Case No 421/95

In the matter between:

ZEEM SHIBOYANE Appellant

and

MUTUAL & FEDERAL INSURANCE
COMPANY LIMITED Respondent

CORAM: Mahomed CJ, EM Grosskopf, Nienaber, Olivier et
Zulman JJA

HEARD: 13 MARCH 1997

DELIVERED: 9 MAY 1997

JUDGMENT

/NIENABER JA

NIENABER JA:

The appellant was injured when he was run over by a motor-cycle ("the accident"). He instituted, but lost, a claim for damages against the respondent, the statutory insurer of the motor-cycle, in the then Witwatersrand Local Division. With leave of the trial court he appealed to the then Transvaal Provincial Division, but lost again. This is a further appeal, with special leave of this court, against the dismissal of his action.

Three eye witnesses testified, resulting in three different versions of the accident which, it was common cause, occurred on 1 February 1989. The appellant's version, in brief, was that he was accompanying one Gumede in the latter's truck to deliver a consignment of liquor. The vehicle broke down somewhere along Jo Zimane drive, KwaThema, in the veld. Gumede left the appellant to guard the vehicle and its cargo while he proceeded to seek assistance to change a wheel. Some time later, after it had turned dark, appellant heard voices. Being somewhat apprehensive that he might be attacked, so he explained, he decided to cross the road from east to west. His right foot was on the road, with his left foot still on the edge of the road,when he was struck by a motor-cycle approaching

from the north. He never saw it, he said, but he did hear the noise of an approaching motor-cycle "as if it was still far". That was the appellant's case.

The respondent called Gumede as his first witness. His version was as follows: On his return to his vehicle he saw that a case of beer and six bottles from another case were missing and he noticed that the appellant was intoxicated. He accused the appellant of taking the missing beers but the appellant did not reply. He lost his temper and assaulted the appellant. He then searched for the missing case which he discovered in some long grass. Once again he assaulted the appellant. The appellant ran away, pursued by Gumede. Gumede stopped to conduct a further search for the remainder of the missing beers. Gumede at first testified that he witnessed how the appellant veered into the road and was hit by the motor-cycle but later in his evidence-in-chief he corrected himself and said that he only heard the sound of the impact as the vehicle collided with the appellant; and that it was reconstruction on his part that the appellant ran directly into the path of the oncoming vehicle. It was, he said, beginning to be dark. The motor-cycle's lights were on. During his cross-examination the following exchange took place between the court, counsel for the

appellant (Mr Smith) and counsel for the respondent (Mr Luitingh):

> "So if Mr Shiboyane [the appellant] says that the motor-cycle had no lights on prior to the collision you cannot say anything about that, can you?
> COURT: Yes I - this is a matter of argument. You have got the evidence.
> MR SMITH: As your lordship pleases. (Mr Luitingh intervenes)
> MR LUITINGH: M'lord he does not have the evidence that is the point - Mr Shiboyane never said that. He never testified that he had no lights.
> COURT: Well that is also not correct but we will - according to my notes - but we will deal with that later. I do not think that this question is a true factual question."

The trial court was wrong. The appellant had not been asked, either during his evidence-in-chief or under cross-examination, whether the motor-cycle's lights were on. Gumede, on the other hand, had earlier volunteered the evidence that they were. And contrary to what the trial court intimated this was a factual question par excellence. As a result of the trial court's untimely intervention this issue, which was a crucial one on the insured driver's alleged negligence, was not further explored with the witness.

Gumede was closely questioned as to how intoxicated the

appellant appeared to him to be and he described the appellant's condition variously as being "drunk", "between very drunk and a person who had just consumed liquor", "blind drunk" and "not blind drunk".

The insured driver, Andries Vusumuzi Mahlayeye, was available to be called but from the opening remarks made by the respondent's counsel to the court before evidence was led on its behalf, it is clear that the respondent did not propose to call Mahlayeye provided that Gumede's evidence "does not go badly". As it happened Gumede's evidence, as counsel conceded, did go badly and at the conclusion of his evidence he elected to call Mahlayeye. His version, the third one on the evidence, was as follows: On the day in question he was driving on the Mzamane road. He saw the appellant. The appellant was facing him. "It was in the evening, the sun was set already". He had travelled from his home to a nearby hostel to fetch water which he conveyed in a container on the back of his motor-cycle. "When I was about to pass him, he walked into the street." He tried to swerve and he applied his brakes but he was too close to the appellant and could not avoid the collision. The motor-cycle's lights were on. He admitted signing a statement made to an insurance assessor, which is

in English, but he denied that he had made the statement to a white man. When confronted with its content under cross-examination, he denied the accuracy of certain of its passages. In particular he denied that he had ever said that sunset had not yet occurred and that visibility was good - which implied that there was no need for the lights to be on - and that the appellant "ran" (as opposed to "walked") into his approaching vehicle. When challenged on his statement he said: "How could I have travelled in the dark road without my lights on?". He reiterated, on being questioned by the court, that he switched his lights on when he left home to drive to the hostel, which would have taken him between 20 and 30 minutes to reach. At that point it was "beginning to be dark". There were no street lights where the accident happened. It happened on the return journey.

The trial court found that the appellant had given his evidence "in a clear and concise manner" and that he had not been "discomforted by cross-examination. His demeanour could not in any way be faulted."

Mr Gumede, on the other hand, according to the trial court,

fared badly:

> "He conceded that he had neither seen the motor-cycle nor the plaintiff running into the road as he had returned to look for the

> case of beer when the accident happened. I have no hesitation in dismissing his evidence as totally unreliable insofar as it concerned the actual collision. However, the evidence relating to what had happened at the truck had an air of truth about it and is no less probable than plaintiff's version of what occurred. No reason could be advanced as to why Mr Gumede should have admitted hitting the plaintiff or why he should have accused the plaintiff of having been drunk."

Although commending the appellant and condemning Gumede the trial court nevertheless preferred the latter's evidence on the events preceding the collision, more particularly, on the appellant's state of insobriety.

As far as the insured driver is concerned the court found:

> "The defendant never called the assessor to confirm this evidence of the witness and I am accordingly left with the clear impression that the witness made a previously inconsistent statement. No purpose would have been served by the assessor recording different facts to those given by the witness. The only reasonable inference I can draw from his inconsistent statement is that initially the witness did not think it was dark enough to have his lights on and that his evidence in relation to his lights being on is a reconstruction or afterthought."

The trial court nevertheless found, as a matter of probability:

"However, even if the driver did not have his lights on there must have been sufficient light for him to see where he was going. It is highly improbable that he would be driving on a road when it was so dark that he could not properly see what was ahead of him. Thus if he could see he could be seen. Accordingly it seems to me that the probabilities are that the plaintiff was intoxicated and failed to appreciate the danger posed by the oncoming motor-cycle when he stepped into the road."

And again:

"Even if the motor-cycle did not have its lights on it must, in my view, have been visible at that distance to any person keeping a proper look out. It is always dangerous to cross a road and a pedestrian has a clear duty not to attempt to do so unless he is satisfied it can be done with safety.

In my view, even if the lights of the insured vehicle were not on, the most probable and sole cause of the collision was plaintiffs act of stepping into the path of the insured vehicle at a time when the driver was unable to take any avoiding action."

The approach of the court a quo in dismissing the appeal may be summarized as follows:

(i) It is common cause that the appellant, without prior warning or any indication that he was going to do so, stepped into the

path of the oncoming motor-cycle driven by Mahlayeye.

(ii) Both Gumede and Mahlayeye testified that the motor-cycle's lights were on. The fact that the court stopped the appellant's counsel from cross-examining Gumede on the issue was

> "a pity as it may well be that he saw the light of the motor-cycle when it was still far away or after the collision when it had fallen over." (iii) There is no room to differ from the trial court's

acceptance of Gumede's evidence of what happened at the truck upon

Gumede's return and, consequently, that the appellant was inebriated.

(iv) The trial court erred in drawing an adverse inference against the respondent based on Mahlayeye's prior statement since the correctness of the contents of that statement, as opposed to its actual making, was disputed and had not been proved.

(v) The recollection of a drunken appellant cannot stand against the evidence of Gumede and Mahlayeye that the lights were on.

(vi) The respondent's counsel's failure to cross-examine the appellant on the issue of the lights must be criticized but in the event the appellant was not prejudiced thereby.

(vii) In the result it had not been established that the insured

driver was negligent.

The two courts below differed in their appraisal of some of the disputes of fact but agreed on the result. To assess that result it is necessary to re-examine the disputes of fact.

In resolving those disputes of fact not a great deal of reliance can unfortunately be placed on the credibility findings of the trial court. The appellant was found by the trial court to be a good witness yet his evidence on the events preceding the accident and on his state of sobriety was rejected - which can only mean that the appellant was disbelieved. Gumede was found by the trial court to be a bad witness yet his evidence was preferred to that of the appellant on the events preceding the accident and on the appellant's state of sobriety - which can only mean that he was believed. Mahlayeye was disbelieved by the trial court because he contradicted the statement he signed - yet the court did not find that it was established that the statement was accurately recorded. In the result the trial court's assessment of the various witnesses is not, I fear, conclusive. This court is therefore constrained to make its own assessment of the value of each of the witnesses and to do so as best it can on the probabilities.

On any version, including his own, the appellant was clearly

negligent. He heard a motor-cycle approaching. Yet without making sure that it was safe to do so he precipitately stepped into its path. Contrary to his professed impression the motor-cycle was not "still far" at the moment when he set foot on the road and was struck. When, therefore, he testified that he saw nothing he was (a) not being truthful or (b) he was heavily intoxicated or (c) he was grossly inattentive. Since there is no compelling reason to conclude that he was lying when he said that he saw nothing, and since he denies being intoxicated, it follows that, on his own showing, he was negligent.

His own negligence no longer being in issue, the focus shifts to two other related questions:

1. whether such negligence was the sole cause of the accident;

2. if not, whether the insured driver was also negligent and, if so, to what degree. The answer to both these questions is to some extent dependent on the factual issue whether the motor-cycle's lights were on.

I now propose to examine that issue, and certain matters related thereto, and to do so with reference to each of the witnesses in the light of the probabilities.

The appellant was not asked about the motor-cycle's lights, neither in evidence-in-chief nor in cross-examination. Counsel for the respondent acknowledged this to have been an error of judgment on his part. Counsel for the respondent furthermore conceded in this court that it can fairly be inferred from the appellant's evidence (that he saw nothing because it was dark), that the lights were not on, for if they were on the appellant would have seen them; and that the matter must be approached on that footing.

Neither Gumede's assertion that the lights were on, nor the insured driver's entire version of how the accident happened (which included his evidence that the lights were on), was put to the appellant. The appellant was accordingly not given the opportunity of commenting thereon. Generally speaking a witness should not be disbelieved on an issue unless the issue was squarely put to such witness. The issue of the lights was not put to the appellant but in view of his testimony that he saw nothing (because it was dark) I do not believe that the oversight was fatally prejudicial to the appellant. It would not have added anything to his version if that issue had in fact been debated with him. He might have pointed out that if the lights were on he would readily have seen the motor-cycle - but that

is not evidence, it is an inference which is in any event conceded in his favour. If his response, on the other hand, was that he did see the lights it would have contradicted his earlier evidence that he saw nothing - which would have been to his detriment. Hence the appellant was not prejudiced by the failure to put the point to him.

Of greater moment was the respondent's counsel's failure to put the insured driver's version to the appellant. What was put were the bare bones of Gumede's version, excluding Gumede's evidence that the lights of the motor-cycle were on. Counsel's dilemma, as he admitted in argument in this court, was that the insured driver's version, both as recorded in his statement and as he eventually testified, was not readily reconcilable with the evidence of Gumede. Counsel made a deliberate and no doubt informed decision to put Gumede's version rather than that of the insured driver to the appellant. As appears from what counsel had told the trial court it was only when Gumede performed poorly under cross-examination that the decision was taken to call the insured driver for good measure. The latter's evidence-in-chief was restricted to the bare minimum. The essential features thereof were:

(a) The appellant was standing next to the roadside. This is

in conformity with the appellant's evidence and if put to the appellant would have been assented to by him. On the other hand, it is contrary to both the evidence of Gumede and the contents of the insured driver's statement.

3. "It was in the evening, the sun was set already, I am not sure of the time". Broadly speaking this is again in conformity with the appellant's evidence and would, if put, have been assented to by him. It is also in conformity with the evidence of Gumede but it is contrary to the insured driver's statement to the assessor.

4. As he was about to pass the appellant the appellant walked (not ran) directly in front of his motor-cycle. That piece of evidence was also in conformity with the evidence of the appellant and would not have been disputed by him. It is also not in conflict with the evidence of Gumede but once again it is at variance with what is contained in the statement.

5. The motor-cycle's lights were on. This was in conflict with the inference which is to be drawn from the appellant's evidence, as discussed above, but was in line with what was stated by Gumede. On the other hand, it is again contrary to what is to be inferred from the statement, namely that the accident occurred before sunset, which

would suggest, although it is not stated in so many words, that the motor-cycle's lights would not have been on. On this particular issue, i.e. on whether it should have been put that the insured driver would say that the lights were on, counsel's failure is on a par with his failure to put the same piece of evidence from Gumede to the appellant. For the reasons discussed earlier this failure did not seriously prejudice the appellant.

(e) Lastly, and more significantly, the insured driver was not led in chief on the making of the statement or on its contents or on any departures from its contents. The insured driver under cross-examination admitted signing the statement but he departed from its contents in several respects, notably as to the time when the accident occurred, as to whether the appellant ran into him, and as to the point of impact and certain distances recorded in the statement. Finally Mahlayeye was adamant that he did tell the assessor that his lights were on, something on which the statement was silent.

Three points are to be made about the failure of the respondent's counsel to lead the insured driver on his statement.

First, it deprived the appellant from commenting thereon. But in view of the appellant's evidence that he saw nothing, this failure,

for the reasons given earlier, was not fatally prejudicial to the appellant.

Secondly, it is open to the construction that the insured driver's deviations from his signed statement came as something of a surprise to the respondent's counsel, for if he had been apprised of the deviations in advance it is unlikely that he would not have prepared the ground for them during evidence-in-chief. To that extent the failure to mention the deviations during evidence-in-chief reflected on the credibility of the insured driver, since it created the impression that such deviations were after-thoughts which occurred to him only when the shoe pinched.

Thirdly, because the deviations were not raised at the earliest opportunity, the appellant's legal advisers were placed at a disadvantage in not being forewarned to investigate the matter and in not being able to arrange for the assessor to be called as a witness to contradict (or confirm) the insured driver's evidence about the accuracy of the statement. If the respondent's counsel was unaware of the impending deviations, it is a reflection on the insured driver for not mentioning it to counsel during consultation; if counsel did know of it, it is a reflection on him for leaving the matter so late when it

was foreseeable that the appellant's side would wish that aspect to be investigated further. Either way, so it was contended, the appellant was prejudiced.

I accept that the appellant was prejudiced. But two observations need to be made. The first is that such prejudice, consisting of the failure to put a complete version to the appellant, did not by itself elevate the appellant's evidence (that the motor-cycle's lights were not on) to the status of a fact, nor does it condemn the insured driver's evidence (that the lights were on) to the status of a lie. The second observation is that the prejudice suffered by the appellant was curable. The appellant's advisers could have asked that the matter stand down while the position was investigated or they could have applied for an adjournment to call the assessor and, if needs be, recall the appellant. Such an application was not made at the earliest opportunity. It was only moved during argument and after the respondent had already closed its case. The trial court refused it. It was argued in this court that this refusal was cause in itself for upholding the appeal. But at the time when the application was made, indeed, even when the argument was advanced in this court, there was no clarity as to whether the assessor was available and as to what he would say. The

decision of the trial court was in the nature of the exercise of a discretion. No convincing reason was advanced why this court should conclude that the trial court erred in exercising its discretion as it did.

The appellant's version must in the first place be contrasted with that of Gumede whose version was put to him although only in part. But Gumede admitted that his account of the actual accident was a reconstruction. As such it is unreliable. Even though he corrected himself early in his evidence-in-chief it does cast a shadow over the reliability of his evidence as a whole. In his evidence he stated that the lights were on. The trial court overlooked this piece of evidence when it stopped the appellant's counsel from cross-examining on it. The effect of that unfortunate intervention was that Gumede's evidence (that the lights were on) remained untested, in like manner that the inference from the appellant's evidence (that the lights were not on) was untested. That being so their evidence on that particular issue cannot be regarded as conclusive either way.

The crucial witness on the issue of the lights was of course Mahlayeye, the insured driver. According to his statement the accident occurred before sunset. Being daylight, the inference is that there was no cause for him to switch his lights on, either to see or to be seen.

In his evidence, on the other hand, he insisted that the accident occurred after dark. In his own estimation he switched his lights on as he left his home for his destination, half an hour's driving away. The accident occurred on the return journey, say, some three-quarters of an hour after he left. On that estimation the accident must have happened well after sunset. However, none of the witnesses stated that it was pitch-dark. Indeed, Gumede's evidence was that he was searching in the grass for more missing beers. The probabilities are that the accident happened between dusk and dark.

There are three question-marks which must be raised against Mahleyeye's evidence.

The Erst is that respondent's counsel, having been furnished with two conflicting versions, one by Gumede and one by Mahleyeye, chose to put Gumede's version to the appellant and, consistent with that approach, called him. Mahleyeye was only called when Gumede let the respondent's side down. In itself that is an indication of a lack of confidence in the quality of Mahlayeye's proposed evidence.

The second question-mark arises because nothing was said in evidence-in-chief about the statement when Mahlayeye was eventually called. In particular, no attempt was made to explain any

contradictions between what was contained in the statement and what Mahlayeye was about to say in evidence. Counsel for the respondent was aware that the statement had earlier been forwarded to the appellant's attorney. In the circumstances it is difficult to escape the impression, as stated earlier, that Mahlayeye's repudiation of his own statement under cross-examination must have come as a surprise to counsel for the respondent, which is a further indication of a lack of consistency in Mahlayeye's version of the events.

The third question-mark arises on the probabilities. Mahlayeye did not deny making or signing the statement. With much of its contents he was in agreement. Part of the statement is certainly cast in a somewhat pedantic style which Mahlayeye rightly disclaimed. While it is not impossible that the transcriber of the document might have filled in certain gaps in Mahlayeye's version, e.g. as to the point of impact and certain distances, it is improbable that he would have fabricated vital details which he must have realised would ultimately be contradicted by Mahlayeye. Although the statement was in the event not substantiated by the evidence of the person to whom it was made and who interpreted and/or transcribed it, the probabilities do cast some doubt on whether the appellant's disclaimer of those parts

of the statement which did not match his evidence must necessarily be accepted. I am not convinced that Mahlayeye's actual evidence must be endorsed simply because the person to whom he made the statement was not called as a witness.

That leaves this court free to look at the factual disputes in the light of the probabilities. In my view, all things considered, the accident occurred more or less at dusk and not when it was pitch-dark. On the evidence one cannot find that the appellant was intoxicated, or at any rate so heavily intoxicated that he was unaware of his surroundings and would stumble into the road without appreciating the danger of doing so. The appellant was clearly inattentive but it is unlikely, if not drunk, that he would have been so inattentive as not to notice the lights of a motor-vehicle bearing down on him at a distance of only a few paces. As a probability the lights of the motor-cycle were therefore not on. To drive a motor-cycle at dusk, without lights on, when the driver is aware, as the insured driver was in this case, that someone was standing on the edge of the road who may or may not be aware of the approaching vehicle, is clearly negligent. That negligence consists not so much of not being able to see, and hence of not keeping a proper look-out, as it is of not making proper

allowance for not being readily visible to such a pedestrian. The appellant did not notice the approaching vehicle, although he clearly should have done so, even if the lights were not on. It is impossible to tell what the appellant would have done if the lights were on but it is likely that he would have been aware of the danger of the approaching vehicle and would have behaved, and accordingly would have reacted, differently. The chances are that the accident would then have been avoided.

Two conclusions follow from the above analysis:

6. I disagree with the Ending of the trial court that even if the lights were not on the appellant's negligence was such as to be the sole cause of the accident. If the lights had been on the appellant would most likely have noticed the oncoming vehicle and would not have stepped into its path.

7. Mahlayeye was also negligent. This is therefore an appropriate case for apportioning the blame between the motor-cyclist and the pedestrian. In my view, even if the motor-cycle's lights were not on, the appellant was considerably more at fault than the insured driver. To step into the road when he was aware of the approach of a vehicle, as he testified, without making sure that it was safe for him

to do so, is evidence of a high degree of culpability, endangering not only himself but also other users of the road. I would apportion the blame on the basis that the appellant was two-thirds at fault, and the insured driver one-third, in relation to the damage the appellant suffered as a result of the accident.

The record which was prepared for this appeal contains a mass of documentation which should never have been included in it. Examples are a special plea (which formed the subject matter of separate proceedings: see Zeem v Mutual & Federal Insurance Co Ltd 1996 (4) SA 476 (W)); the claim form; correspondence; the heads of argument before the Full Bench; and the petition which was submitted to this court for leave to appeal. In total 208 pages out of a record consisting of 326 pages were thus wasted. Notwithstanding the consideration that the appellant obtained leave to proceed in forma pauperis such profligacy justifies a special order of costs.

The following order is made:

8. Subject to paragraph 2 below, the appeal is allowed with costs.

9. The appellant is deprived of 30 per cent of the costs of preparing the appeal record.

(3) For the order of the court a quo the following order is substituted:

"(1) The appeal is allowed with costs;

(2) For the order of the trial court the following order is substituted:

'(1) It is declared that any damage proved to have been suffered by the plaintiff as a result of injuries he sustained in the accident, is to be reduced by two-thirds, having regard to the degree to which the plaintiff was at fault in relation to such damage.

(2) Costs of suit."

P M Nienaber Judge of Appeal Concur: Mahomed CJ E.M. Grosskopf JA Olivier JA Zulman JA