

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

(APPELLATE Provincial Division)
Provinciale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

S. MACHUMELA Appellant,

versus

SANTAM INS. CO. LTD. Respondent

Appellant's Attorney Lövius, B.M. & C. Respondent's Attorney SYMINGTON, De K
Prokureur vir Appellant Prokureur vir Respondent

Appellant's Advocate D.M. Furt Respondent's Advocate J.C. Laleuxhorne
Advokaat vir Appellant Advokaat vir Respondent

Set down for hearing on 22-11-1978
Op die rol geplaas vir verhoor op

15101213

Consent: Rumpff & C. Trakke, Katze J.B.A.
Toukment at Gelyk A.S.A.

(W.L.D.) 9-45 am 10.30 am
C.A.V

The Court dismisses the
said appeal with costs,
including the costs of
Appellant's application for

Security

P.T.O

Bills taxed—Kosterekenings getakseer

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SAMUEL MACHUMELA

Appellant.

and

SANTAM INSURANCE COMPANY LIMITED

Respondent

Goram: RUMPF, C.J., TROLLIP, KOTZÉ, J.J.A., JOUBERT et

GALGUT, A.J.J.A.

Heard: 22 November 1976

Delivered: 30 November 1976

J U D G M E N T

KOTZÉ, J.A. :

At the commencement of the hearing of this appeal
the failure of the appellant to deliver timeously to the respon-

dent.....1/2

dent the requisite number of copies of the record in terms of Rule 5 (4) of the Rules of this Court was condoned on application made by the appellant. I shall revert to an aspect of this application at the end of this judgment.

The appeal can, in my view, not succeed. I shall endeavour to state my reasons concisely.

On the 27th October, 1973, at about 3.45 p.m. the appellant was struck down and injured by a motorcar insured by the respondent in terms of the provisions of Act No. 56 of 1972. Visibility and weather conditions were favourable. In an action for the payment of damages instituted against the respondent in the Witwatersrand Local Division, MOSTERT J. decreed absolution from the instance with costs. The appeal is against that judgment.

The versions testified to at the trial by the appellant and the driver of the insured motorcar are irreconcilable. The appellant testified that he crossed Mahalafele Street, Soweto, on foot from south to north within a

pedestrian.... /3

pedestrian crossing at an intersection controlled by traffic lights when the insured car driven from east to west by one Ludwig Khashane collided with him. The state of the traffic lights authorised his passage but prohibited that of Khashane. The version testified to by Khashane was that the car driven by him was travelling from west to east and collided with the appellant an appreciable distance away from the nearest intersection or pedestrian crossing.

According to appellant's original particulars of claim he averred a state of affairs different from that testified to by him viz. that the insured car did proceed from west to east and no mention was made of his having crossed at any intersection. The quality of the appellant's evidence and the divergence between the allegations pleaded and his testimony were, no doubt, important considerations which rightly induced counsel on his behalf to argue the appeal before us on the basis of Khashane's version. Accordingly I need not again refer to the appellant's evidence.

The substance of Khashane's evidence is that he was travelling at about 30 miles per hour, that several motor vehicles preceded him and that several approached from the opposite direction'. The car immediately ahead was about 10 paces in front of him'. He saw the appellant running towards the street from south to north'. As he reached the southern edge of the street the brakes of the car ahead of Khashane were applied'. He applied the brakes of the insured car thus reducing its speed'. The appellant continued running to the broken centre line of the road'. Whilst crossing to that point drivers of vehicles travelling from east to west hooted'. When the appellant reached the broken centre line he stood still and looked towards the insured car'. At that stage the car ahead of Khashane was passing the appellant and the insured car was five paces away from him'. Khashane inferred from the appellant's conduct in standing still and glancing in his direction that he had seen him and that he would allow him to pass'. However, the appellant jumped

forward...../4 (a)

4 (a)

forward quickly in front of the insured car apparently trying to dodge through the line of traffic proceeding east.

To avoid him Khashane applied his

brakes.....1/5

brakes forcibly, endeavoured to swerve slightly to the left but collided with the appellant just above his left knee. The insured car came to a standstill "precisely" where it struck the appellant. During cross-examination Khashane stressed that the brakes of the car ahead of him and of the insured car were applied as the appellant ran towards the centre of the street but that both vehicles continued to proceed "after he had stopped".

Appellant's counsel endeavoured to spell out of Khashane's evidence proof of negligence inasmuch as, having observed the appellant's dangerous behaviour, he failed to reduce speed to a walking pace, to stop, to hoot, to leave the appellant a berth wider than ten inches (testified to by Khashane) or to swing to his left. The answer to each one of the abovementioned contentions is that by standing still and looking in the direction of the insured car approaching from the west, the appellant by his conduct conveyed a message to Khashane that he proposed to recognise

and...../6

and respect his right of way as he did in respect of the preceding car. Even if that was not his actual intention, Khashane was entitled to assume in the circumstances, that it was, and to act on that assumption. Any reasonable driver in Khashane's position would have done so. When thereafter the appellant behaved in a manner inconsistent with his notification, Khashane could not reasonably have been expected to resort to any of the steps suggested. Accordingly it has not been established that the collision was due to any negligence on the part of Khashane.

It was argued, as a last resort, that Khashane's evidence that the appellant came to a standstill and that he gave a noticeable glance to the left cannot be taken at face value as, in an unsworn statement made to the Bantu policeman investigating the case three days after the accident, he made no mention thereof. The difficulty in the way of upholding this contention is that the appellant must perforce stand or fall on Khashane's evidence. And, in any

event,...../7

event the policeman seems to have been somewhat inexperienced and Khashane explained that he had conversed with him and he recorded the statement in a language which the latter probably did not understand.

I now revert to the condonation application.

The failure to comply with the requirement of the Rule of Court was not due to any fault of the appellant himself but due to a fault and inexperience on the part of a professional assistant in the office of his attorney of record at the seat of the trial court. The application for condonation was launched on the appellant's behalf without invoking the provisions of Rule of Court 5 (4) (c) in terms of which the period to deliver copies of the record to the respondent may, with its written agreement, be extended. In this case respondent's consent should first have been sought (see A.A. Mutual Insurance Association Ltd. v. Van Jaarsveld and Another, 1974 (4) S.A. 729 (A.D.) at p. 731 D-E). It would probably have been given for respondent

did...../7 (a)

7 (a)

did not oppose the application for condonation. Thus the costs of the application for condonation were probably unnecessarily incurred and certainly without first heeding the warning sounded by this Court in Van Jaarsveld's case. Regard being had to the fact that no blame attaches to the appellant himself

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in connection with the failure to comply with the Rules of Court, that his attorney was at fault and that Rule of Court 5 (4) (c) was not invoked, I consider that justice requires that a special order as to the costs be made.

The following order is made:

1. The appeal is dismissed with costs, including the costs of appellant's application for condonation of the late delivery of the record to the respondent's attorneys.
- 2(a) The party and party costs of the said application for condonation shall be paid to respondent by the Johannesburg attorney of record for the appellant de bonis propriis.
- (b) The appellant's said attorney shall not be entitled to recover any of the costs in respect of the said application for condonation from the appellant.
- (c) Leave is granted to appellant's said attorney,

if...../9

if so advised, to apply by written application lodged with the Registrar of this Court within three weeks after the date of delivery of this judgment for a variation on good cause shown of the orders as to costs in sub-paragraphs (a) and (b) hereof. The application shall also be served on appellant and respondent.

G. P. C. Kotzé

G.P.C. KOTZÉ
JUDGE OF APPEAL

30/11/76.

RUMPEE C.J.)
TROLLIP J.A.)
JOUBERT A.J.A.)
GALGUT A.J.A.)

concur