Case No 84/94 IN THE SUPREME

COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

MADINGAKA ESTER MOLEFE First Appellant

NOMA MIRRIAM TSOTETSI Second Appellant

and

GENERAL ACCIDENT INSURANCE

COMPANY SOUTH AFRICA LIMITED Respondent

Coram: VAN HEERDEN, NESTADT JJA et VAN COLLER AJA

Date Heard: 13 November 1995

Date Delivered: 22 November 1995

J U D G M E N T

NESTADT. JA:

This appeal concerns claims for damages under the Compulsory Motor

Vehicle Insurance Act, 56 of 1972. The court

below found that it had not been established that the collision in question was caused by the negligence of the driver of the insured vehicle. Hence absolution from the instance was granted.

Save to the extent which follows, I do not propose to set out the evidence which was adduced before the trial court or the course that the trial took. These matters appear from the judgment of the court a quo, with which judgment I assume the reader hereof is familiar.

The issue was whether the plaintiffs (now the appellants) proved that the collision took place on the insured driver's incorrect side of the road, ie on the eastern half. If it did, then clearly such driver was negligent and the appeal must succeed.

In the absence of a witness's direct evidence, the point

or area of impact is often inferred from marks and debris on the road (see Cooper: Motor Law, vol 2, 420). But in casu the streak of blood (which went virtually across the whole width of the road) and the fact that there was broken glass and mud "all over the place" was equivocal. Thus it was that the policeman who attended at the scene was unable (or perhaps unwilling) to express an opinion as to where on the road the collision took place. It was, nevertheless, the task of the trial court to do so - provided, of course, the evidence was sufficient to justify such a course.

In my opinion, the evidence was sufficient. The bakkie was found on the extreme eastern side of the road almost wholly between the edge of the road and the yellow line. The truck came to a stop with approximately half its length on to the eastern side of

the road. Goods which were being conveyed on the truck were recovered from a ditch on the eastern side of the road. And a person who had been a passenger in the truck lay injured after the collision on the eastern side of the road.

These were the objective facts. To my mind, the most natural and plausible inference to be drawn from them (taking into account especially their cumulative effect) is that the collision occurred (somewhere) on the eastern side of the road. They were at least as cogent as say the existence of brake marks or broken glass on the eastern side of the road. There was no need, as the trial judge would seem to have held, for any expert evidence (explaining how the vehicles would behave after impact) to have been led by the plaintiff before the inference of negligence on the part of the driver

of the truck could be drawn. This was an unrealistic approach. It was an unduly technical one. Logic and human experience teach one that where, as here, the vehicles involved in the collision, as also goods and a passenger from one of them, were found on the eastern side of the road, it was there that the collision probably occurred.

At the least, the inference that the collision occurred on the truck's incorrect side of the road was a possible one. Stegmann J was therefore correct in refusing absolution at the end of the plaintiffs' case. But then when the defendant led no evidence, the learned judge should have found the allegation of negligence proved. I leave aside the fact that the passenger was not called. The insured driver was an available witness. It was for the defendant to call him (Minister of Justice v Seametso 1963(3) SA 530(A) at 535 F).

There

is no reason to doubt that the manner in which the collision took place was within his knowledge. It was never suggested in evidence or from the Bar that he suffered from amnesia or that he refused to testify (because his answers might be incriminating). The trial judge was therefore not entitled to take these speculative possibilities into account. An adverse inference should have been drawn against the defendant. In accordance with the principle stated in Galante v Dickinson 1950(2) SA 460(A) at 465 (and see too Botes vs Van Deventer 1966(3) SA 182(A) at 188 E-F) this should have been done by selecting the plaintiffs' explanation for the cause of the collision.

Certain parts of the appeal record relate only to the issue of quantum. Neither they nor a copy of the inquest record should have been included. Their costs will not be allowed.

The following order is made:

(1) The appeal succeeds with costs but the appellants will not be entitled to any costs in respect of pages 21-47 or 128-172 of the record.

(2) Paragraph 3 and 4 of the trial court's order are set aside and the following substituted:

"3. The collision was caused by the negligent driving of the insured vehicle.

4. The defendant is to pay the costs occasioned in the determination of the question set out in paragraph 1. 5. The trial is to proceed. It is accordingly postponed sine die".

H H Nestadt

Van Heerden, JA )

) concur Van

Coller, AJA )