehicle was, on the day in question, involved in a collision with the applicant on the Western Bypass, and not on Wykeham Avenue. Kleynhans described, in his evidence-in-chief, how the collision occurred. He stated, to put it briefly, that at about 10 p.m. on the day in question he was driving at about 50 miles per hour along the northern lane of the southern carriage-way of the Western Bypass when, on rounding a bend in the road, and on putting his headlights (which had previously been on dim) on bright, he observed the applicant in the road ahead of him, walking in the same direction as he was driving; the applicant was then about 25 yards away; he applied his brakes immediately, but could not stop his vehicle before colliding with the applicant; he held on to the steering wheel with both hands, and could not sound his hooter; he

did...../8

did not swerve to the right because there was a ditch to the side of the road, and, also, because he feared that the applicant might, on becoming aware of the vehicle behind him, jump to his right and into the path of the vehicle; and, finally, he decided against swerving to his left because his passenger, Constable Augustyn, warned him of the presence of a motor vehicle immediately to his left, and, also, because he himself, on glancing to his left, saw a vehicle in close proximity to his own. Kleynhans was cross-examined at length, the cross-examination being directed, in the main, to showing that he had been negligent in colliding with the applicant on the Western Bypass. Augustyn gave evidence in support of that of Kleynhans, and his cross-examination was along the same lines as that of Kleynhans. A second inspection - this time at night - was held of the scene of the collision as testified to by Kleynhans and Augustyn, and the trial Court's notes of the inspection deal with matters relevant to the issue of Kleynhans's alleged

negligence..../9

negligence in colliding with the applicant on the Western Bypass.

According to the judgment of the Court a quo, the applicant's counsel -

> "sought during argument to amend his declaration so as to rely in the alternative on the defendant's version of the collision and on the negligence which he contended had been shown on the evidence of Kleynhans and Augustyn in the cross-examination".

The judgment continues:

> "This amendment would naturally entail the complete rejection of the plaintiff's case as made in his declaration and supported by his evidence",

and then states that counsel for the applicant,

> "realising the full implication of the amendment he sought....eventually abandoned his application and unequivocally took his stand on the case made in the declaration and supported by the plaintiff's evidence, asking the Court to find that this case

had...../10

had been made out on a balance of probabilities".

The learned Judge, according to the judgment, then proceeded to deal with the applicant's evidence relating to the alleged collision on Wykeham Avenue, and, having rejected it as wholly improbable, made an order of absolution from the instance on the applicant's claim. The judgment does not in any way deal with the issue of negligence on the part of Kleynhans as disclosed in his own evidence and that of Augustyn, although, as I have shown above, this question was apparently fully canvassed in the evidence-in-chief and cross-examination of both these witnesses.

In this Court Mr. Israel made no attempt to argue that the Court a quo erred in holding that the applicant failed to discharge the onus of proving a collision on Wykeham Avenue. His submission was that, even if the learned Judge correctly found that the applicant had not discharged such onus, he should nevertheless have held, on the evidence of Kleynhans and Augustyn, that Kleynhans was

guilty.....11

guilty of negligence, and that the applicant was, therefore, entitled to at least a part, if not all, of the agreed damages of R10 657-00. Submitting, furthermore, that the silence of the judgment on the question of Kleynhans's negligence was presumably due to the fact that there had been no amendment to the applicant's declaration so as to allege a collision on the Western Bypass, Mr. Israel contended that no such amendment was necessary before negligence on the part of Kleynhans could be considered, or, alternatively, that if such amendment was necessary, the necessary leave to amend could be granted by this Court since all the relevant facts were fully investigated at the trial.

Mr. Cubitt's answer to these submissions was, briefly, that in the Court below, despite the investigation of the question of Kleynhans's negligence in relation to the collision on the Western Bypass, the applicant's counsel abandoned not only his aforementioned application for leave to amend his declaration, but also his right to

place...../12

place reliance on the evidence of the respondent's witnesses regarding the collision on the Western Bypass. He contended that the applicant could not, on appeal, make a case which he had abandoned in the Court below. In making these submissions, Mr. Cubitt relied on the above-quoted extracts from the judgment of the Court a quo, and he stated, furthermore, that at the trial the applicant's counsel said to the Court in clear and unequivocal terms that he took his stand on the applicant's evidence, and that the Court should not direct its mind to the issue of negligence on Kleynhans's and Augustyn's version of the collision. Mr. Cubitt said, also, that because of this statement by the applicant's counsel, he did not address the trial Court on the issue of negligence as alleged disclosed in the evidence of Kleynhans and Augustyn, and he submitted that this was also the reason why the learned Judge gave no consideration to that issue in his judgment. Mr. Israel, not having appeared in the Court below, was unable to supply any information as to

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the statement which, according to Mr. Cubitt, the applicant's counsel made to that Court, and Mr. Cubitt accordingly suggested that this Court should ask the learned Judge for a report on the matter. Mr. Israel did not oppose this suggestion, and, after judgment had been reserved, it was decided, after due deliberation, that it would be just and fair to both parties if the learned trial Judge were asked to submit a report to this Court on the question - I put it briefly - as to how it came about that he gave no decision on the issue of negligence on the version of the respondent's witnesses' even although that issue would appear to have been fully canvassed at the trial.

The learned Judge has now submitted a report, from which the following appears. The applicant's counsel, at the very outset of his argument, indicated that he would apply for an amendment of his declaration so as to rely on the negligence of Kleynhans on the Western Bypass, and after arguing that the applicant's version should be

accepted...../14

accepted in preference to that of the respondent's witnesses, counsel proceeded to argue on the basis of the proposed amendment, contending that there was no reason why the amendment should not be allowed since the issue of Kleynhans's negligence on the Western Bypass had been fully canvassed. The learned Judge then indicated to the applicant's counsel that, as then advised, he "could see no objection to the declaration taking the form he proposed, since it was quite permissible to plead in the alternative", but that what did seem "to present a problem at that stage of the case, after all the evidence had been led, was whether he could still argue in the alternative in the circumstances of the case". The report continues (paragraphs 8 and 9 thereof):

> "8.... I put to him that he might have to make up his mind as to what evidence he would ask the Court to accept. It seemed to me incongruous that he should first argue that the plaintiff's evidence should be accepted and the evidence of the defence witnesses be rejected as untrue, and then to

argue...../15

argued that the plaintiff's evidence be rejected as a figment of his imagination and the entirely different version of the defence witnesses be accepted as the truth.

9. I indicated to him that he could make his application for the amendment of his declaration, and proceed to argue on that amendment as if it had been granted, and that I would then hear Mr. Cubitt's submission on this issue in the course of his address, and deal with the application in the course of my judgment on the case as a whole".

The applicant's counsel then proceeded to argue on the basis of his proposed amendment, but, says the learned Judge, after proceeding along that line of argument for some time, counsel -

"somewhat unexpectedly desisted from pursuing this argument any further and told the Court that he had decided to withdraw his application for an amendment of his declaration and proposed taking his stand unequivocally on the evidence given by the plaintiff. On the acceptance of this evidence, he said,

he...../16

he stood or fell".

Regarding this decision on counsel's part, the learned Judge states that, apart from the difficulties which he put to counsel as set out in paragraph 8 of his report (supra), -

> "counsel's decision to withdraw his application was not brought about by any pressure or suggestion to that effect from the bench".

In counsel's final address to the Court, the report states, he -

> "reiterated that he stood on the acceptance of plaintiff's evidence, and that if this be rejected then he had no case at all. He asked the Court therefore to reject the defendant's witnesses who said that the collision had occurred on the Western Bypass".

In view of all this, the learned Judge states, he came to the conclusion that the applicant's counsel "had in fact abandoned his right to rely on any negligence which may have been disclosed in the evidence of the defence witnesses", and for that reason he did not consider whether Kleynhans had been shown to be negligent on the evidence led by the respondent's witnesses.

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In the light of the aforegoing there seems to be no doubt that Mr. Cubitt is correct in his submission that the applicant's counsel abandoned his right to rely on the evidence of the respondent's witnesses relating to the collision on the Western Bypass. The applicant cannot, on appeal, make a case which he specifically abandoned at the trial (see Wolfowitz v. Fresh Meat Supply Co., Ltd. 1908 T.S. 506 at p. 512; Kannenberg v. Gird 1966 (4) S.A. 173 (C) at pp 181-183), so that it follows that the leave which he seeks to prosecute the appeal he has noted in forma pauperis cannot be granted.

In view of this conclusion, the question whether the applicant would have a reasonable prospect of success on appeal, does not arise for discussion. I would add, however, very briefly, that even if it were open to the applicant to rely on the evidence of the respondent's

witnesses..../18

witnesses, his chances of success, on the evidence as recorded, would appear to be rather slender. The main contention advanced on his behalf is that Kleynhans should have swerved to his left in an effort to avoid the collision, and that his evidence as to why he did not do so is, in some respects, not borne out by that of Augustyn. It is true that there are certain discrepancies in the evidence of these witnesses, but this does not necessarily mean that the version of Kleynhans, who was the driver, falls to be rejected. Furthermore, and quite apart from this reason as to why he did not swerve to his left, Kleynhans's uncontradicted evidence shows that he had very little time in which to weigh up the relative merits of alternative courses of action while attempting to avoid the collision, and it is problematical whether it can be said that he was negligent in having done nothing more than to apply his brakes.

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The application is dismissed with costs.

P.J. Rabie

P.J. RABIE

JUDGE OF APPEAL.

Ogilvie Thompson CJ.)
van Blerk JA.)
Jansen JA.) concur.
Muller JA.)