THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No:103/2001

In the matter between:

VALASHIYA: ELIZABETH LAWUKAZI Appellant

and

ROAD ACCIDENT FUND Respondent

Coram: Marais, Streicher, Farlam, Mthiyane, JJA and Heher, AJA

Heard: 16 May 2002
Delivered: 29 May 2002

Motor accident – Inference of negligence not drawn from fact that driver disappeared from the scene.

J U D G M E N T

STREICHER, JA/

STREICHER JA:

[1] The appellant, in her personal capacity and in her capacity as the mother and natural guardian of her minor children, instituted action in the

Witwatersrand Local Division against the respondent for the payment of damages suffered as a result of the death of her husband ('the deceased') as a result of injuries sustained by him in a motor accident. The trial court ordered that the issues be separated and that the question of the liability of the respondent be determined first. At the conclusion of the trial in respect of the question of liability the trial court found for the appellant and ordered the respondent to pay the costs. An appeal to a full bench was upheld and the order of the trial court was replaced with an order of absolution from the instance.

[2] At the trial it was common cause between the parties that on 14 August 1994 between 19h00 and 20h00 Mr Mohlala, a witness called by the respondent, found the deceased at a curve in a street in the Mnisi Section of Katlehong, that he transported the deceased to the Natalspruit Hospital and that the deceased subsequently died. The issues to be determined were whether the injuries sustained by the appellant on that day were caused by a collision with a motor vehicle and if they were whether it had been proved that the driver of the motor vehicle was negligent. At this stage only the latter issue is still in dispute.

[3] As Mohlala was traveling, the road in which the accident occurred runs from West to East and then curves by 90 degrees to run from North to South. According to Mohlala he found the deceased lying on the tarred surface, on his side of the road, near the kerb just about where the road straightens out to run from North to South. Close to the deceased but nearer to the centre of the road he also found a carton container and some broken beer bottles. He testified that he was driving home when he observed an object in the roadway. At that time it was already dark and no electric lights illuminated the area. At first he thought that the object was a plastic bag but he then realised that it was a person. He stopped before he got to the person, picked him up and took him to the hospital.

[4] The appellant called one witness, namely Miss Konyana, to testify as to how it came about that the deceased was injured. According to Konyana she lived near the curve in the road. On the evening in question, just before sunset, she was sitting in the dining room facing the street and waiting for the Apollo lights to come on, which would signal that the supply of electricity to the area had been restored after a disruption of the power supply which had occurred earlier that day. She then saw a vehicle approaching the curve from the North at a terrible speed. The driver of the vehicle lost control as he was approaching the curve, drove onto the pavement on the Western side of the road and collided

with a pedestrian on the pavement. He did not stop after the collision. The pedestrian remained lying on the pavement on the Western side. She did not go to his assistance. She did not telephone the police either as there was no telephone in the house. After about 45 minutes Mohlala appeared on the scene. He noticed the injured person, made a U-turn so that his car was pointing in the opposite direction from where he was coming, examined the injured person, picked him up and drove away.

[5] Under cross-examination Konyana testified that the injured person lay on the pavement for about 2 hours before he was removed. She explained that she did not go to his assistance because of the violence in the area at the time. Although there was no other person in the vicinity the driver of the car could, according to her, deliberately have driven into the person on the sidewalk and could have been hiding nearby to see who was going to the injured person's assistance. She admitted that she made a statement to an assessor, that he recorded the statement and that she signed it, but denied that she read it or that it was read to her before she signed it. The statement as recorded differs from her evidence in various respects. According to the statement she heard a crash ('slag') and then saw that there had been a collision; she saw that the injured person was lying on the tarred surface of the road; people tried to stop the car that collided with the pedestrian; and she did not see who removed the person from the scene. She denied that she gave that information to the assessor. Confronted with the fact that according to the statement there was a telephone in the house she admitted that that was the case but said that the service had been interrupted at the time of the accident.

[6] The assessor, Mr Ratsaka, testified that he recorded Konyana's statement correctly and that he read it back to her after having done so. The trial court found that there were various flaws in Ratsaka's evidence. That finding is clearly correct. In view of the conclusion to which I have come it is unnecessary to recount those flaws.

[7] The trial court found that despite the flaws in Ratsaka's evidence Konyana told him that she had not witnessed the collision and rejected her evidence that she actually saw the collision. It seemed likely to the trial court that Konyana embellished her account of what she witnessed in a misguided attempt to assist the plaintiff. The trial court also rejected Konyana's account as to the place of the collision and the location of the deceased after the collision. It nevertheless not only accepted Ratsaka's evidence that she told him that she

heard tyres screeching; that she then heard the sound of a collision; and that she then saw the vehicle speeding away, but also accepted that she was truthful when she gave him that information. The trial court found, furthermore, that the collision occurred at or near dusk but when it was still light. On the strength of this evidence the trial court concluded as a matter of probability:

1 The unidentified vehicle was approaching the curve from the South.

2 The driver would have had an unobstructed view of the deceased.

3 The unidentified vehicle sped away after the collision.

4 In the light of the fact that the unidentified vehicle sped away after the collision there could be no question that the driver knew that a pedestrian had been struck.

5 The driver's hasty departure indicated a guilty conscience on the part of the driver.

6 The inference could be drawn that the driver had been driving negligently at the time of the collision.

[8] A separate judgment was given by each of the three judges who heard the appeal to the full bench. Stegmann J held that the written statement was, in terms of s 34 of the Civil Proceedings Evidence Act 25 of 1965, not admissible to prove the truth of its content because it had never been suggested at the trial that it was admissible or that it should be admitted on that statutory basis. He

was, however, satisfied that, in terms of s 3(b) of the Law of Evidence Act 45 of 1988, the evidence of Ratsaka as to what Konyana told him was admissible for that purpose. But, he disagreed that any weight could be given to Ratsaka's recollection, denied by Konyana, of what Konyana had said to him about the screeching of tyres before the collision. He also disagreed that the evidence justified the inference drawn by the trial court. He thought that it was on the evidence no less likely that the collision was caused by the deceased's own negligence as that it resulted from the negligent driving of the unidentified driver.

[9] Malan J held that the statement was admissible in terms of s 34 of Act 25 of 1965 but that no weight could be given to it: firstly, because Ratsaka whose Afrikaans was grammatically and semantically flawed, spoke to Konyana, whose language is Sepedi, in Southern Sotho and recorded the statement in Afrikaans; and secondly because the contents of the statement differed considerably from Konyana's evidence in court. There was in his view no basis for accepting either Konyana's evidence or her statement as the truth as it was equally possible that Konyana never saw or heard the collision and that she fabricated both versions. He concluded:

> 'There is no … evidence of the clothes the deceased wore. The deceased was run down by a vehicle in the dark on a curve. It is probable that the headlights, assuming that they were on, did not illuminate the deceased before the collision. There is no evidence where the deceased was before he was struck down. He could have been too close to the road or he might have walked or run in front of the approaching vehicle just before the collision.'

[10] Foulkes-Jones AJ held that no reliance should have been placed on the

evidence of Ratsaka, that the evidence of Konyana should have been accepted and that the appeal should therefore be dismissed.

[11] In my view the trial court correctly rejected Konyana's evidence that she actually saw the collision. It could have arrived at this conclusion without having regard to the statement Konyana allegedly made to Ratsaka. If the unidentified vehicle approached the curve to the West at a terrible speed and if the driver lost control it is unlikely that the vehicle would have mounted the pavement on the Western side of the road on the inside of the curve. Konyana's evidence as to why she did not go to the assistance of the injured person, namely because she feared that the driver might have deliberately collided with the pedestrian, not only contradicted her earlier evidence that the driver lost control but also borders on the ridiculous. She contradicted herself as to whether there was a telephone in the house. Mohlala contradicted her evidence as to where the injured person was lying after the collision as well as her evidence that he executed a U-turn after he had noticed the injured person, and that there had been a power failure which could have caused her to be looking at the lights in anticipation of power being restored. The trial court's acceptance of Mohlala's evidence cannot be faulted. Konyana was in my view a thoroughly unreliable witness. No weight could be attached to her evidence as to what she observed on the day in question. There is no reason to believe that what she allegedly told Ratsaka was more reliable than her evidence in court. In the circumstances I do not consider it necessary to decide whether or not the

admissibility of Ratsaka's evidence as proof of the truth of what Konyana told him was established.

[12] It remains to decide whether an inference of negligence can be drawn from the fact that the unidentified vehicle collided with the deceased in a built-up area where the speed limit was 60km/h and disappeared from the scene. The appellant submitted that it could. She relied in this regard on the decision in *Motor Vehicle Assurance Fund v Dubuzane* 1984 (1) SA 700 (A) in which the majority of the court held, per Botha JA, at 705F:

> 'The fact that the deceased was run over at a pedestrian crossing and that the driver, having caused him obvious injury, made off immediately and without rendering assistance gives rise to a probability of negligence on his part. Such conduct justifies the drawing of an inference of negligence. Once it is clear as a matter of probability that the front of the motor vehicle struck the deceased there is no real basis for postulating that the driver was unaware that he collided with a human being and that his reason for the departure from the scene was not a feeling of guilt.'

[13] Whether the fact that a driver who had collided with a pedestrian immediately drove away without rendering assistance gives rise to a probability of negligence on his part would of course depend on the particular circumstances of the case. In the present case the violence in the area where the collision took place (which was common cause) may have been the reason for the driver's disappearance from the scene, but, in any event, the inference can

obviously only be drawn, as was recognized in the above quoted passage, if the driver was aware of the collision.

[14] In the present case there is no evidence on the basis of which it can be found that the front of the unidentified vehicle struck the deceased. The deceased was found near the verge of the road and could, therefore, have been struck by the side of a vehicle while it was negotiating the curve. There is no evidence on the basis of which it can be found what type of vehicle collided with the deceased. The vehicle could, therefore, have been a truck or a truck with a trailer. There is, furthermore, no evidence as to the movements of the deceased immediately before the collision. He could have been running or could have stumbled onto the road. In the light of the violence prevalent in the area and the fact that the deceased was according to Mohlala smelling of liquor, neither of these possibilities is far-fetched. In these circumstances it cannot be found that the driver of the unidentified vehicle was probably aware that he had collided with a pedestrian. No inference of negligence can therefore be drawn from the fact that he disappeared after the collision. Moreover, one can only speculate as to how the collision occurred. No facts which could assist a court in this regard has been proved. In my view the full court correctly upheld the appeal to it.

[15] The appeal is consequently dismissed with costs.

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P E Streicher
Judge of Appeal

Marais, JA)
Farlam, JA)
Mthiyane, JA)
Heher, AJA) concur