

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

{ Appel (Provincial Division / Provisiesiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

G. TSAMBO

Appellant,

versus

Union National South British Insurance Co Ltd Respondent

Appellant's Attorney
Prokureur vir Appellant

Respondent's Attorney
Prokureur vir Respondent

Appellant's Advocate
Advokaat vir Appellant

Respondent's Advocate
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op 15/5/81

26/3

WPA

Cum:

Wessels, Carbett AR Galgen WAR

Advokaat: B. Ancoo 9100 10h34

Advokaat: S. J. Burger 10h35 - 11h00 11h15 11h16

Reptiek: 11h16 - 11h51

UITSPRAAK HOEFNR 1 29.5.81 21h50m @ 2 15am

sien uitspraak in Hofboek

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed—Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

GLADSTONE TSAMBO appellant

versus

UNION NATIONAL SOUTH BRITISH

INSURANCE COMPANY LIMITED respondent

Coram: WESSELS JA, CORBETT JA, et GALGUT AJA

Date of appeal: 15 May 1981

Date of judgment: 29 May 1981

J U D G M E N T

CORBETT JA:

On the evening of 1 November 1976 the appellant was being conveyed in a taxi, as a fare-paying passenger, from Newcastle to Charlestown, Natal. The distance from Newcastle to Charlestown is about 40 km. At a certain stage the road between these two towns passes through the Majuba hills.

/ At.....

At the commencement of the journey there were two other passengers in the taxi, but they alighted before the Majuba hills were reached. Thereafter, there were in the vehicle only the driver and the appellant. After passing through the Majuba hills, and at a point where the road runs downhill and takes a turn to the right, the taxi left the road and eventually landed in a donga on the lefthand side of the road. Appellant was seriously injured in the accident. This happened about 2 km from Charlestown.

Appellant sued respondent in the Witwatersrand Local Division for compensation in terms of sec. 21 of the Compulsory Motor Vehicle Insurance Act, 56 of 1972 (the "Act"). In his particulars of claim appellant alleged, inter alia, that the taxi in question was a vehicle having the registration number NN 15025 and was owned by one Absolom Nkosi; that this vehicle was insured in terms of the Act by respondent; that at the time of the accident he (appellant) was being conveyed in the taxi for reward; that the accident was caused by the negligence of

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the driver of the taxi; and that in consequence of the injuries sustained in the accident appellant suffered damages in the sum of R31 343,46. His right to compensation being limited by the provisions of sec. 22 (1)(a) of the Act to R12 000, appellant claimed from respondent payment of that sum, interest thereon at the rate of 11 per cent per annum from the date of judgment to the date of payment, and costs.

Respondent defended the action. At the time of the trial there were three main issues between the parties: (1) whether the taxi involved in the accident was in fact the vehicle bearing registration number NN 15025: respondent admitted having been the authorized insurer under the Act of the motor vehicle bearing this registration number, but denied that this was the vehicle in which appellant was being conveyed at the time of the accident; (2) whether the accident, and appellant's consequent injuries, were due to the negligence of the driver of the taxi; and (3) the quantum of compensation to which appellant was entitled.

/ The.....

The trial Judge (GORDON J) found that the accident was to be attributed to the negligence of the driver of the taxi and fixed the compensation claimable by appellant in the sum of R12 000,00. As to issue (1) the learned Judge held that there was not sufficient evidence to identify the taxi in question as being the vehicle bearing registration number NN 15025 and he, accordingly, ordered absolution from the instance with costs.

On appeal the only question which arises is whether the trial Judge was correct in his conclusion as to issue (1).

It is true that the evidence which was adduced in order to establish the identity of the taxi was of a somewhat fragmentary nature. This was due mainly to three factors. Firstly, the appellant did not know the driver of the taxi and at the time of conveyance did not ask his name; and subsequently neither appellant's legal advisers nor respondent were able to trace him. Secondly, the accident was not reported to the police at the time of its occurrence. And, thirdly, Absolom

/Nkosi,

Nkosi, the owner of motor vehicle NN 15025, which was alleged by appellant to be the taxi in question, died in 1977, some three years before the trial. Nevertheless, I am of the view, for the reasons which follow, that there was sufficient evidence to establish, on a preponderance of probability, that the taxi in which appellant travelled on the night of the accident was vehicle NN 15025 and that, therefore, respondent was at the time the authorized insurer of the taxi.

In evidence appellant stated that at the time of the accident his home was at Orlando East, near Johannesburg. On Saturday, 29 October 1976, he arrived in Newcastle in order to visit relatives in the Newcastle district. He stayed in Newcastle until the following Tuesday (1 November) and then took the taxi to Charlestown. He planned to stay in Charlestown overnight and to return to Johannesburg the following day. When he boarded the taxi in Newcastle (from a taxi-rank) he did not know who the owner of the taxi was; nor did he know the driver of the taxi. He observed, however, that it was a

/ Valiant.....

Valiant motor-car. During the journey he dozed intermittently, but remained generally aware of his whereabouts. He was conscious of the fact that beyond the Majuba hills the vehicle was travelling fast, that just before the accident it was going downhill and that it then left the road (he heard the sound which tyres make running over gravel). He saw the taxi land in the donga and heard the sound of the impact as it did so, and then lost consciousness. He came to thereafter in the hospital at Volksrust, which is close to Charlestown. He remained at the Volksrust hospital for only about a day and was then moved to the Natalspruit hospital, near Johannesburg. On 12 December 1976 appellant was discharged from hospital in order to return home to recuperate.

After appellant's discharge from hospital - he estimates that it was about three or four weeks after Christmas 1976 - he visited the scene of the accident. He had no difficulty in identifying the spot and found the wreck of the Valiant taxi lying there in a donga. It had been "stripped"

/ and.....

and no longer carried either its insurance disc or its licence number. (It is to be inferred from this that both the number-plates and the licence disc had been removed.) Appellant confirmed that the wreck continued to lie there for a long time. And it is common cause that it was still lying there in 1978.

On the occasion of this visit to the Newcastle area appellant also went to see Absolom Nkosi and discussed the accident with him. He knew Nkosi well and had in fact at some stage worked for Nkosi as a taxi-driver.

Mandla Nkosi, the brother of Absolom Nkosi, was called to give evidence on appellant's behalf. (For convenience and in order to distinguish the two Nkosis I shall refer to the former as "Mandla".) It appears from Mandla's evidence, and also to some extent from the testimony of appellant, that Absolom Nkosi lived in Newcastle and carried on business from there. In 1976 he (Nkosi) owned four taxis which were duly licensed to operate as such. He had three taxi-drivers in his employ and drove the fourth taxi himself.

/ (Here.....

(Here I might just interpolate that appellant was positive that the driver of the taxi which conveyed him on the night of the accident was not Absolom Nkosi.) According to Mandla, Absolom Nkosi had two Valiant motor-cars, used as taxis, at the time of his death in 1977, but Mandla was unable to say how many Valiants Nkosi owned in November 1976. Mandla stated that he had personal knowledge of the fact that one of the four taxis owned by his brother was involved in an accident in November 1976. He visited the scene of the accident and saw the taxi there, lying in a donga. He described the place of the accident thus:

"Now can you just help us, where more or less, where this donga is situated, where did you see it, what road is that?-- When one drives past Majuba hills.

On the way from where to where?-- From Newcastle to Charlestown.

And you say, if you start from Newcastle is it the other side of Majuba hills?-- Yes, on the other side of Majuba."

While he was in hospital appellant was visited by members of the firm of attorneys who acted on his behalf in the action. At an early stage the attorneys started making enquiries about the accident. Letters of enquiry were

addressed, inter alios, to the South African Police in Newcastle and Charlestown. In a letter dated 3 February 1977 and addressed to the station commander at Newcastle police station, appellant's attorney states:

"I enclose a copy of registered letter to Mr Nkosi dated 3 January '77, to which he he has not replied."

(It is clear from the context that the Mr Nkosi referred to is Absolom Nkosi.) The enclosure mentioned was unfortunately not placed before the trial Court. The letter itself does, however, refer generally to the accident and asks the police to "contact" Nkosi and to obtain from him the third party declaration of insurance in respect of his vehicle, the name of the insurer, the registration letters and number; and also to ascertain from him whether he is a registered taxi-driver, whether he is comprehensively insured and, if so, details thereof and to which police station he reported the accident.

/ Thereafter....

Thereafter appellant's attorney received from Absolom Nkosi a letter dated "29.2.77" (sic) (Exhibit "A"), the body of which reads as follows:

"I have learnt from Glandstone Ntsambo that sustained injuries while being conveyed in my taxi near Charlestown on the 1.11.76. Here are the particulars of my third party and tokohon numbers.

First number No. A17723 Second No. Group IX-UBSB Third No. M.V.5 C.O. Ltd.

My taxi was a registered taxi NN 15025 I was not driving the taxi on day of 1.11.76. Taxi is insured but not me as the owner To my knowledge accident was not reported any police station Further information if you are need of

Yours faithfully

Absolom Nkosi."

At the trial this letter was tendered in evidence by appellant's counsel in order to establish the truth of the contents thereof.

It was greatly relied upon by appellant in order to prove the identity of the vehicle in which appellant was travelling at the time of the accident. Although prima facie hearsay evidence,

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the letter was tendered and admitted in evidence in terms of sec. 34(1) of the Civil Proceedings Evidence Act, 25 of 1965. It was formally agreed between the parties that Exhibit "A" was a letter from, and was signed by, Absolom Nkosi, who was then (i.e., at the time of the trial) deceased. Respondent's counsel also agreed that the contents of the letter were admissible in evidence in so far as the author purported to speak of facts within his personal knowledge. On appeal respondent's counsel (who did not appear at the trial) adopted the same attitude. I shall later discuss the interpretation to be placed on Exhibit "A" and its probative significance.

The evidence led by respondent at the trial was designed to show that a vehicle bearing the registration NN 15025 was in use during 1977. It being common cause that the vehicle in which appellant travelled at the time of the accident (or rather the shell thereof) remained an abandoned wreck at the scene of the accident until at least 1978, it was argued by

/ respondent....

respondent that the aforementioned evidence established that the taxi in which appellant was being conveyed at the time of the accident was not vehicle number NN 15025.

The first witness called by respondent was Mr Dormehl, the traffic superintendent at Newcastle. He produced a traffic ticket which was issued in respect of a Valiant sedan motor-car, registration number NN 15025, on 22 April 1977 and which recorded the offence as being "parking in a public place other than a taxi rank". In cross-examination the following was put to him:

"My instruksies is die volgende, dat dit alombekend is veral onder die swart bevolking, en veral miskien onder huurmotoreienaars, dat as 'n kar geskraap word, as hy so beskadig word dat hy nie meer kan bestuur nie, dan word alles wat kan beweeg, en die wat nie kan beweeg nie, afgehaal en aan 'n ander kar gesit, het u dit teëgekom?-- Nog nie teëgekom nie, ek dra geen kennis daarvan nie.

Want my instruksies kom van die Luitenant-kolonel in die - in Newcastle, die hoof van die Polisie daar?-- Nee, ek dra geen kennis van so 'n geval nie.

(Vraag onverstaanbaar, onduidelik)?-- Nee.
Die polisie sal seer-sekerlik daarvan weet?--

/ Heel....

Heel moontlik, ja.

Want ek wil aan u stel dat hulle talle gesteelde motors gekry het wat lisensienommers dra van ander karre, het u daarvan ooit gehoor?-- Moontlik.

En dat saam met die dele van die kar wat weer gebruik kan word, gaan alles tesaam, dit wil sê lisensienommer, assuransietekens, endiesmeer?-- Ek dra nie kennis daarvan nie.

U kan dit nie ontken nie?-- Nee."

Secondly, respondent called Mr Borain, a senior administrative assistant, who worked in the licensing bureau of the Natal Provincial Administration. He produced the relevant files and documents from which it appears that on 19 October 1975 Absolom Nkosi (who gives his full name as Absolom Sibusiso Nkosi) made written application (Exhibit "N1") for the registration of a Valiant sedan with engine number 18944. In the space in the application form relating to particulars concerning the dealer or previous owner there is written, apparently by the applicant, "Built up from scrap". The application also indicates that the vehicle is to be used for private purposes. On this application the registration number NN 15025 was allocated to the vehicle. A further document / indicates.....

indicates that on 22 October 1975 the owner, Absolom Nkosi, registered the same vehicle for public use (Exhibit "N2"). This involved the payment of an additional licence fee. A further document shows that the licence for vehicle NN 15025 was renewed on 14 October 1976 (Exhibit "N3"). The following two documents (Exhibits "N4" and "N5") show that on 25 July 1977 vehicle NN 15025 was suspended from use on the ground that it was found to be unroadworthy in certain respects and that on 1 August 1977 the suspension was uplifted after the vehicle had been re-tested. The licence of NN 15025 was again renewed on 20 October 1977 (Exhibit "N6"). The final document put in (Exhibit "O1") is an application dated 4 July 1978 for the registration of vehicle NN 15025 in the district of Dannhauser. On this application a new registration number NDH 1614 was allocated to the vehicle. In the space for particulars concerning the previous owner the name A.S. Nkosi and a Newcastle address appear; while in the space for particulars of new owner the name A.S. Nkosi and a Dannhauser / address.....

address appear. (This is so despite the death of Absolom Nkosi the previous year.) Mr Borain explained that this was merely an inter-town transfer by the same owner. The engine number given is the same as on Exhibit "N1", viz 18944.

Under cross-examination Mr Borain agreed that at the time the licensing authorities did not record chassis numbers at all. He was asked:

"Is there anything to have stopped somebody from taking an engine and a registration, car registration number off one car, and putting it onto another car of the same make?-- Not at all.

You wouldn't be able to spot it would you?-- Not off the file.

I want to put it to you Mr Borain that it's actually quite commonly known, if a car were a write-off, the owner, particularly possibly a taxi-owner, they take whatever moves..... (inaudible) ... and strip it from that car and then build it into another car. Have you come across that?-- We have had that experience."

That concluded the evidence for respondent.

There is no dispute of any substance in regard to the facts and evidence which I have recounted. The essential question is whether, having regard to the evidence adduced by appellant and bearing in mind the countervailing testimony of

/ respondent's.....

respondent's witnesses, it can be concluded, on a preponderance of probability, that the taxi involved in the accident was vehicle number NN 15025. This is largely a matter of deduction and inference from the recorded evidence. Questions of credibility do not appear to be relevant. I think that the trial Judge recognized this. And it seems to me that in the circumstances this Court is in as good a position as the Court a quo was to apply this process of deduction and inference.

In my view, the following points emerge from the evidence adduced by the appellant:

- (1) When appellant revisited the scene of the accident shortly after Christmas 1976, it is probable that he identified it correctly and that the motor vehicle wreck which he found there, lying in a donga, was in fact the remains of the vehicle in which he had travelled on the night of the accident. Respondent's counsel does not appear to have challenged appellant's evidence to this effect in the Court below. It is also of importance that the wreck which he found was the remains of

a Valiant motor-car, that it had been, as appellant put it, "stripped" and that it no longer carried its licence number or insurance disc.

- (2) It is also probable that the wreck which Mandla inspected was the same wreck as that seen by appellant when he revisited the scene of the accident. Mandla described the location of the wreck, viz in a donga off the road between the Majuba hills and Charlestown. Admittedly this description is not very precise but it coincides generally with that given by appellant and it seems to me unlikely that there would have been two such wrecks lying in different dongas about this time adjacent to the stretch of road between the Majuba hills and Charlestown. Here it is important to note that Mandla stated that he had personal knowledge of the facts that one of Absolom Nkosi's taxis had been in an accident in November 1976 and that the wreck which he

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inspected was the taxi in question. His evidence in this regard was not challenged in cross-examination.

- (3) The logical inference to be drawn from (1) and (2) above is that the vehicle in which appellant was travelling at the time of the accident was one of the four taxis owned and operated by Absolom Nkosi. The evidence further establishes that it was a Valiant motor-car.
- (4) It seems clear that in November 1976 Absolom Nkosi was the owner of a Valiant motor-car with registration number NN 15025 and that this vehicle was one of his four taxis. This is to be deduced from the declaration of insurance issued by respondent (Exhibit "L"), the licensing and other documents (Exhibits "N1", "N2", "N3", "N5" and "N6") and the evidence of Mandla.
- (5) Early in 1977 appellant's attorneys set enquiries afoot in order to obtain information in regard to the accident and in particular to find out details concerning the
/ vehicle.....

vehicle in which appellant was travelling at the time of the accident, such as registration number, third party declaration of insurance, etc. These enquiries included letters to local police stations, one of which contains a statement to the effect that a registered letter addressed to Absalom Nkosi had not been replied to and a request that the police "contact" Nkosi to obtain the necessary information.

It is against this background that Exhibit "A", Nkosi's letter dated 29 February 1977, must be interpreted and evaluated. This letter was written to appellant's attorney and was obviously prompted either by a police enquiry or by the registered letter referred to above or by both. In the Court a quo it was common cause that the first sentence of the letter contained a statement which would have been hearsay as far as Nkosi was concerned and that the sentence should be disregarded. This approach was endorsed by the trial Judge. On appeal, appel-

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lant's counsel (who did not appear at the trial) sought to resile from the concession made in this regard. He argued that the letter was obviously written by someone of limited fluency and literacy and that the first sentence should be interpreted to read: "I have heard from Gladstone Tsambo who sustained injuries while being conveyed in my taxi near Charlestown on the 1st November 1976 and here are the particulars of my third party and token numbers". This interpretation involves certain interpolations and changes of language. It is true that the interpretation contended for by respondent also involves the interpolation of the word "he" after "that" in the first sentence, but I am not able to say that either interpretation is more probable than the other. In view of this uncertainty and bearing in mind that evidence of the contents of the letter was admitted in terms of sec. 34 (1) of Act 25 of 1965 and that the author of the letter is not available to give evidence, I think that it would be dangerous and incorrect to

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prefer the interpretation contended for by appellant's counsel. Nevertheless, I do not think that this sentence should be totally disregarded. Account can be taken of it, in my opinion, not in order to establish the truth of the allegation that appellant sustained injuries while being conveyed in Nkosi's taxi near Charles-town on 1 November 1976, but in order to show that Nkosi was aware at the time that appellant claimed to have sustained injuries in this way and wrote the letter with this knowledge (cf. Ruto Flour Mills (Pty) Ltd v Adelson (2), 1958 (4) SA 311 (T), at pp 312-3; Da Mata v Otto NO, 1971 (1) SA 763 (T), at p 770). And in this connection it must be remembered that appellant discussed the accident with Nkosi when he revisited the scene of the accident in about January 1977.

After the initial sentence discussed above the letter proceeds to give particulars of the third party insurance and token numbers and the registration number of the taxi concerned, viz NN 15025. The letter does not specifically say that the third party insurance and token numbers relate to the taxi with registration number NN 15025, but this is the clear implication of the letter; and, in any event, Exhibit "L" / (the

(the declaration of insurance relating to NN 15025 for the relevant period) confirms that the insurance number stated in the letter is in fact that of vehicle no NN 15025.

Now Nkosi would not have known how or when appellant sustained his injuries, but it is clear from his letter that he had personal knowledge of the fact that a taxi belonging to him had been involved in an accident (which was not reported to the police) near Charlestown on 1 November 1976 and in the letter he identifies this taxi as being vehicle no NN 15025. It was obviously because of this knowledge, and on the basis thereof, that Nkosi drew the conclusion that appellant must have been injured in the accident involving taxi number NN 15025. The positive facts that can be accepted as being established by Exhibit "A", therefore, are (i) that on 1 November 1976 a taxi belonging to Absolom Nkosi and having the registration number NN 15025 was involved in an accident near Charlestown, and (ii) that this accident was not reported to the police. If these facts are taken in conjunction with the essential

/ facts.....

facts proved or admitted by the remaining evidence adduced by the appellant, viz (a) that he was injured in an accident which occurred near Charlestown on 1 November 1976 while he was travelling as a passenger in a taxi owned by Absolom Nkosi and (b) that this accident was not reported to the police, then, in my view, the conclusion that the taxi concerned was vehicle no NN 15025 is virtually inescapable. The only possible alternative inference is that of the four taxis belonging to Absolom Nkosi, two were involved in separate accidents on 1 November 1976 near Charlestown and that both accidents were not reported to the police. This seems a very improbable coincidence; there is no suggestion of this possibility in the recorded evidence; and indeed, had this been the case, Absolom Nkosi could hardly have omitted to mention this when he wrote Exhibit "A".

Finally, the conclusion that the taxi in which appellant was conveyed was vehicle no NN 15025 is further strengthened by the evidence of appellant that the taxi was a Valiant motor-car and the indisputable fact that NN 15025 was a Valiant.

Of course, this conclusion must be weighed against the countervailing evidence adduced by respondent, to which I have already alluded. This amounts to proof that a vehicle bearing registration number NN 15025 and registered in the name of Absolom Nkosi was in use during 1977 and 1978, whereas the wrecked taxi in which appellant travelled remained in the donga near Charlestown until 1978. Appellant's counsel argued that these two facts are not necessarily destructive of appellant's case. He postulated the possibility that after the accident Absolom Nkosi salvaged from the wreck all removable parts of any value or utility (including the engine) and used them, together with the chassis and body of another Valiant motor-car, to create a new vehicle, to which he then attached the licence number (number plates and licence disc) and third party insurance disc of the original NN 15025. This postulate is, of course, based largely on speculation, but there are two pieces of evidence which lend some support to it.

/ Firstly,

Firstly, there is the evidence of Mr Borain, referred to above, which establishes that at the time chassis numbers were not recorded and that an operation such as that postulated by appellant's counsel was not only feasible, but was one which he had in fact encountered in practice. Secondly, there is the evidence of appellant that the vehicle which he found when he visited the scene of the accident some two to three months later had been "stripped" - this suggests that, inter alia, the engine, which is the most valuable removable part of a vehicle, had been removed - and that the licence number and third party disc had also been removed. If the engine, the licence plates, licence disc and third party disc were removed, then they could have been utilised in the creation of a new vehicle, as suggested by appellant's counsel.

Weighing all the evidence in the light of the foregoing arguments and considerations, I am of the opinion that there is a preponderance of probability in favour of the conclusion that the taxi in which appellant was travelling at the time

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of the accident was vehicle no NN 15025. It follows that the Court a quo wrongly ordered absolution from the instance.

The appeal is allowed with costs and the order of the Court a quo is altered to read:

"Judgment for plaintiff in the sum of R12 000,00,
and costs of suit."



M M CORBETT

WESSELS JA) CONCUR
GALGUT JA)