# *THE SUPREME COURT OF APPEAL OF SOUTH AFRICA*

Case number : 441/2002

In the matter between :

DORIS GOODENOUGH NO APPELLANT

and

ROAD ACCIDENT FUND RESPONDENT

CORAM : HARMS, BRAND JJA and MOTATA AJA

HEARD : 15 SEPTEMBER 2003

DELIVERED : 15 SEPTEMBER 2003

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# *EX TEMPORE JUDGMENT*

**BRAND JA/**

BRAND JA :

[1] The appellant was appointed as *curatrix ad litem* for Mr Norman Modise because he was unable to manage his own affairs. His incapacity resulted from brain injuries which he was caused to sustain in an incident that occurred on 3 December 2000.
[2] The appellant's contention is that this incident was a hit and run accident in which Modise who was a pedestrian at the time, was struck from behind by an unidentified motor vehicle while crossing the street. On this basis she instituted action against the respondent in the Witwatersrand Local Division in terms of the Road Accident Fund Act 56 of 1996.
[3] In the Court *a quo* the issues were separated and the issue of liability determined first. On this issue the Court (Malan J) found in favour of respondent. The present appeal is against this finding.
[4] On the pleadings respondent denied that Modise was struck by a motor vehicle. Consequently two questions arose for determination.

(a) Was Modise struck by an unidentified motor vehicle, as alleged?

(b) Was the accident caused by the negligence of the driver of this unidentified vehicle?
[5] Quite understandably in the circumstances, respondent did not call any witnesses. The only direct evidence regarding an alleged collision was adduced by Modise himself. On his version he was indeed struck by a motor vehicle while crossing a street on his way home. That, however, was also the sum total of his contribution. A reading of the record of his testimony reveals that, as a result of his brain injuries, this unfortunate man was left severely confused and with a memory that is fatally flawed. It is also apparent that his mental condition rendered any cross-examination on vital aspects meaningless. In these circumstances, I find myself in agreement with the finding by the Court *a quo* that very little, if any, reliance can be placed on Modise's own evidence.
[6] For the most part, the appellant's case was based, firstly, on circumstantial evidence and, secondly, on hearsay evidence of statements allegedly made by Modise shortly after the accident. The circumstantial evidence was presented by a friend of Mr Modise, Mr Zwandele Dube. He testified that on the day that Modise was injured, the two of them visited a shebeen. At about 17:30 Modise left the shebeen on his way home. Dube accompanied him to where he had to

cross a street, Lali Street. It is a busy street used *inter alia* by taxis. Shortly after Dube turned around he heard a screeching of brakes. He did not, however, think at the time that this had anything to do with Modise.

[7] Dube also provided the first hearsay statement relied upon by the appellant. In this regard his testimony was that a few days after the accident he saw Modise again. On this occasion Modise told him that he had been admitted to hospital for injuries he sustained when he was struck from behind by a motor vehicle. He also showed Dube where in the street the accident occurred but Dube did not convey to the Court where in the street the point of impact was indicated.

[8] The further hearsay statement was testified to by Modise's sister, Ntede Modise. According to her testimony Modise told her, when he returned home after being discharged from hospital, that he was struck from behind by a motor vehicle while he was 'inside the street'. Finally, appellant seeks to rely on Modise's hospital records from which it transpires that Modise must have told the hospital personnel that he was 'a pedestrian hit from behind'.

[9] The Court *a quo* found the hearsay statements relied upon by appellant admissible, under s 3(1)(b) of the Law of Evidence Amendment Act 45 of 1988, on the basis that Modise himself was called as a witness, although he could not confirm these statements in evidence. This construction of s 3(1)(b) is in conflict with the subsequent judgment of this Court in *S v Ndlovu and Others* 2002 (2) SACR 325 (SCA) 342c-e. However, be that as it may, I am prepared to accept for the sake of argument that the Court *a quo* could and should have admitted the hearsay statements in the exercise of its discretion under ss 3(1)(c) of the Act.

[10] On that basis it must be accepted that Modise was struck by a motor vehicle. The first of the two questions to be determined must therefore be answered in appellant's favour. That leaves the second question, namely whether it can be found that the collision was caused by the negligence of the driver of that vehicle.

[11] In support of the argument that such an inference is justified, the appellant resorted to the maxim with the somewhat high sounding name of *res ipsa loquitur*. It means no more than that the proven facts must speak for themselves. The underlying reasoning does not depend on any rule of law. It is merely a method of logical deduction. Otherwise stated, it is simply an exercise of common sense. The question is one of fact – can it be said that in view of all the

proven facts, the inference sought to be drawn is as a matter of common sense the most probable one? The appellant's contention is that the following facts had been established from which the driver's negligence can be inferred:

(a) Modise was struck from behind whilst crossing Lali Street;
(b) the collision occurred in daylight while the visibility was good; and
(c) the driver of the vehicle failed to stop and fled the scene.

[12] With regard to the facts recited in (a) and (b) I will assume that these facts have been established, albeit that this is an assumption of doubtful validity. But even on the basis of that assumption, I do not believe that it can be inferred as a matter of probability, that the driver of the vehicle involved must have been negligent. In my view there are too many other possible inferences that cannot fairly be eliminated in determining the dictates of human experience. One such possible inference that immediately comes to mind is that Modise stepped from the pavement or from between parked vehicles into the path of the oncoming vehicle immediately before the collision. The possibility of this inference is strengthened if it borne in mind that, on the facts relied upon by the appellant, Modise was struck from behind, which justifies the inference that Modise was not keeping a proper lookout for oncoming traffic immediately before the collision.

[13] This brings me to the further “fact” contended for by the appellant, namely that the driver who had collided with Modise failed to stop after the collision and drove away after rendering assistance. On a proper analysis of the evidence it is apparent however that a positive finding of this 'fact' cannot be based on direct evidence, but is in turn also dependant on an inference from other facts. This latter inference is in itself not justified on the available evidence. One simply does not know what happened after the collision. It is just as possible that the driver did take Modise to the hospital. It is true that the driver did not report the matter to the police, as he should have done. Whether such failure gives rise to an inference of negligence on the part of a driver involved in a collision is, of course, dependant on all the circumstances of the particular case. Numerous other possible explanations spring to mind. The driver could have been driving without a licence or the vehicle could have been unlicensed or the driver could have been at a place where he should not have been. Or, as suggested by Botha JA in his minority judgment in *Motor Vehicle Assurance Fund v Dubuzane* 1984 (1) SA 700 (A) 706G-H:

'A feeling of guilt coupled with a desire to escape the consequences of self-perceived culpability, is but one possible explanation of the driver's conduct amongst a host of possible explanations which are consistent with an absence of negligence on the driver's part.'

[14] In the circumstances the appeal is dismissed with costs.

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F D J BRAND
JUDGE OF APPEAL
Concur:

Harms JA
Motata AJA