G.P.-S.25617—1974-75—3 000 J 219

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

Union of S.W.A. Ins. Co. Ltd Appellant,

versus

Tatamo Mtyeka Respondent

Appellant's Attorney Symmonds & Co
Prokureur vir Appellant

Respondent's Attorney
Prokureur vir Respondent

Appellant's Advocate P.J.J. Olivier
Advokaat vir Appellant

Respondent's Advocate W.H.E. Slaydon
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op

Coram: Rumpff C.J. Corbett Berman JJA
Wessels et Hefer AA

(E.C.D)

9.45 am — 11.00 am
11.15 am — 12.40 pm

C.A.V.

The Court allows the appeal with costs and the order in the Court a quo is altered to one of absolution from the ~~Judgment~~ Application with costs.

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:

UNION AND SOUTH WEST AFRICAN
INSURANCE COMPANY LIMITED Appellant

and

TATANA MTYEKU Respondent

Coram: RUMPFF, C.J. CORBETT, KOTZé, JJ.A. et
VILJOEN, HOEXTER, A. JJ. A.

DATE OF HEARING: 14 NOVEMBER 1978

DATE OF DELIVERY: 1 December 1978

J U D G M E N T

HOEXTER, A.J.A.

After dark on the evening of the 25th August 1973 the plaintiff, an adult African male, was driving an Opel motor car from Mdantsane Township to East London on

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the Rubusana Road, when a collision took place between the said Opel and a Holden motor car travelling in the opposite direction upon the same road. The Holden motor car was being driven by one Lizani, and in terms of the Compulsory Motor Vehicle Insurance Act, 56 of 1972, the defendant company was the insurer of the Holden. As a result of the collision the plaintiff suffered bodily injuries. Alleging that the collision had been caused by the negligent driving of Lizani the plaintiff sued the defendant for loss and damage suffered as a result of the said injuries. The defendant resisted the action which was heard in the East London Circuit Local Division by CLOETE, J.P. The trial Court found that the plaintiff's injuries were due to the negligence of Lizani in that at the time of the collision the Holden had been travelling on its incorrect side of the Rubusana Road. Accordingly judgment was entered in favour of the plaintiff who was awarded damages in the

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sum of R11 950, together with interest thereon from ten days after the date of judgment to date of payment, and costs. The defendant appeals against the whole of that judgment.

The scene of the accident was a section of the Rubusana Road which runs roughly from east to west. Lizani's Holden was travelling from east to west and the plaintiff's Opel from west to east. The Rubusana Road has a tarred surface which, at the scene of the accident, is some 7,5 metres wide. There was no white line (nor any other device such as a series of reflectors) to mark the middle of the highway. The collision took place on a stretch of the highway in which the Rubusana Road has a bend. In order to negotiate the bend the plaintiff's Opel had to turn left, thereby traversing the inner section of the curve, and Lizani's Holden had to turn right, thereby traversing the outer section of the curve. The sole pas= senger in the Opel motor car was an African woman. Imme= diately after the collision she fled from the scene.

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In consequence of the collision both the plaintiff and Lizani lost consciousness and when at about 8.20 p.m. on the same evening sgt. Mateza of the Mdantsane police station arrived at the scene of the accident the only eye-witness still there present was one Ninzi. Assisted by another member of the S.A.P. sgt. Mateza took measurements at the scene of the accident, and two days later he pro= duced a police plan and a key thereto, both of which were handed in at the trial in the Court below.

After the collision the plaintiff underwent surgical treatment at the Frere Hospital in East London. He was still a patient in an orthopaedic ward of that hos= pital when on the 14th September 1973 constable Mcanyangwa of the S.A.P. took from him a statement which was handed in at the trial as exhibit "E". A further sequel to the accident

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was the prosecution of the plaintiff during the middle of 1974 in the Magistrate's Court at Mdantsane on a charge of negligent driving. At the said criminal trial Lizani, the driver of the insured vehicle, was one of the witnesses for the prosecution; and the plaintiff testified under oath in his own defence. At the outset of the proceedings in the Court a quo there was handed in a signed minute in terms of Rule 37. One of the matters recorded in the minute is an agreement that the record of the proceedings in the said criminal trial in the Magistrate's Court -

> "be handed in without proof by the Clerk of the Court".

Counsel informed us that the above terse statement was intended to signify that the record produced in the Court a quo represented an accurate transcript of the proceedings at the plaintiff's criminal trial; and that it was dealt with on that footing by the trial Court. It is necessary once again

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to stress that when agreements of this sort are recorded in trial matters they should be framed in clear language leaving no room for speculation as to precisely what was intended.

The plaintiff is 37 years of age and is a person of very limited education. At the time of the collision he was not the holder of a driver's licence and he was running a "pirate" taxi service in Mdantsane. Pro= ceeding as he was from west to east the plaintiff's correct side of the highway was the northern half of Rubasana Road. Some distance to the east of the place where the collision took place, and on the gravel strip immediately adjacent to the southern half of Rubasana Road, there is a bus-stop serving passengers travelling by bus in the same direction as that in which Lizani was driving his Holden car. Shortly before the collision the eye-witness Ninzi was standing on the gravel verge flanking the

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southern edge of the tarred road surface, but at a point some distance west of the bus stop.

At the trial both the plaintiff and Lizani testified. Sgt. Mateza was called as a witness for the plaintiff and Ninzi testified on behalf of the defendant. According to the plaintiff's evidence he was approaching the aforesaid bend in the Rubusana Road when he noticed a stationary bus at the bus stop. He next observed an on-coming vehicle which had merely its parking lights on. The plaintiff estimated his own speed at the time at 20-30 m.p.h. and he said that the oncoming vehicle was travelling faster than that. In order to induce the driver of the approaching vehicle to switch on its headlights, so explained the plaintiff, he signalled to the approaching vehicle by dimming the headlights of his Opel car. Of the further sequence of events the plaintiff in his evidence-in-chief gave the following brief account -

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"What happened then ? You dimmed your lights at him you say, did he put on his headlights or didn't he ? ---- It was then that I heard an impact.

When the impact occurred, where were you driving ? Were you on your incorrect side or on your correct side of where were you travelling ? ---- I was driving on the correct side of the road.

Acoording to you what caused this man to come across to his incorrect side then ? ---- That is what I fail to understand because I couldn't reason out how he came on my side of the road.

Were you able to do anything to avoid the accident ? ---- No. "

In cross-examination the plaintiff conceded that the oncoming vehicle passed the stationary bus without going onto its (the Holden's) incorrect side of the road ; and that the presence of the stationary bus was therefore not related to the col= lision between the two cars. But the plaintiff departed somewhat from his version in chief by saying that before the moment of impact he had actually seen that the oncoming car

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was -

"more to my side; he was on my side."

Indeed, the plaintiff went on to describe how he had seen the oncoming vehicle "astride the white line". The plaintiff admitted that at about 6 p.m. on the night in question he had consumed a quart of beer.

The version of the collision given by Lizani in the course of his evidence was the following. He was driving his Holden with its lights on dim at a speed of 35 m.p.h.. Whe he passed the bus stop he saw an oncoming car. I quote from Lizani's evidence-in-chief -

> "When you saw this car for the first time, where was it ? Was it on its correct side of the road or not ? ---- It was in the middle of the road.
>
> When it collided with you ? ---- I was trying to avoid it and when it collided with me, I was almost leaving the road.
>
> What did you do to try and avoid it ? ---- I tried to avoid it (the witness indicates swerving).
>
> To your left ? ---- That is correct.
>
> Were you on your correct side of the road

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~~when the collision occurred ? ---- That is~~ so."

At an early stage of his evidence-in-chief Lizani was asked whether when he drove past the bus-stop there was a bus standing there. His answer was -

"I cannot remember seeing a bus there."

This answer was in conflict with the testimony given earlier by Lizani when he was a witness at the criminal trial in the Magistrate's Court, when he said the following -

> "The bus was stationary on the bus bay on my side in front. I overtook this bus. I did not see a bus on the other side of the accused. As I was going past the bus the accused came towards me. .... The accident happened just in front of the bus. The car was past and this car was coming straight at me."

~~When Lizani was cross-examined in the Court~~ a quo the above passage from his evidence at the criminal trial was put to Lizani. Lizani said that he had not seen any bus

at the time and that he could not remember making any mention of a bus when he testified before the magistrate.

The police plan prepared by sgt. Mateza is unhelpful and misleading to boot. However, it indicates that the positions respectively occupied by the two cars involved in the collision when he arrived on the scene were as follows. The front of the plaintiff's Opel was pointing roughly in a south-easterly direction with its left rear on the extreme northern edge of the tarred surface of the road; the front of the Holden was facing roughly in a north-westerly direction and the left rear of the Holden was ½ metre from the southern edge of the tarred surface of the road. From the damage to the two cars it was apparent that the right-hand side of the Opel had been in contact with the right-hand side of the Holden. A point marked "C" on Mateza's plan is described in the key thereto as the "alleged point of impact". Point "C" is 2,9 metres from the northern edge of the tarred road surface

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and therefore ,85 metre North of the imaginary middle line of the Rubusana Road. By what means sgt. Mateza selected point "C" emerges from the following answers elicited from Mateza during his examination-in-chief -apparently without any objection based on the inadmissibility thereof :

> "Was a point of impact pointed out to you by anybody there ? ---- A certain man by the name of Elliot Ninzi pointed out to me".

Mateza went on to say that he:

> "agreed with this point of impact, because there were pieces of glasses (sic) that were scattered around."

Mateza told the trial Court that on the day previous to the day on which he gave evidence he had kept traffic at the scene of the accident under observation. During this time he had noticed that when a bus was stationary at the bus-stop adjacent to the southern edge of the tarred surface of Rubusana Road, motor cars travelling from East to West past the bus-stop were inclined to cut the corner and to

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encroach upon the northern half of the highway.

In cross-examination Mateza watered down his earlier evidence that Ninzi had indicated a point of im= pact to him; and he seemed to suggest that Ninzi had done no more than to indicate a general area on the road in which the collision might have taken place. In re-examination Mateza confessed to uncertainty about where precisely on the road he had seen glass scattered about ; and he further said that except for the glass on the road there was nothing else at the scene of the collision to indicate the point of impact.

The defendant's witness Ninzi is a factory machine-operator aged 30. He matriculated at school and he has a driver's licence. Neither the plaintiff nor Lizani was known to him. On the night in question he had visited a friend and he was walking home. Ninzi said that he had

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nothing to drink. Very shortly before the accident Ninzi was standing on the gravel verge on the southern edge of the Rubusana Road, intending to cross to the northern edge of the road, when his attention was attracted by the two motor cars approaching each other from opposite directions. According to Ninzi he saw the Holden first and then the Opel. The Holden had its lights on but they were "not bright"; he was unable to say whether the Holden's lights were on dim or whether only its parking lights were on. The lights of the Opel, however, were on bright. Ninzi said that the Opel was travelling at a high speed. It failed to negotiate the bend in the road and collided with the Holden on the latter's correct side of the road. After the collision Ninzi went first to the Opel. When he opened a door of the Opel a female passenger, apparently unhurt, got out of the car and ran away. The plaintiff was unconscious and Ninzi detected a smell of liquor on the plaintiff's breath. Ninzi said that

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the Opel had encroached only partially onto its incorrect side of the road; it was straddling the imaginary middle line of the tarred surface. Ninzi admitted that after the arrival of the police at the scene of the accident Mateza spoke to him about the accident, and asked him how it had occurred. But Ninzi was adamant throughout that Mateza had not asked him to indicate a point of impact; and that he had in fact not given Mateza any indication as to the situation of the point of impact. Indeed, Ninzi said that he (Ninzi) had asked Mateza where the point of impact was. According to Ninzi the accident happened "all of a sudden and quickly" and he was unable to indicate the point of impact because after the collision "the cars swerved". At the time of the accident, so Ninzi testified, he had not been aware of the presence of a bus at the bus-stop in question.

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In [illegible] the evidence before the trial Court rejected the evidence of Lizani which it described as an unreliable witness. This finding was based on the contradiction between Lizani's evidence before the Magistrate, wherein he made fairly detailed reference to the presence of a stationary bus at the bus-stop in question, and Lizani's evidence in the Court *a quo*, in the course of which Lizani firmly denied that there had been any bus at the scene of the accident. It seems to me that on this score Lizani's evidence is open to substantial criticism, and for purposes of the present appeal I shall assume in the respondent's favour that the trial Court was correct in so rejecting Lizani's evidence as unreliable.

While not attacking the trial Court's rejection of Lizani's evidence counsel for the appellant forcefully contends that the judgment given in the respondent's favour was open to objection because the Court *a quo* (i)

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had failed to subject the evidence of the plaintiff himself to proper critical examination and (2) had erred in concluding on the evidence as a whole that the plaintiff had discharged the onus of establishing on a balance of probabilities that the collision had taken place on Lizani's incorrect side of the road.

To deal with the above submissions it is necessary to begin by considering the effect of the plaintiff's statement to the police on the 14th September 1974, as well as his evidence at the criminal trial in 1974; and to look also at certain averments made in the plaintiff's particulars of claim. The portions of the plaintiff's statement to the police presently material are the following -

> "I was travelling with bright lights. As I was taking a slight curve to the left I saw another motor vehicle coming from the opposite direction. It was travelling at a very high speed and with bright lights. This motor vehicle was travelling on its correct side of the road but in a zig-zag. When I

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> dimmed the lights it never did. It was at this stage that the two motor vehicles col= lided and I lost consciousness ..... My driver's licence was in my pockets when this accident occurred ..... I was perfectly sober at the time of the accident."

At his criminal trial the plaintiff said that he had not seen the oncoming car which collided with him; that the on= coming car had no lights; and that on the day of the colli= sion the plaintiff had had no liquor. In addition he told the magistrate that the right wheels of the bus at the bus-stop had been on the tarred surface of the road. Turning next to the pleadings one notices that among the alleged acts of negligence which the plaintiff seeks to lay at the door of Lizani there are the following two :

> " (g) He overtook another vehicle at a time and in a manner which was dangerous and inopportune in the circumstances;
> (h) He drove the insured vehicle without the lights burning."

In the course of his judgment the learned Judge-President said of the plaintiff :

> "Before .....

"Before the magistrate he gave substantially the same version in evidence in chief as be= fore me. He however now states that the sta= tionary bus was wholly off the tar whereas before the magistrate he said that the right wheels of the bus were on the tarred road. He now says that he cannot remember making a statement to the police and that at the time the statement was supposed to have been made he was in hospital. The plaintiff also can= not explain how it was pleaded on his behalf that the approaching car had no lights. In spite of these circumstances, and a degree of vagueness in his evidence on these contradic= tions his version is substantially the same in this court as it was in the magistrate's court, namely that he was travelling on his correct side when the insured vehicle in passing a stationary bus collided with his car on the incorrect side of the road."

It seems to me, with respect, that in concluding that the plaintiff's version in the Court below was substantially the same as his version in the magistrate's court the learned trial Judge overlooked several palpable differences between

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the two versions. In addition to the matter of the position of the stationary bus mentioned by the trial Court the contradictions affected more vital features of the plaintiff's story such as (a) the question whether or not the oncoming car had its lights on; (b) whether or not the plaintiff had seen the oncoming car before the collision; and (c) whether or not the plaintiff had had anything intoxicating to drink shortly before the collision. To this should be added, I think, that an examination of the plaintiff's whole evidence in the Court a quo reveals that the plaintiff was throughout not merely vague but thoroughly evasive as well. To sum up, whatever may have been Lizani's demerits as a witness, the evidence of the plaintiff was in several and important respects quite unsatisfactory. It follows that no good reason exists for preferring the plaintiff's version of how and where the collision occurred to that proffered by Lizani.

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The crucial question in the case is whether the evidence sufficiently establishes on whose half of the highway the collision took place. Dealing with the tes= timony of sgt. Mateza and the eye-witness Ninzi the learned trial Judge remarked -

> "There is a conflict between Matiza and Ninzi in that the latter denies that he pointed out the point of impact to Matiza. Ninzi admits that he gave his name to the policeman as a witness. He admits that he was asked how the accident occurred. It seems to me highly improbable that this ex= perienced policeman would not have asked Ninzi to point out the point of impact. It is obvious that this factual issue would have featured prominently in the investi= gation. I therefore accept that Ninzi did, as Matiza says, point out the place where more or less the point of impact was."

Even if the trial Court were correct in accepting Mateza's statement that Ninzi indicated to him a point of impact, such statement, standing alone, cannot in my view materially advance the plaintiff's case. The question is not so much whether Ninzi indicated to Mateza some spot on the highway as being the point of impact, but rather whether point "C" on Mateza's plan correctly reflects the actual point of impact. The evidence elicited by the plaintiff's counsel from Mateza affecting not merely the <u>fact</u> that Ninzi had somewhere indicated a point of impact but in addi= tion fixing the <u>situation</u> of such point -if tendered in order to establish the correctness of point "C" on Mateza's plan- was plainly inadmissible as hearsay evidence. Assuming that Ninzi in fact indicated some place on the highway to Mateza, then the only witness qualified to assert that this was in truth the point of impact would be Ninzi himself. But, as has already been shown, when Ninzi came to testify

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he said nothing of the sort. It is, however, unnecessary to dwell on the testimonial status of the answers so given by Mateza. For the reasons stated hereunder it seems to me that even if it be accepted that Mateza did ask Ninzi where the point of impact was, such finding is by itself insufficient to sustain the further inference drawn therefrom by the trial Court, namely, that Ninzi complied with Mateza's request.

No doubt the learned trial Judge was correct in regarding it as probable that Mateza, who was investigating the collision, would have inquired of Ninzi where the point of impact had been. And in turn this probability must to some extent cast doubt on the correctness of Ninzi's denial that Mateza ever put such a question to him. But from this it is not necessarily, or even probably, to be inferred that Ninzi was being untruthful when he insisted throughout that he had never indicated a point of impact to Mateza; and indeed that he would not have been able to do so.

It seems to me that a finding in regard to this further and hotly disputed issue requires a careful assessment of the respective merits of Mateza and Ninzi as witnesses; and a rather broader appraisal of the probabilities than seems to have been undertaken by the trial Court.

There is nothing in the judgment of the Court a quo to suggest that in general it considered Mateza to be a more convincing and trustworthy witness than Ninzi. It is true that Ninzi's evidence is not entirely above criticism, but then Mateza too was far from being an impeccable witness. An examination of his plan and key tends to show, in the first place, that his investigation of the accident was superficial and perfunctory. In the second place Mateza's evidence is characterised by a number of obvious contradictions which I shall not detail here. Ninzi, insofar as one is able to gauge from a perusal of the record, seems on the whole to have been an impressive witness who gave a reasonable and

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coherent account of what he had seen. It must not be overlooked that Ninzi was apparently a completely independent witness. Ninzi is a person of some education and he is, moreover, the holder of a driver's licence. He was strate= gically placed to observe the approach of both oncoming cars; and he mentions a cogent reason for paying particular atten= tion to the Opel : he says it was travelling so fast that he entertained doubts as to its driver's ability to negotiate the bend lying immediately ahead. In its judgment the trial Court did not find that this part of Ninzi's account of his observations was unworthy of credence or open to serious doubt. And in argument before us counsel for the respondent was unable to advance any good reason why this part of Ninzi's testimony should be rejected. It seems to me, further, that no valid ground exists for disbelieving Ninzi's evidence that according to his observation the collision took place on the plaintiff's incorrect side of

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the highway. Having regard to the aforegoing I consider that the learned trial Judge erred in finding as a fact that Ninzi indicated to Mateza some point of impact on the plaintiff's correct side of the road.

What remains is Mateza's claim that in any case he formed an independent impression that the impact between the two cars had occurred at, or in the immediate vicinity of, the point "C" reflected on his plan. Upon proper exami= nation of his evidence that assertion by Mateza does not, I think, really bear scrutiny. It is clear that apart from the presence of the two damaged motor cars and the presence of pie= ces of broken glass scattered over the highway, Mateza found no other external evidence of a collision, let alone even an approximate point of impact. In response to a question by the learned trial Judge Mateza correctly conceded what everyday experience clearly teaches : that in a collision such as the present when glass is shattered the resultant pattern of pieces of broken glass lying on the road hardly offers any

sort of reliable clue as to the actual point of impact. In the light of the rather scanty evidence adduced at the trial no inference as to the probable point of impact is safely to be deduced either from the distribution of the broken glass or the respective positions in which the two cars finally came to rest after the collision; and quite rightly, in my opinion, the trial Court did not attempt to do so.

Having reviewed the main features of the evi= dence the learned trial Judge expressed the viewe that "the total picture and the probabilities" favoured the plaintiff's version. While experiencing sympathy for the respondent's unhappy plight it seems to me that the trial Court was wrong in so concluding. For the reasons mentioned in this judgment, and having regard to the totality of the evidence led at the trial, I am of the view that at worst for the appellant Lizani's version of the accident is no

less probable than that of the respondent. It follows that the respondent failed to discharge the *onus* of es= tablishing that the collision was due to the negligence of the driver of the insured vehicle, and that the trial Court erred in not decreeing absolution from the instance. The appeal is allowed with costs and the order in the Court *a quo* is altered to one of absolution from the instance with costs.

G. G. HOEXTER, A.J.A.

RUMPFF, C.J.)
CORBETT, J.A.)
KOTZÉ, J.A.) CONCUR
VILJOEN, A.J.A.)