G.P.-S.43575—1969-70—2,000 J 219

64/76

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

S.A. MUTUAL FIRE AND GENERAL INSURANCE *Appellant,*

versus

NOSINGILE MHLAWULI *Respondent*

Appellant's Attorney [illegible] *Respondent's Attorney* VAN DER Merwe Sorrie
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate H.J.O. van Heerden S.C. *Respondent's Advocate* M.P. Jennett
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on 22-11-1976
Op die rol geplaas vir verhoor op

(S.K.A.) 403911

Coram: Jansen, Rabie, Hofmeyr, de Villiers et Miller AJJ

Van Heerden - 9.45 - 10.50, 12.30 - 12.35.

Jennett - 10.50 - 11.00, 11.15 - 12.30.

C.A.V.

The Court dismisses the said appeal with costs.

(Judgment per Hofmeyr JA)

31/12/76

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:

SOUTH AFRICAN MUTUAL FIRE AND GENERAL INSURANCE COMPANY LIMITED — APPELLANT

and

NOSINGILE MHLAWULI — RESPONDENT

Coram: Jansen, Rabie, Hofmeyr, De Villiers et Miller, JJ.A.

Heard: 22 November 1976

Delivered: 2 December 1976

JUDGMENT

HOFMEYR, JA:

This is an appeal from a judgment of EKSTEEN, J., in the East London Circuit Local Division awarding the respondent damages in the sum of R5 200-38 and

costs ...../2

costs of suit together with certain ancillary relief.

In the court below the respondent, a Bantu woman, sued the appellant as the insurer in terms of Act 29 of 1942 of the motorcar which collided with her on 14 December 1969 on the Douglas Smit highway, East London. The respondent sustained serious fractures of both the left and right femur which necessitated surgical interference and the insertion of a Kunscher nail and screws at the site of the left femur and fitting of a plate to reduce the fracture on the right. The evidence of Mr. Smit, orthopaedic surgeon, regarding the treatment she had to undergo and the extent to which she has recovered was not challenged in this Court and I pass immediately to the main issue in the case, namely the question of negligence.

The version of the respondent and her witness, Ntombo Mlungu Myatuza, on the one hand, and the version of the driver of the insured vehicle, Euphenia Nomtshongwana,

on ...../3

on the other hand, as to what occurred, are totally irreconcilable. According to the respondent and her witness (to whom I shall refer as Myatuza), they were crossing the Douglas Smit highway from the northern side to the southern side. The respondent had, according to Myatuza, almost reached the southern side of the highway when she was struck down by the insured vehicle travelling from east to west in the highway. The driver of the insured vehicle (to whom I shall refer as Euphenia), also testified to travelling in Douglas Smit highway from east to west when he noticed the two women referred to above. His further evidence directly conflicts with the respondent's case. According to him the two women were standing talking about 100 to 150 yards away on the southern side of Douglas Smit highway a foot or so from the edge of the road when he first noticed them. The respondent had her back to him as he was approaching them at a speed of 25 to 30 miles per hour. When he was a distance of about 10 to 15 paces from them, the respondent

stepped ..../4

stepped into the road and turned around as if to cross the road to the northern side. He immediately sounded his hooter and swerved to his right. The respondent at the same time started running across the highway. He applied his brakes so firmly that he managed to stop his car within a short distance. At that very moment the respondent ran into his vehicle and collided with the side of the left front fender. His evidence amounts to a denial that he knocked the respondent down at all and an assertion that it was she who ran into his motorcar while it was stationary.

The only eyewitnesses who testified to the merits are the two women and Euphenia. Certain photographs of the scene, an accident report and a plan with key were handed in at the trial. The judge a quo made special mention of the fact that the trial was held some 6½ years after the accident and that

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"the memories and possibly even some of the impressions of the witnesses must have been affected by the passage of time." He also remarked upon an unfortunate complication resulting from the undue delay, namely, "that the police docket had been destroyed in the meanwhile and that none of the statements or other documents which would normally have been included in the docket, is available to elucidate any of the features of this case."

The abovementioned qualification affecting the assessment of the evidence relates to all three of the eyewitnesses. The judge also made a general remark which only applied to the evidence of the two female witnesses, namely, that they were simple and unsophisticated persons. It would therefore be unrealistic to apply standards that would be fitting in the case of educated persons with disciplined minds to the evidence given by these two women. The judge also

noted ...../6

noted that Euphenia was a relatively knowledgeable person in possession of a junior certificate who had acted as an interpreter since 1956, also in court proceedings. Comparatively minor discrepancies between the versions of the two female witnesses would, in the circumstances, be of even less importance than in the ordinary run of cases. It is also a fact that the judge a quo did not make any positively adverse comment upon the truthfulness of any of the witnesses although it is of course implicit in his judgment that he accepted the evidence of the two women and rejected the evidence of Euphenia. The case was decided largely upon the probabilities of the versions placed before the court.

Mr. van Heerden, who appeared for the appellant, drew attention to a number of discrepancies between the evidence of the two women eyewitnesses, inter alia, as to their position relative to each other as they cros-

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sed the abovementioned road. He pointed out for instance that the respondent's evidence was that Myatuza had already crossed the road whilst she was still on the northern side. The justification for the above-mentioned comment on the evidence of the women and especially on the respondent's evidence is illustrated by the following extracts from her evidence:-

"Q. Now before you set off the pavement to cross the road, you say you stood there and you looked right and left?

A. Yes.

Q. Where was Ntombo Mulungu (i.e. Myatuza) then?

A. She was out of the street.

Q. Where?

A. She was in front of me, and on the street. I was crossing."

Further answers to questions on the same topic were:-

"I was knocked out by the car and when she was already out of the street."

"We were following each other but she crossed first before I had already crossed."

Admittedly ...../8

Admittedly she gave answers that appear to lend colour to the submission pressed on us but the matter was not at all clear as shown by the following question asked by the court:-

"Q. Doesn't she understand what I am talking about?

A. Yes, I do understand what you say."

When the question was reformulated the respondent answered:-

"Ntombo Mlungu Myatuza crossed first but I followed close to her."

The respondent pointed out 15 paces as the distance between them. This estimate may not be very satisfactory in view of other evidence. Even this statement, however, does not allow for the possibility of Myatuza having reached the opposite pavement before the respondent entered the road.

I have quoted from the respondent's evidence in

order ...../9

order to indicate the nature of the evidence forming the basis of the judge's assessment of her as a witness, viz. that she had difficulty in understanding some of the questions but that he did not form the impression that she was deliberately attempting to mislead the court.

The respondent's evidence is supported in the main by Myatuza. According to this witness they in fact crossed the road simultaneously from the northern to the southern side. The collision, as she testified, took place as the respondent was about to reach the southern side of the road. There is a conflict in their evidence as to whether they walked or ran across the road but the judge held from their appearance as middle-aged native women that it is likely that they "bustled" across the road. This may well explain the apparent discrepancy in the evidence of these women on this point. Other discrepancies, or inadequate observation, are in the circum-

stances ..../10

stances of the case not serious enough to justify a finding that the judge a quo erred in accepting their testimony.

As regards the evidence of Euphenia it is true, as observed earlier in this judgment, that he was not directly stated to be an untruthful witness. I have also indicated that his version must have been rejected as being unacceptable on a balance of probabilities.

Despite the submissions of Mr. van Heerden to the contrary, there is in my opinion, no inherent improbability in the account given by the women of the accident.

In respect of Euphenia's evidence the judge a quo was firmly of the opinion that it was most unlikely that a middle-aged woman would have sustained such serious injuries merely by running against the side of a stationary motor car. Despite Mr. van Heerden's efforts to show from

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the record that Euphenia did not really intend to testify to his motorcar being stationary at the moment when he alleges that she collided with it, I am unpersuaded that that was not precisely what this evidence came to. If so it would constitute an assertion of an essentially improbable occurrence.

If Euphenia's account is to be believed, one would have to accept that the instinctive reaction of the respondent, upon hearing Euphenia sounding his hooter from a position 10 or 15 paces to the east of her and from well within the highway, was not to jump back into safety but to rush forward into a patently dangerous area in the road. Euphenia's allegation that the respondent acted in such a manner, is in my opinion so unlikely that it cannot be entertained as a reasonable probability.

No irregularity in the trial or misdirection by EKSTEEN, J., is suggested. It is, therefore, incum-

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bent upon the appellant to show that the decision of the court a quo was wrong. In view of the evidence of the two women and the probabilities of the matter, I cannot hold that EKSTEEN, J., was not entitled to accept the respondent's version of the accident. It was admitted that on that version Euphenia would have been clearly causally negligent. It was found in the court below that the respondent had to share the responsibility owing to her own negligence. Although it is true that the respondent failed to keep a proper look-out, the risk undertaken by her was not so grave if it is borne in mind that she had virtually reached the southern side of the road when the collision occurred while Euphenia had the opportunity of observing her for the time it took her to cover 20 feet. His failure to avoid the accident was in my opinion so serious that there seems to be no reason why the apportionment of the

blame ..../13

blame decided upon in the court a quo should be dis-

turbed.

The appeal is dismissed with costs.

HOFMEYR, JA

Jansen, JA)
Rabie, JA)
De Villiers, JA) Concur
Miller, JA)