



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

No precedential significance

Case No 577/2010

In the matter between

PUTCO (PTY) LTD

APPELLANT

and

WINNIE MINA MOSHOLI

RESPONDENT

Neutral citation: *Putco (Pty) Ltd v W M Mosholi* (577/2010) [2011] ZASCA 95 (31 May 2011)

Coram: NAVSA, CLOETE, MALAN, MAJIEDT JJA and MEER AJA

Heard: 12 MAY 2011

Delivered: 31 MAY 2011

Summary: Damages — collision — mutually destructive versions — probabilities and improbabilities even — no grounds for interference with trial court's credibility findings.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Van den Heever AJ, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

MAJIEDT JA (NAVSA, CLOETE, MALAN JJA and MEER AJA concurring):

[1] The appellant appeals against the judgment and order of Van den Heever AJ, sitting as court of first instance in the North Gauteng High Court, Pretoria, in terms whereof the appellant was held liable for such damages exceeding the amount of R25 000 as the respondent is able to prove to have suffered as a consequence of injuries sustained in a motor vehicle collision. This appeal is with the leave of the court below.

[2] The trial proceeded on the issue of liability only, the issue of the extent of the respondent's damages having been ordered to stand over for later determination. The incident giving rise to the claim concerns a collision between the appellant's bus in which the respondent, Ms Winnie Mosholi, was a fare paying passenger, and a bakkie. After hearing evidence the trial court found the probabilities and improbabilities to be evenly balanced and decided the matter on the credibility of the parties' respective witnesses. It found the evidence presented by one of the respondent's witnesses, Mr Fernando Manuel, who was a passenger in the bakkie, to be more credible than that of the appellant's sole witness, Mr Stephen Seloane, the driver of the bus. As a consequence, the trial judge held that Seloane's negligent driving was the sole cause of the collision.

[3] The court below further found that the Road Accident Fund (RAF) is not a joint wrongdoer for purposes of s 2(10) of the Apportionment of Damages Act, 34 of 1956 (the Act). The finding was made by the trial judge on the basis that, even if he was wrong in rejecting Seloane's evidence, Seloane was in any event on his own version contributorily negligent.

[4] The collision caused the bus to overturn, resulting in a number of fatalities and injuries to passengers. The RAF settled the respondent's claim for damages in the magistrate's court for its full amount, namely R25 000, being the erstwhile statutory limit in respect of a claim of a passenger being conveyed for reward in terms of the Road Accident Fund Act, 56 of 1996.¹ The respondent claimed the balance of her damages from the appellant in the court below. It was common cause that, at the time of the collision, Seloane was acting in the course and scope of his employment with the appellant.

[5] Appellant's counsel attacked the trial court's credibility finding in favour of Manuel on a number of grounds. He alluded to the fact that Manuel is the only one of a number of the respondent's witnesses who makes mention that the bus was swerving from side to side prior to it crashing into the bakkie. But it is fallacious to reason that, because other witnesses make no mention of this fact, it did not happen. In my view it is quite possible that the passengers in the bus were not aware of the bus moving from side to side. Manuel, being conveyed in the bakkie ahead of the bus, noticed its lights 'zig-zagging' (as he described it) behind their vehicle. I am not persuaded that this contention has any merit. Counsel contended further that the trial judge was inconsistent in rejecting the evidence of one Mr Kuzwayo, one of the respondent's witnesses who was also a passenger on the bus, for deviating from earlier written statements, whereas Manuel's evidence was accepted, despite him not having mentioned the swerving of the bus in his written statement. The criticism is unfounded. Kuzwayo's evidence was rejected on a number of bases, including his failure to mention material facts relating to Seloane's driving, in his earlier written statements. The trial judge was careful in his

¹The respondent's case falls outside the purview of the judgment in *Mvumvu v Minister for Transport* 2011 (2) SA 473 (CC) which declared the statutory limitation provision in the said Act invalid – see para 54 thereof.

assessment of Manuel's evidence. He found his evidence as a whole satisfactory and more credible. It is in that context that the trial judge accepted Manuel's evidence, despite the omission referred to above. In any event, Manuel did not deviate from his written statement; he merely added a further aspect in his testimony.²

[6] The trial judge, correctly in my view, found that the collision occurred due to Seloane's failure to keep a proper lookout. He justifiably criticized Seloane's unsatisfactory evidence in the following respects – Seloane was unable to state whether he had flashed his lights or whether they were on bright before the collision, whether he had swerved to the right before or only after the collision, whether he applied brakes to avoid the collision and, if he did, why his speed was not reduced. He was also unsatisfactory in his evidence concerning the movement of the bakkie onto the roadway prior to the accident. The trial judge correctly found that the manoeuvres that Seloane claimed to have executed to avoid the collision, are not compatible with the timeframe of his description how the collision occurred. This is particularly so in respect of his testimony that the bakkie suddenly and without warning moved into his path of travel. Seloane's version was rightly rejected by the court below.

[7] The trial judge cannot be faulted in his finding that Seloane's negligence was the sole cause of the collision. His approach and findings on the probabilities and on the witnesses' credibility are in my view unassailable. He gave a carefully reasoned judgment, furnishing detailed reasons for his credibility findings in favour of Manuel and against Seloane. The submissions advanced by counsel to challenge the credibility findings against Seloane do not bear scrutiny. The record supports the trial judge's comprehensive motivation for rejecting his evidence. There are no grounds upon which this court can interfere with the trial judge's credibility findings. Upholding the finding of the court below that Seloane's negligence was the sole cause of the collision has the result that the other issue mentioned in para 3 above does not arise.

² See *S v Mafaladiso & andere* 2003 (1) SACRS 83 (SCA) at 593E-594C.

[8] The appeal is dismissed with costs.

S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

Counsel for Appellant : T POTGIETER

Instructed by : SAVAGE JOOSTE & ADAMS INC
PRETORIA
NAUDES, BLOEMFONTEIN

Counsel for Respondent : F DIEDERICKS

Instructed by : WILSENACH VAN WYK GOOSEN &
BEKKER, PRETORIA
HUGO AND BRUWER
BLOEMFONTEIN