EB/215/78

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

A.A. MUTUAL INSURANCE ASSOCIATION LTD. Appellant

and

ANGELINA VELLEM Respondent

Coram: RABIE, KOTZé, MILLER, DIEMONT, JJ.A. et

TRENGOVE, A.J.A.

Heard: 20 November 1978

Delivered: 30 November 1978

J U D G M E N T

KOTZé, J.A.:

In the East London Circuit Local Division KANNEMEYER, J., awarded to the plaintiff (the respondent in this Court) damages in the sum of R2 250,00 with costs

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in respect of bodily injuries sustained by her on Qumza Highway, Mdantsane on 20 January 1975 when she came into collision with a motor vehicle GCE 1601 (the insured vehicle) insured by the defendant (the appellant in this Court) in terms of the provisions of the Compulsory Motor Vehicle Insurance Act No. 56 of 1972. The learned trial Judge held that both the plaintiff and the driver of the insured vehicle, Pozolo Ngqubekile, were responsible for the accident. He assessed their fault at 70 per cent and 30 per cent respectively and accordingly reduced the plaintiff's damages (which had been assessed by agreement at R7 500,00) by seven-tenths. The defendant now appeals against this order. As the argument addressed to us does not raise any matter of principle and falls within a very narrow factual compass, I shall deal therewith very briefly.

Qumza Highway runs from west to east. The accident occurred at about 7 a.m. on 20 January 1975 in what Pozolo described as conditions of good visibility. He was driving

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from east to west. In the vicinity of where the collision occurred there is, on the southern side of the highway, a decline to a stormwater drain some distance below the road surface. A gravel verge now separates the road surface from the point where the descent commences. At the time of the collision the gravel verge was to some extent overgrown by vegetation. A rough track or pathway traverses the decline from the highway to the low-lying area.

It is common cause that at about 7 a.m. on the day of the accident the plaintiff, then 53 years of age and in the words of the trial Judge "a somewhat stout woman who does not give the impression of one who would be of great agility", came up the track towards Umzumbe Highway intending to cross it on her way to a nearby railway station. The main disputed issue of fact at the trial was whether the plaintiff was struck, as she testified, by the insured vehicle whilst she stood in the middle of the road waiting

for another vehicle travelling from west to east to pass in front of her or whether, as the defendant maintained, she suddenly and unexpectedly ran across the highway from south to north when Pozolo was a mere seven paces away from her. The learned trial Judge rejected the plaintiff's version that she was stationary and found that she was crossing the highway "at a brisk pace ... without ensuring that it was safe for her to do so". This conduct on her part the learned Judge regarded as negligent "particularly in view of the terrain and the fact that this was an unusual place for a pedestrian to emerge".

But the learned Judge found that Pozolo was also negligent albeit far less so than the plaintiff. He based this finding on the conclusion that Pozolo failed to keep a proper lookout and held that in explaining his failure to see the plaintiff earlier than he did Pozolo exaggerated the height of the growth on the side of the highway. His evidence was that the plaintiff only became visible when

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she reached the edge of the tar as his view was obstructed by bushes. This explanation the trial Judge did not accept. He expressed his finding as follows:

> "... he should and could have been conscious of her presence when she was approximately three metres from the edge of the gravel. He only appreciated her presence when she was on the gravel itself and on his own evidence, had he seen her earlier and at the reasonable speed at which he was driving, he would have been able to stop and to avoid the accident."

> "In view of all the evidence that I have heard, I have come to the conclusion that the insured driver exaggerated the height of the growth on the side of the road. I reiterate that it was never put to the plaintiff that the growth on the side of the road was of such a nature that it would have obscured her from oncoming cars and that when she was asked the height of this bush and when she said it was about waist-high, that evidence remained uncontradicted, and the first suggestion one had of bush or trees some 7 or 8 feet high was when the insured driver gave evidence under cross-examination."

> "In all these circumstances I come to the conclusion that the probabilities established

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> by the plaintiff are that the bush, that she freely admitted existed there, was as she described something in the vicinity of waist-high. Looking at the photographs it is clear that had a driver been keeping a proper lookout he would have been conscious of the upper half of a person crossing what is now the gravel verge and must then have appreciated that that person might cross the road and should have taken appropriate precautions, particularly if she come onto the road as she certainly did on the insured driver's version, either running or moving at a brisk pace."

(With reference to the first of the above quoted paragraphs the "reasonable speed" mentioned was that given in evidence by Pozolo viz. about 30-35 miles per hour and the photographs were exhibits A1-8. They were taken at the accident scene by a firm of loss adjusters on behalf of the defendant during 1978).

The sole basis upon which the finding of the Court a quo was assailed before us was that the plaintiff's evidence that the bushes were only waist-high was "completely unacceptable" and should have been rejected together with

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the major part of the remainder of her evidence.

Only two witnesses, viz. the plaintiff and Pozolo, testified in regard to the nature of the vegetation on the southern side of the highway as at 20 January 1975. The pleadings were silent in regard to this feature and understandably the plaintiff did not refer thereto in her evidence-in-chief. In the course of cross-examination it was put to the plaintiff that she came "out of the bushes on the side of the road into the road". She agreed and in re-examination the matter was reverted to. I quote from the record:

> "You said that there were bushes on the side of the road where the gravel shoulder is now. How high were these bushes? -- The bushes were not tall.
>
> How tall? Indicate with your hand how tall about? -- Up to here.
>
> BY THE COURT: About waist-high.
>
> MR JONES: Iam sure it is nearly waist-high, My Lord, it would be about a metre, or less than a metre."

Senior counsel who appeared on behalf of the defendant

obtained leave to cross-examine the plaintiff further and, although he then had the opportunity to do so, he did not revert to the nature of the vegetation, the density or the height thereof. Nor was it suggested to her that evidence on behalf of the defendant would be to different effect. In his evidence in chief Pozolo said that he could not see the plaintiff before she was at the edge of the tar because his "view was obstructed by those bushes". The final question in his evidence in chief reads:

> "Was it possible to see a person who had come up that pathway before that person reached the edge of the tar?"

He replied:

> "There was none."

He was neither questioned during examination-in-chief nor did he testify about the height of the bushes. But in cross-examination the matter was pertinently raised. I again quote from the record:

"MR JONES: Now what sort of bushes were there? On the gravel verge? -- They were big bushes and they were all of the same size.

What size? -- They were fairly big. A person travelling on foot could not be seen.

What size?

BY THE COURT: What height.

MR JONES: What height? -- They were very tall, but not as far as this roof.

It is about 10 foot six.

BY THE COURT: Taller than you? -- Yes, they were.

Were they trees? -- They were trees.

MR JONES: Why did you say they were bushes and shrubs?

BY THE COURT: I think he used the word 'fati' in giving evidence.

MR JONES: I do not recollect his wording. What word did you use when you described these. Now you say they were trees. What word did you use before that? -- (Interpreter: He said 'ntu(?)')

And in his evidence-in-chief? -- Bushes are the trees.

What word did he use, Mr Interpreter?

BY THE COURT: When he was giving evidence-in-chief, can you remember yourself how he described these, a word meaning a bush or a shrub or a tall tree? Is there a difference in Xhosa between them? -- (Interpreter: Yes, there is, My Lord).

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Yes, now can you remember what he said in chief, what word he used?
INTERPRETER: He used 'amahlatu'.
BY THE COURT: What does that mean?
INTERPRETER: It means bushes.
BY THE COURT: Bushes? -- Yes.
MR JONES: And he did not use the word 'ntu'? -- I referred to 'amahlatu', known as bushes.

Why do you now say they were trees if they were bushes? -- A bush is a tree.

No, a bush is not a tree. Everybody knows that. -- And there were bushes as well as trees there.

Yes, you said initially they were bushes. -- That is so.

The plaintiff says there were bushes about as high as her waist, a little under a metre. -- I maintain that there were bushes which were taller than herself, otherwise I would have been able to see her.

Well now firstly, were there bushes or were there trees? -- They were bushes.

So there were not trees? -- There were also some trees.

Where were the trees? -- It was growing amongst the bushes.

And these trees you say were as tall as - not quite as tall as the roof, the ceiling? -- That is correct.

Now what were the bushes? -- They are of the same height.

The bushes the same height as the trees? -- They were of the same height.

What sort of bushes are these? -- They were wild bushes.

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Are they thick bushes? -- They were thick.

Thick and tall? -- That is so.

And growing all along the gravel verge? -- That is so."

The following interchange is recorded after a remark by plaintiff's counsel that he did not understand the defendant's counsel to have challenged the plaintiff's evidence as to the size of the bushes:

"MR MULLINS: My Lord, it was in answer to a final question by Your Lordship, I suppose I could have asked ... (intervenes)
BY THE COURT: Well, it was left in the dark and I wanted to know, because it seemed a very vital question whether she was concealed by these bushes or not, that is why I asked her.
MR JONES: And I do not think it has been suggested to any other witness that these trees were as high or as thick as you suggest.
BY THE COURT: Mr Mullins, it was in fact elicited in re-examination of Mrs Vellem.
MR MULLINS: I beg Your Lordship's pardon.
BY THE COURT: I asked other questions.
MR MULLINS: Yes, I beg your pardon.
BY THE COURT: The last answer in re-examination was the bushes were on the gravel - I am sorry, re-examination would have been you.

MR JONES ...../12

MR JONES: I recall dealing with it.
BY THE COURT: The bushes were on the gravel shoulder and they were about 3 foot - up to about my waist high.
MR MULLINS: Yes, I beg Your Lordship's pardon.
MR JONES: Are you sure that you are not embroidering or exaggerating the size of these bushes? -- I am not exaggerating anything, the bushes were tall.

I suggest to you that if your evidence as to the height and thickness and position of these bushes and trees is correct, it would have assumed a major importance in this case so far. What do you say to that? -- I hear as you put it to me.

Do you not agree? -- I know nothing."

Having outlined the relevant evidence, I now return to counsel's argument in support of the appeal. In essence it was contended that the plaintiff's evidence was found to be false in every material respect (that she walked across the road and that she was stationary in the middle of the road when she was struck), that it was therefore not necessary to question her on the height of the bushes and that the respondent was accordingly fully entitled to stand or fall by the argument that her evidence should be rejected in toto. The main obstacle in the way of upholding

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this contention is that it would involve a finding that the trial Judge erred in his evaluation of factual evidence. The power of a court of appeal to overrule a trial court's factual findings and the circumstances in which it ought to do so have been stated too often to bear repetition. Suffice it to point out that:

(a) The present is not a case in which factors of the kind mentioned by INNES, C.J., in the ultimate sentence on p. 75 of Parkes v. Parkes, 1921 A.D. 69 are present or where there has been a failure to take account of probabilities. On the contrary material exists on the record which bears out the assessment of the trial Judge that Pozolo tended to exaggerate. For example: (i) during cross-examination the plaintiff was moved to ask counsel "Isn't a car supposed to give a warning when it was going to hit somebody?" There was no suggestion then that Pozolo did hoot and yet when he came to testify he maintained that

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he did so - a statement hardly compatible with his version of the collision; and (ii) whereas during his evidence-in-chief he testified that the plaintiff emerged running, his description became more graphic during cross-examination. ("She emerged running fast"; "She was running as fast as she could" - rather unlikely conduct having regard to her age, build and the incline she had to mount).

(b) The learned Judge was well aware of the shortcomings in the plaintiff's testimony and clearly did not overlook them. Steeped as he was in the atmosphere of the trial, he was in a particularly favourable position to determine whether the plaintiff's spontaneous reply in regard to the height of the bushes was more convincing than Pozolo's belated testimony in regard thereto and his hesitation and uncertainty whether the vegetation consisted of bushes or trees or a combination of both.

(c) Although...../15

(c) Although undoubtedly the failure to cross-examine on a particular point does not necessarily amount to acceptance of the unchallenged evidence, a trial court cannot be faulted if, as happened in the present case, in appraising the evidence it has regard to such failure together with all the other relevant features.

Mindful of the advantages enjoyed by the trial Judge and the features abovementioned I find it impossible to conclude that a wrong result was arrived at. It follows that the appeal must fail.

There is no reference in the order of the Court a quo to the payment of interest on the amount of the judgment debt. I need not deal with this question as it was conceded by Mr. Mullins, on behalf of the defendant, that, in the event of the appeal being dismissed, interest would be payable to the plaintiff at the prescribed rate in terms of the provisions of Act No. 55 of 1975.

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The appeal is dismissed with costs.

G.P.C. KOTZÉ
Judge of Appeal
30/xi/19.

RABIE, J.A.)
MILLER, J.A.)
DIEMONT, J.A.) concur
TRENGOVE, A.J.A.)