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

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

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# Appeal in Civil Case
# Appèl in Siviele Saak

COMMERCIAL UNION ASS. CO OF SA LTD *Appellant,*

*versus*

P J W B JANSEN VAN VUUREN. *Respondent*

*Appellant's Attorney* SYMINGTON'S & *Respondent's Attorney* DEP. STATE ATT.
*Prokureur vir Appellant* *Prokureur vir Respondent*

*Appellant's Advocate* P LE R. VAN WYK *Respondent's Advocate* I H. HUGO
*Advokaat vir Appellant* *Advokaat vir Respondent*

*Set down for hearing on* 7- 11- 1978
*Op die rol geplaas vir verhoor op*

(T P D)

CORAM RABIE, CORBETT, HOFMEYR, MILLER ARR et DIEMONT. AR

VAN WYK: 9h45 - 11h00; 11h20 - 11h25; 11h50 - 11h55

HUGO 11h25 - 11h50

CAV P T O.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills taxed—Kosterekenings getakseer

| Date Datum | Amount Bedrag | Initials Paraaf |
|---|---|---|
| | | |

COMMERCIAL UNION ASSURANCE COMPANY OF SOUTH AFRICA LIMITED

versus

PHILIPPUS JACOBUS WILHELMUS BUYS JANSEN VAN VUUREN

M.P.
(372/77)

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

COMMERCIAL UNION ASSURANCE COMPANY OF S.A. LTD. Appellant

and

PHILIPPUS JACOBUS WILHELMUS BUYS JANSEN VAN VUUREN Respondent

CORAM: RABIE, CORBETT, HOFMEYR, MILLER, DIEMONT, JJA.

HEARD: 7 November 1978

DELIVERED: 27/11/78.

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J U D G M E N T

DIEMONT, J.A.

Six years ago a collision between two vehicles occurred at an intersection in Pretoria. The one vehicle, a Toyota truck carrying a load of pigs, was driven by a

policeman, .....

policeman, Philippus Jacobus Wilhelmus Buys Jansen van Vuuren; the other vehicle, a Cortina truck, was driven by Marthinus Johannes Roodman, the chief public relations officer of the National Road Safety Association. The driver of each vehicle contended that the other driver had negligently entered the intersection against the red robot light and was responsible for the damage caused and the injuries suffered.

Although the issue is a straightforward one, the conflict on the evidence is such that the dispute has been protracted and no doubt costly, since it has been before the Courts on no less than four previous occasions. Initially van Vuuren was prosecuted in the magistrate's court and acquitted. This was followed by a civil action in which van Vuuren sued Roodman for the damage done to his vehicle and Roodman, in turn, counterclaimed for the damage he had suffered. A ruling of absolution from the instance on both claim and counter-claim was given and the magistrate's judgment was upheld when van Vuuren took

the matter on appeal to the Transvaal Provincial Division.

Nothing daunted van Vuuren issued summons in October 1975 against the Commercial Union Assurance Company of South Africa Limited, the insurer of Roodman's vehicle in terms of the provisions of Act No. 56 of 1972. He alleged in his particulars of claim that the collision had occurred on 2 December 1972 at the intersection of Boom and Paul Kruger Streets, Pretoria, and that the collision was caused solely by the negligence of Roodman in that, inter alia:

"a) he failed to keep a proper look out"

and

"e) he entered the intersection against the red robot".

It was alleged further that in consequence of the collision he had:

"sustained a blow to the head, the nature and effects of which were:

a. That .....

a. That the Plaintiff is permanently blind in his left eye.

b. That the Plaintiff endured pain and suffering.

c. That the Plaintiff has permanently lost the amenities of life to which he was used.

d. That the Plaintiff is permanently disabled."

As a result of this misfortune and other distress which he had suffered and which was catalogued in detail in the pleading, the plaintiff claimed damages in the sum of R24 524,37. This sum was reduced by agreement between the parties at a pre-trial conference, to R7 715,19.

At the conclusion of the trial judgment was given in favour of the plaintiff with costs, but the trial judge, F.S. Steyn,J., held that the collision was partly caused by the fault of the plaintiff and having assessed that fault at 20%, reduced the damages to the sum of R6 173,00. The defendant in the Court a quo, the Insurance Company, appealed against this award.

The issue in this case is largely one of

credibility/ .....

credibility and counsel for the appellant, Mr. van Wyk, was faced in argument with the formidable task of disturbing the strong credibility findings made by the trial judge.

Both the drivers gave evidence; in addition there was the evidence of three eye witnesses - Johannes Mawusa, who was a passenger in plaintiff's vehicle, and two pedestrians, Eliza Kekane and Jennifer Grobler. Evidence was also given by Nicolaas Geldenhuys, a traffic officer who arrived on the scene shortly after the occur= rence, and Jacobus Booysen, the municipal superintendent of the traffic division in the city.

Booysen was the first witness called and gave evidence to the effect that there had been no report of malfunctioning of the robots at the time of the collision and that they were operating normally on a 60 second cycle. That meant that the driver of a vehicle approaching the lights along Boom Street for example, would see a green light for 22 seconds, an amber light for 4 seconds and then a red light for 34 seconds. The only time the lights

would/ .....

would be the same colour for a driver approaching the crossroad along either Boom or Paul Kruger Streets, would be for a safety period of 4 of the 34 seconds when the robots would show red in all directions.

Neither of the drivers gave evidence which was above reproach. The Judge a quo found that the plaintiff was "aggressive" and that in view of the head injury which he suffered, his recollection of events, after the collision, was very unreliable. There can be little doubt that this injury was more serious than anyone realised, and that he remained confused for some hours. He could not remember being assisted out of the overturned vehicle, nor could he say whether he had identified the point of impact to witnesses.

Whether or not he had admitted to the traffic officer that he had drunk one beer earlier in the day was strenuously debated; it is a matter of little consequence since there is no suggestion in the evidence that he was under the influence of liquor or that drink caused the mishap.

What is of consequence is that van Vuuren's evidence shows that he had a clear recollection of the events immediately preceding the collision:

> "Nou eerstens, kan u min of meer onthou hoe laat hierdie botsing plaasgevind het? - Ja, Edele, dit was ongeveer halftwee die Saterdag= middag op die 2de.
>
> Nou kan u dan ook verder net vir Sy Edele sê wat gebeur het of hoe dit gebeur het dat hierdie botsing plaasgevind het? - Edele ek was ongeveer 'n 100 treë van die verkeerslig af toe het ek opgemerk dat die lig rooi is vir my. Ek het stadiger gery en ongeveer 100 treë - ongeveer 50 treë van die verkeerslig af het hy na groen geslaan. Ek het my bakkie oorgesit na 'n laer rat en stadig oorgery. Die volgende ding wat ek gesien het is 'n wit ding wat van die regterkant af aankom. Dit het ek in die hoek van my oog opgemerk en die volgende oomblik het 'n botsing plaasgevind."

The trial judge summed up van Vuuren's evidence, as corroborated by the passenger in his vehicle, as a logical, reasonable and likely account of how a driver had entered an intersection after the robot had changed

to green in his favour.

On the other hand the trial judge found that the driver of the other vehicle, Roodman, was also a good witness and that nothing could be said against his credibility. This finding is rather strange, regard being had to the criticism which followed in the judgment.

There is substance in this criticism because a careful reading of Roodman's evidence shows that the evidence which he gave before Steyn,J., does not tally in several important respects with what he said in the magistrate's court.

I refer specifically to his testimony in regard to speed and distance.

Roodman claimed that by virtue of his occupation he was able to estimate the speed of motor vehicles with some measure of accuracy. Although he was asked about van Vuuren's speed, it is significant that during the course of his examination-in-chief, he was not questioned about

his own speed. Under cross-examination he was pressed to estimate his speed:

> "Teen watter spoed het u ongeveer gery? Toe die botsing plaasgevind het? - - Ek praat onder korreksie maar dit was beslis nie vinniger as 50 kilometer per uur nie."

His attention was then drawn to the evidence which he had given previously:

> "... by die twee vorige verhore het u nadruklik gesê dat u beslis nie vinniger gery het as 35 kilometer per uur nie. Kan u dit onthou dat u dit gesê het of moet ek u daarna verwys? - - As u my daarna kan verwys.
>
> Ons sal nou daarby kom. Ek sal u dadelik daarheen neem. As ek u eerstens kan verwys na die strafsaak bladsy 141, daar het u die volgende gesê. Daar is 'n vraag aan u gevra -
>
> 'Wat was u spoed?' Hulle bedoel daardeur die spoed van u voertuig nie u eie spoed nie -
>
> 'Ongeveer 35 kilometer per uur'.
>
> Kan u onthou dat u dit gesê het? - - Ek kan nie onthou dat ek dit gesê het nie.

Betwis .....

Betwis u dat u dit gesê het? - - Ek betwis dit nie. En dit was gewees op 'n stadium in April van 1973, met ander woorde ongeveer vier maande nadat die botsing plaasgevind het. Is dit reg? - - Korrek.

En ek wil aanvaar dat die dinge darem toe redelik vars in u geheue was? - - Korrek."

At a later stage in the cross-examination counsel returned to the question of speed and more particularly to what Roodman's average speed was as he approached the crossroad :

"Kan ek net wat u spoed aanbetref, u eerstens verwys na bladsy 103 van die oorkonde. Dit was in die siviele saak gewees, dit is die volgende vraag aan u gevra - Daar is aan u gevra:

"Kan ons aanvaar dat u gemiddelde spoed tot en met die botsing nie meer as 30 kilometer per uur gewees het nie?"

U antwoord -

"As jy 5 kilometer meer of minder gaan neem dan is dit korrek."

Volgende vraag is -

"U het .....

"U het vroeër gesê dat u 'n bietjie stadiger gery het nadat u uit Bosmanstraat uitgekom het want u moes 'n draai vat. U het later gesê u het 30 kilometer per uur gery en op die uiterste 35 kilometer per uur. - - - Korrek."

Dan was die vraag -

"Mag ek aanvaar dat u spoed op die meeste gemiddeld nie meer as 30 kilometer per uur was nie? - - Korrek".

Kan u u daaraan herinner? - -

As dit so daar staan is dit korrek".

The reason advanced by the witness for changing his testimony was unconvincing. The matter did not end there as the evidence which he gave in regard to distance was also unsatisfactory. The evidence-in-chief given in the Court a quo reads as follows:

"Het u die hele tyd in Boomstraat gery of het u voor dit in 'n ander straat gery? - - Nee, ek het in Bosmanstraat afgery en ....

In watter rigting? - - In die noordelike rigting en regs gedraai in Boomstraat.

Wat was/ .....

Wat was die kleur van hierdie robot op die tersaaklike kruising toe jy dit vir die eerste keer opgemerk het? - - Dit was groen gewees vir my.

Hoe ver van hom af was u gewees op daardie stadium? - - Edelagbare, dit is moeilik om te bepaal in meter maar ek was omtrent halfpad in die blok van waar ek ingedraai het.

DEUR DIE HOF: Omtrent 50 treë en hy was ...

MNR. DANIELS: Edele, ek dink dit is gemenesaak die blok is afgetree tydens die vorige saak en die blok is 245 tree lank. Dit is 'n besondere lang blok, Edele.

DEUR DIE HOF: Dus die halfblok ver is omtrent 120 treë?

MNR. VAN WYK: 120 treë Edele."

He was cross-examined on this evidence:

"In elk geval, die ander vraag waarmee ek probleme het is die stadium toe u die lig die verkeerslig in die kruising van Boomstraat en Paul Kruger= strate die eerste keer gesien het, u het nou vir Sy Edele gesê op 'n vraag van my Geleerde Vriend, in die getuienis in hoof dat u hom die eerste keer gesien het ongeveer helfte in die blok in. Is dit korrek? - - Korrek.

Met ander .....

Met ander woorde ongeveer 120 treë vanaf die punt van botsing het u hom die eerste keer gesien? - - Ek neem aan 'n bietjie meer omdat die botsing feitlik aan die anderkant van die kruising plaasgevind het.

Sê omtrent 120 meter vanaf die kruising, waar die kruising begin, dit is so afgemeet deur my Geleerde Vriend en my voorganger. - - Ja.

Is dit korrek? - - Korrek.

Want u het op 'n vorige geleentheid in die strafsaak het u getuig bladsy 146 in herondervra=ging deur die Aanklaer het u die volgende gesê. Die vraag was as volg -

> "Meneer kan u net vir die hof sê hoe ver was u van hierdie verkeerslig af toe hy vir u groen geslaan het? (Dit is die verkeerslig verwysende na die een op Paul Kruger en Boomstraat.) Ongeveer hoe ver was u? - - Toe ek om die draai gekom het, dit was presies een blok vanaf daar was die lig vir my groen".

Kan u onthou dat u hierdie antwoord gegee het? - - Ek aanvaar dit so, Edelagbare."

Since it was common cause that the length of the block was 245 yards (220 metres approximately) it is apparent that Roodman attempted to colour his evidence, not

only/ .....

only in regard to his speed, but also in regard to the distance in which he kept the green light under observation. The reason for his so doing is apparent. A simple calcula= tion exposes the fallacy in the figures he gave. At a speed of 35 kilometres per hour, he would cover a distance of 9,7 metres per second, and during the 22 seconds which the light showed green, he would travel approximately 214 metres. It is true that if the light had turned to amber, he would have been able to travel a further 39 metres before the change to red, but he claimed that he did not see an amber light: (I refer to page 118 of the record):

> "Waar was u die laaste keer toe u die robot gesien het, die een wat verkeer reguleer in die rigting wat u gery het? - - Toe ek die interseksie binnegegaan het.
>
> Wat bedoel u met, toe ek die interseksie binne= gegaan het? Voordat u oor die wit oorganger strepe is, voetganger strepe is? - - Nee, nadat ek alreeds binne die kruising was, Edele.
>
> Het die lig op enige stadium van kleur verander? - - Nee."

The .....

The trial judge referred to the estimates of speed and distance given by Roodman and said that they cast a shadow on Roodman's credibility as a witness. He continued:

> "Die feit skep 'n onweerspreekbare waarskynlikheid dat die robot wat reeds groen was toe hy om die hoek van Bosmanstraat gekom het, rooi teen hom kon geslaan het voordat hy in die kruising ingegaan het, inagnemende 'n skatting van sy snelheid as 30 kilometer per uur, met 5 kilometer per uur meer of minder."

The courts have from time to time drawn attention to the fact that mathematical calculations based on estimates of speed or distance may lead to erroneous results. In van der Westhuizen & Another v S.A. Liberal Insurance Co. Ltd., 1949 (3) SA 169, the trial judge (Ogilvie Thompson, A.J., as he then was) stated at p.168 of the report:

> "In my opinion, however, the strictly mathematical approach, though undoubtedly very useful as a check, can but rarely be applied as an absolute test in collision cases, since any mathematical calculation so vitally depends on exact positions and

speeds; / .....

> speeds; whereas in truth these latter are merely estimates almost invariably made under circum= stances wholly unfavourable to accuracy."

The Judge a quo did not overlook the risk of placing too great a reliance on this type of calculation; indeed he specifically referred to the well-known passage in the judgment of Watermeyer, CJ., in Pierce v Hau Mon 1944 A.D. 175 at 179 in which the Chief Justice stated that small errors in the estimates may cause very large errors in the conclusions. Having sounded this note of caution, the trial judge stated:

> "Indien Roodman, nadat hy lank die groen robot in sy guns waargeneem het en vir 'n paar sekonde sy oplettendheid verslap het voor hy in die kruising ingegaan het, is dit logies moontlik dat hy die kruising teen 'n rooi robot ingegaan het."

I find no fault with this conclusion since in a case such as this, weight can, in my view, be given to a calculation where two of the three factors are definite - the distance 220 metres, the time 22 seconds - and where the third factor, the speed, is given by a witness who claims

some skill in the estimation of speed.

However, the matter does not rest there. The trial judge considered what reliance he could place on the three eye witnesses who testified. The first of them was a Mrs Grobler who alleged that she had been standing on the south-eastern corner of the crossroad in front of a cafe. She said the robot was red against traffic entering the crossroad from Paul Kruger Street, that is the direction from which the plaintiff came. She wilted under cross-examination; the trial judge was not impressed. He recorded that she had a poor standard of intelligence, and described her with more candour than gallantry as giving the impression in the witness box of "'n verskrikte 17-jarige bakvissie". He concluded that her evidence must be dismissed as pure imagination and reconstruction. Counsel for the appellant could find no fault with this conclusion. He did, however, challenge the Court's finding that evidence given by another eye witness, Eliza Kekana, should be believed.

This witness was called by the plaintiff. She

said / .....

said that she was on her way from work to Marabastad to the north of Boom Street. She was proceeding on her lawful way with two loaves of bread on her head when she came to the Boom-Paul Kruger Street crossroad. The light was red and so she waited on the north-eastern corner for the light to change. Before the light changed, the vehicle driven by the plaintiff entered the crossroad, travelling from north to south, while another vehicle, travelling from west to east along Boom Street entered the crossroad against the red light, and collided with the first vehicle.

Counsel for the appellant concentrated much of his argument on the defects in this witness's evidence. That there are defects cannot be gainsaid. She told the magistrate that she left her place of work at about 1 pm; she told the Judge a quo that it was midday when she left. She said that there were two pigs lying dead in the road - victims of the collision; other witnesses say that only one pig was killed. She said cars travelling from east to west along Boom Street waited at the robot while she waited -

this / .....

this cannot be, since to the east of the crossroad is a one way street for traffic moving from west to east. The trial judge was made aware of these imperfections in Kekana's evidence; he considered them in his judgment, discussed them and came to the firm conclusion that they were of no significance and that she was a reliable and trustworthy witness.

> "Ek is deur hierdie kritiek op Kekana se getuienis nie oorreed om die gevolgtrekking te maak dat sy 'n geheel-en-al leuenagtige en gefabriseerde verhaal aan die hof kom vertel het dat sy die betrokke ongeluk sien gebeur het nie. Trouens die kritiek oorreed my nie eers om die gevolg= trekking te maak dat sy moontlik met 'n totale verdigsel voor die hof voor 'n dag gekom het nie. Ek aanvaar dat hierdie bejaarde, eerbare, en rustige Swart vrou die ongeluk gesien het soos deur haar getuig. Aangesien sy 'n onbetwisbare motief gehad het om die robot, wat die oorgang van Paul Krugerstraat deur middel van Boomstraat beheer, waar te neem en te gehoorsaam, aanvaar ek haar getuienis oor die stand van die verkeersligte toe die botsing plaasgevind het."

I have read Kekana's evidence carefully and I am satisfied that she witnessed the collision and that her

recollection of the state of the lights was accurate despite the fact that five years had gone by since the occurrence.

It does not surprise me that after this passage of time, some incidental events may have become blurred, that she may have forgotten what other vehicles there were at the crossroad and that she may be vague as to the time she took to walk from her place of work to the corner of Boom and Paul Kruger Streets. But she would be less likely to be confused about the cardinal fact that she saw the car enter the intersection against the red light. It has been said that a Court of Appeal will hesitate long before it disturbs the findings of a trial judge on verbal testimony. Certainly no argument has been adduced before us to justify the rejec= tion of this woman's evidence.

There is one other witness who was called to testify for the plaintiff - the man who was a passenger in the Toyota vehicle - Johannes Mawusa.

This witness testified that he was seated next to van Vuuren, that he had bent down to fasten his shoe lace, and that when he looked up he saw that the robot was green. He estimated that the vehicle was then 8 or 10 yards from the

crossroad. This evidence would have been more impressive if Mawusa had not told the Court on the previous occasion when he was in the witness box, a somewhat different story. He told the magistrate that when he first saw the light, it was yellow and that it turned green - a sequence which was patently incorrect. The trial judge nevertheless accepted Mawusa's evidence on the basis that the interpretation may have been faulty; he pointed out that the same word "ethlasa" is used to describe more than one colour in the language which the witness spoke. This may be so but it does not explain how the witness came to tell the magistrate that the light changed colour when the vehicle was some 70 yards away from the crossroad. While I would not go so far as to say that Mawusa's evidence should be rejected, it is by no means as convincing as the evidence which Eliza Kekana gave and on which, as I have said, the trial judge placed great reliance.

In the result I cannot find that the trial judge erred save possibly in one respect, and that was on an issue

which/ .....

which was not raised on appeal. In the penultimate paragraph of his judgment he stated:

> "Op die geheel van die getuienis bevind ek dat die verkeer in en by die kruising nie druk was nie. In die bepaalde verkeersomstandighede meen ek dat Eiser nie onthef was van sy plig om by die binnegaan van die kruising uit hoofde van 'n gunstige robot-lig, 'n blik na regs en links te werp om hom te vergewis dat dwarsverkeer op die robotsein reageer. Die versuim om die hele interseksie deur 'n vlugtige blik te oorsien was na my oordeel in die omstandighede nalatig en dit het kousaal bygedra tot die ongeluk. As Eiser die aankomende gevaar bemerk het in die sekond of twee vermydingstyd wat nog oor was, kon hy hoogswaarskynlik vermydingstappe gedoen het wat minstens die voortvloeiende skade kon beperk het as dit die botsing nie heeltemal voorkom het nie.
>
> In die omstandighede meen ek dat Eiser in die mate van 20% self skuld het aan die ongeluk".

There is much to be said for the proposition that a driver is not under a duty to look to the left and the

right/ .....

right on entering an intersection when the lights are in his favour. I refer to a passage in the judgment of Scott, L.J., in the case of Joseph Eva Ltd. v. Reeves 1938(2) A.E.R. 115 at 120:

> "Nothing but implicit obedience to the absolute prohibition of the red - and indeed of the amber, subject only to the momentary discretion which it grants - can ensure safety to those who are crossing on the invitation of the green. Nothing but absolute confidence, in the mind of the driver invited by the green to proceed, that he can safely go right ahead, accelerating up to the full speed proper to a clear road in the particular locality, without having to think of the risk of traffic from left to right crossing his path, will promote the free circulation of traffic, which, next to safety, is the main purpose of all traffic-regulation. Nothing again will help more to encourage obedience to the prohibition of the lights than the knowledge that, if there is a collision on the crossroad, the trespasser will have no chance of escaping liability on a plea alleging contributory negligence against the car which has the right of way. Finally, nothing will help more to encourage compliance with the summons

of the green to go straight on than the knowledge of the driver that the law will not blame him if unfortunately he does have a collision with an unexpected trespasser from the left or right".

This case was cited with approval in a recent judgment of this Court - Netherlands Insurance Company of South Africa Limited v Brummer (as yet unreported).

However, as no cross-appeal was noted, no further consideration need be given to the question whether the quantum of damages was wrongly reduced by 20%.

The appeal is dismissed with costs.

M.A. DIEMONT

RABIE, JA
CORBETT, JA
HOFMEYR, JA
MILLER, JA

Concur.