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G.P.-S.25617—1974-75—3 000

J 219

# In the Supreme Court of South Africa
# In die Hooggeregshof van Suid-Afrika

( APPELLATE ~~Provincial~~ Division)
( ~~Provinsiale~~ Afdeling)

# Appeal in Civil Case
# Appèl in Siviele Saak

J. A. DE FREITAS Appellant,

*versus*

RONDALIA ASS. CORP. OF S.A. LTD Respondent

*Appellant's Attorney*
*Prokureur vir Appellant* ISRAEL & SACKSTEIN

*Respondent's Attorney*
*Prokureur vir Respondent* KRIEK & CLOETE

*Appellant's Advocate*
*Advokaat vir Appellant* J. H. Coetzee

*Respondent's Advocate*
*Advokaat vir Respondent* D. Marais

*Set down for hearing on*
*Op die rol geplaas vir verhoor op* 11 1977

(W.L.D.) / .13

Coram: Wessels, Muller, Hofmeyr, Diemont et Trengove A.J.A.

9.45 am ——— 11.00 am

C.A.V.

29.12.77. Wessels A.R.
met koste afgewys.

[signature] a/G

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills taxed—Kosterekenings getakseer

| Date Datum | Amount Bedrag | Initials Paraaf |
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOSE AMARO DE FREITAS........................Appellant

and

RONDALIA ASSURANCE CORPORATION
OF SOUTH AFRICA LIMITED .....................Respondent

Coram: Wessels, Muller, Hofmeyr, Diemont, JJ.A. et Trengove, A.J.A.

Heard: 28 November 1977

Delivered: 29 December 1977

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JUDGMENT

WESSELS, J.A.:

During the afternoon of 19 July 1972 appellant, a pedestrian, sustained serious bodily injuries as a result of a collision with a truck driven in a westerly direction in Bezuidenhout Ave., Bezuidenhout Valley, Johannesburg, by a Mr. Van Taak. The truck was insured by respondent in terms of the provisions of the Compulsory Motor Vehicle Insurance

Act...............2/

1972 Act, No. 56 of 1972. Appellant instituted an action in the Witwatersrand Local Division in which he claimed payment of a substantial sum of damages from respondent. It was alleged in the appellant's particulars of claim that the collision was caused by Van Taak's negligence. In its plea, respondent denied that Van Taak had driven the truck negligently and averred that the collision was caused by appellant's negligence or, alternatively, by the negligence of both appellant and Van Taak. Respondent claimed an order dismissing appellant's claim with costs or, alternatively, for an apportionment in terms of the provisions of section 1 of Act No. 34 of 1956.

The matter eventually came to trial before Nestadt, J., on 21 February 1977, i.e., some 4½ years after the date of the collision. By agreement between the parties, the Court a quo was only required to determine the issue of negligence, it being understood that, if necessary, the quantum of damages was to be determined at a subsequent hearing of the

matter. Appellant did not give evidence at the trial; it was common cause that by reason of his injuries he was unable to do so. The only eye-witness, who testified on appellant's behalf, was his friend, a Mr. Pita. Van Taak, who was called as a witness to testify on respondent's behalf, did not become aware of appellant's presence on the road at any time prior to the occurrence of the collision. After hearing evidence and argument, the Court a quo delivered its judgment on 24 February 1977, ordering absolution from the instance with costs in favour of respondent. The appellant now appeals to this Court against the order of the Court a quo.

Notwithstanding the expedition with which the learned Judge a quo delivered his judgment in this matter, he dealt in detail and adequately with the evidence of the several witnesses who testified before him. This renders it unnecessary for me to undertake the somewhat arduous task of once

again setting out in detail in this judgment the effect of the evidence given at the trial. For the purposes of this judgment, I consider it convenient, adequate and time saving to quote somewhat extensively from the judgment of the Court a quo.

Certain facts which were either common cause or not disputed are summarised as follows in the judgment of the learned Judge a quo:

> "Bezuidenhout Avenue is a straight tarred road running through a residential suburb of Johannesburg from west to east. It is apparently a road which normally carries heavy traffic. According to the witness, Townsend, whose evidence I shall later refer to, it was at the time seven metres wide. West of the intersection of Bezuidenhout Avenue and Third Street, and on the southern side of the road, are houses. Between the houses and the southern side of the road is a sidewalk or pavement. The plaintiff at the time worked as a driver of a vehicle that transported ready-mixed concrete. The vehicle in question was approximately 2½ metres wide, 7 metres in length, and between 3 and 3½ metres in height.

One could............5/

One could not see through the vehicle, so to speak, if one stood in front of it looking along its length. One of the plaintiff's co-employees and friend was a certain Mr. Pita. Both he and the plaintiff are Portuguese-speaking. On the afternoon in question at about 3.00 p.m., the plaintiff, Pita and the plaintiff's brother-in-law were each driving one of the vehicles to which I have referred. They went to the plaintiff's home to visit the plaintiff's wife who, at the time, was pregnant. The plaintiff and his wife lived in one of the houses to which I have referred bordering on the southern side of Bezuidenhout Avenue, west of the intersection with Third Street. The address of the house in question is 62 Bezuidenhout Avenue. Pita parked his vehicle in the proximity of the plaintiff's house on the southern side of the road facing west in such a position that the wheels on the left-hand side were on the sidewalk and the wheels on the right-hand side were on the road. In this position the body of the truck protruded on to Bezuidenhout Avenue by between a half and one metre. I shall deal later in this judgment with the exact extent and effect of this protrusion. The truck was parked in such a way that it faced directly west; in other words, it was parked straight. The plaintiff's brother-in-law parked his vehicle in a similar position approximately 3 metres behind or in front of Pita's vehicle. I will deal later with

whose vehicle was in front. There is a dispute on this point. What is clear is that the two of these vehicles were parked one behind the other on the southern side of the road, as indicated and as pictorially illustrated in EXHIBIT 'B' which is a plan drawn up by a Mr. Townsend, to whose evidence I shall later refer. I mention at this stage that the two trucks to which I have referred are depicted by the numbers '1' and '2' on EXHIBIT 'B'. The plaintiff parked his vehicle on the northern side of the road facing east. The whole of the vehicle was parked on the road adjacent to the kerb on the northern side of the road. It was parked more or less opposite the front vehicle on the southern side of the road. After having alighted from their respective trucks the plaintiff, Pita and the brother-in-law went into the plaintiff's house. The brother-in-law remained there. After a while the plaintiff and Pita came out and stood talking to each other, according to Pita, in the following position: they were a few paces, approximately 2.25 metres, in front of, i.e. to the west of, Pita's truck. They were standing within the breadth of this truck. Whether this was the front or the back truck on the southern side is a matter which, as already indicated, I will deal with later. Pita was standing on the sidewalk facing the plaintiff, that is, north. He was not right on the edge of the pavement. He could not, however, say how far

in from..............7/

in from the kerb itself he was standing. The plaintiff was standing very slightly in to the road facing Pita, that is, south. They were approximately an arm's length away from each other. I take this to be something between 1 to 2 ft., but not more. The insured vehicle, a 1¾ ton truck, or lorry, was being driven along Bezuidenhout Avenue in a westerly direction by a Mr. Van Taak on its correct side. The lorry had at its back a loading platform which had vertical sides around it. This loading platform protruded beyond the cab portion of the vehicle by approximately 10 inches on either side. In other words, the loading platform portion of the vehicle was approximately 20 inches wider than the cab portion of the lorry. As it passed the first or second concrete mixer, parked as I have indicated on the southern side of the road, a collision occurred between it and the plaintiff. It was not possible to establish by reference to any marks on the road where exactly the point of collision was. It would seem as if the plaintiff was struck by the front part of that part of the lorry to which I have referred as the loading platform, on its left-hand side. As a result the plaintiff was flung in a westerly direction, landing up in the gutter on the southern side of Bezuidenhout Avenue, west of the point where the plaintiff was struck. The insured vehicle came to a stop still further west of where the plaintiff lay. There was no damage to the insured vehicle. These facts are a combination of the

evidence............8/

> evidence given by and on behalf of the plaintiff and the defendant, and which neither party disputed, or was able to dispute, and which is consistent with both versions."

The plaintiff's case as to how the collision occurred rested in the main on the evidence of Pita. The effect of his evidence is summarised as follows in the judgment of the learned Judge a quo:

> "After having come out of the plaintiff's house he and the plaintiff stood infront of Pita's truck, which was the front one, that is, truck No. 1 on EXHIBIT 'B'. Truck No. 2 was that of the plaintiff's brother-in-law. Pita and the plaintiff stood in the position indicated. Having finished their conversation, the plaintiff turned round to proceed to his truck on the opposite side of the road - at least, he started to turn around. At that moment the insured vehicle was passing. The plaintiff was hit as he turned. Pita cannot say which way the plaintiff started to turn. When he was struck he was still in the same position in the road as when he and Pita were talking to each other. Pita never thought it was possible for the truck to strike the plaintiff in the position in which the plaintiff was.

He thought............9/

He thought that the plaintiff was in a safe position. The insured truck passed almost against the right-hand side of his truck. The plaintiff had not yet started crossing the road. The plaintiff was hit on his shoulder, but Pita cannot say which shoulder. The front of the lorry passed the plaintiff, and it was then that the plaintiff was struck. Pita had seen the truck approaching as it travelled along Bezuidenhout Avenue. He first saw it approximately one kilometre to the east. He saw it pass the left-hand side of his truck, parked as I have indicated. Pita concedes that it was not possible to see through and beyond his vehicle. When the insured vehicle reached the back of the vehicle, referred to as No. 2 on EXHIBIT 'B', i.e. the so to speak, back vehicle, or rear vehicle, his view of the insured vehicle became obscured by his own truck and he could not see it until it reached the front of his truck, as described above. He alternated looking at the plaintiff, whilst they were talking to each other, and the oncoming insured lorry. The speed he estimated at between 70 and 80 kilometres. It never reduced speed as it approached the two parked trucks on the southern side of Bezuidenhout Avenue. Consistent with Pita's evidence that plaintiff was standing within the protection of Pita's truck, he stated that in order to strike the plaintiff, the lorry had to, and did, swerve to its left."

Pita was cross-examined in regard to a written statement purportedly made by him to the police in February 1973 in which the following appears:

> " He then walked in between two parked trucks into Bezuidenhout Avenue."

("He" is a reference to appellant). It appears that at that time Pita neither spoke nor understood English. He gave a verbal statement in Portuguese, which was interpreted into English by a friend. He denied having made the abovementioned statement to the effect that plaintiff walked in between two parked trucks into Bezuidenhout Avenue. Neither party called the interpreter - he was apparently not available to be called to testify. In the result, the Court <u>a quo</u> (correctly so, in my opinion) disregarded the contents of the statement in determining Pita's credibility.

Van Taak was called as a witness to testify on respondent's behalf. The effect of his evidence is summarised as follows in the judgment of the Court <u>a quo</u>:

" Van Taak was a paint contractor, aged 48 years. When a few hundred yards east of the point of collision, he was travelling on his correct side of Bezuidenhout Avenue, he saw ahead of him one truck parked on the left, i.e. on the southern side of the road, parked partly on the sidewalk and partly on the road. His impression was that it was half on the side-walk and half on the road. He also observed another vehicle parked on the right-hand side of the road, i.e. on the northern side, more or less opposite the vehicle parked on the southern side. At that stage his speed was approximately 30 miles per hour. As he got nearer he saw that there were, in fact, two vehicles parked on the southern side of the road, both in the position indicated, namely, partly on the side-walk and partly on the road. He stated that he had to go over to his right to see whether there was any oncoming traffic. He then reduced speed, though he cannot say to what speed he so reduced his speed. He then began to pass the two trucks on his left-hand side and the one on his right-hand side. In relation to the two trucks on his left he gave a berth of approximately 1½ to 2 metres. He could not say what the distance was between his truck and the parked truck on the right-hand side of the road. When he drove past these three trucks he was looking ahead, concentrating on going through, what may be described as, the gap. He never, at any time, prior to the collision saw the plaintiff on

or near.............12/

or near the road, or at all, nor did he see Pita. He said that if the plaintiff had been in the road he would have seen him. He denies that after passing the trucks on the southern side of the road he moved, or swerved to his left. When he was approximately opposite the front truck, i.e. the one parked most to the west, he heard a Bantu, who was on the loading platform at the back of the cab in which he was, shout, 'Stop baas!' There were approximately eight Bantu at the back. The one who so shouted was a certain Jacob. Such person was not available to, and did not give evidence. Van Taak brought his vehicle to a gradual halt, not yet realising that there had been a collision. He alighted and then saw the plaintiff lying on the southern side of the road to the east of where he had stopped. After the collision he noticed that a fourth truck had arrived, and shortly thereafter three of the four trucks left the scene leaving only truck No.1, as depicted on EXHIBIT 'B', that is the one on the southern side of the road, to the west of the truck that had been parked behind it. Van Taak said that he knew that he had to make provision for the loading platform which protruded, as I have indicated, on both sides of the cab. He estimated that the width of his lorry at its maximum point, i.e. at the loading platform point, was approximately 2 metres. He conceded that pedestrians on the road were to be expected in the area in question seeing that it was a residential area."

Shortly after the collision, during September 1972, Van Taak made a written statement to the police. He was cross-examined as to differences in the contents of that statement and his evidence at the trial. The trial Court took note of these differences, and remarked as follows:

> " I have given the best consideration that I can to these criticisms. They are not without substance. In my view, however, they are insufficient to justify a rejection of Van Taak's evidence. I say that, not because of the impression that I gained of Van Taak's demeanour, namely, that he was trying to tell me as best he remembered what actually happened, and that he seemed a responsible person, but because of the unsatisfactory nature of Pita's version, a matter to which I now turn."

The learned Judge a quo proceeded to an analysis of Pita's evidence and, in regard thereto stated:

> " The salient feature of Pita's evidence was that the plaintiff was struck whilst in the position he was when talking to Pita, i.e. when he was within the width and protection of Pita's vehicle, and that this happened because the insured vehicle swerved, or moved, to its left immediately after passing Pita's vehicle. That this is the gravamen of Pita's

> evidence is shown by the following: Firstly, his evidence regarding the distance between himself and the plaintiff whilst they were conversing with each other; secondly, his statement that both he and the plaintiff were within the width and protection of his vehicle; thirdly, his allegation that the insured vehicle, immediately after passing Pita's vehicle, swerved to its left; and fourthly, that when struck, the plaintiff was still in the same position in the road as he was whilst he and Pita were speaking to each other. This is an inherently improbable manoeuvre that Van Taak would have made. There was no need whatever for Van Taak to move or swerve to his left as alleged by Pita. There was, at the time, no oncoming traffic travelling eastwards. The plaintiff was virtually standing in the gutter of the southern side of the road; why should, or how could, Van Taak turn in to his left and strike the plaintiff."

In the Court a quo appellant's counsel submitted that the approach to Pita's evidence should not be too technical, and that it could be held that appellant probably did proceed into the road for some short distance before the collision took place. The Court a quo held that such a finding could not be made; it was contrary to Pita's version and

would be............15/

would be based on speculation as to when and for what distance appellant proceeded into the road before he was struck by the truck. I am in agreement with the approach of the Court a quo.

After having had regard to all the relevant circumstances, the Court a quo concluded that Pita's credibility as a witness was suspect. I do not propose to refer to those circumstances which influenced the Court in its conclusion. It held ultimately that it could not find "on a balance of probabilities that the collision did not occur as Van Taak stated".

The learned Judge a quo then proceeded to an analysis of Van Taak's evidence in order to determine whether on his version a finding on the issue of causal negligence could be made in favour of the appellant. On this aspect of the matter, the judgment of the Court a quo concludes as follows:

"The question.........16/

" The question is whether it has been shown that Van Taak should reasonably have foreseen that the plaintiff might suddenly emerge, because that is what he must have done, into the path of or the lorry itself. In my view the answer must be in the negative. Furthermore, even if the collision occurred in front of the most westerly parked vehicle, and whether the collision occurred there or between the two vehicles, even if Van Taak should have seen the plaintiff there was, in my view, no sufficient proof that his failure to do so was causatively linked to the collision. In other words, there was no proof that he could or should have avoided the collision.

It is apparent that the plaintiff, at what must have been a late stage, or the last moment, proceeded to commence to cross the road. The insured vehicle must have been within one to two paces of the right-hand side of the two parked trucks on the southern side of the road. Because the plaintiff collided not with the front portion of the insured vehicle, but with the side, and because it would not take long to traverse the distance referred to, it seems as if the plaintiff's conduct occurred when it was too late for Van Taak to do anything about it. It was suggested that Van Taak should have given the trucks a wider berth. I cannot agree. In my view there was no proof that he could have or that it was necessary so to do having regard to what ought reasonably to have been foreseen."

Before this Court, appellant's counsel submitted that, in considering whether appellant who, on Pita's version, was standing on the road near to its southern edge and within the width of the parked cement truck, was reasonably visible to the driver of a motor vehicle approaching that spot from the east, at a sufficient distance to enable him to adjust his driving with due regard to the presence of the pedestrian, the Court *a quo* failed to take into account appellant's bulk. As counsel put it, a person standing as appellant did on the day in question "does not occupy a dot on the road". In my opinion, this submission is without any substance. Although the learned Judge *a quo* did not specifically deal with it in his judgment, I have no doubt that he was fully aware of the fact that the visibility of any object, including that of a human male, would to some greater or lesser extent depend on its or his bulk - an elephant would normally be more readily visible than a mouse.

A further submission was that Pita's version, that Van Taak had veered to his left before colliding with appellant, who was then in the act of turning round prior to commencing to walk into the road, furnished the probable explanation of how the collision occurred. I cannot agree with this submission. Pita's version imputes to Van Taak a highly improbable manoeuvre, the more so if, as was found by the Court *a quo*, appellant and Pita were standing between two parked concrete trucks and not to the west of the more westerly parked one. The record does not disclose any reason for this improbable, indeed hazardous, manoeuvre, on the part of Van Taak.

The submission that the learned Judge *a quo* was influenced by Pita's alleged written statement is pertinently contradicted by the terms of his judgment.

A further submission by appellant's counsel was that the Court *a quo* erred in accepting Van Taak's version on

the basis of the rejection of Pita's evidence, I quote from counsel's heads of argument:

> "It is submitted that in this regard the learned Judge erred in law because one does not decide to accept the evidence of one witness because one rejects the evidence of another even though the first-mentioned can be seriously criticised."

In his judgment, the learned Judge _a quo_ stated that he had given every consideration to the criticisms levelled at Van Taak's evidence and that though they were not without substance "they were insufficient to justify a rejection of Van Taak's evidence". In addition to this consideration for not rejecting Van Taak's evidence, the learned Judge _a quo_ also had regard to the unsatisfactory nature of Pita's evidence in so far as it contradicted that of Van Taak. The lack of acceptable evidence from one witness to gainsay, or to create doubts,about the acceptability of the evidence of another witness, is, in my opinion, a matter which may legitimately be taken into account in assessing the acceptability of the evidence of the last-mentioned

witness. The Court a quo cannot, in my opinion, be faulted in regard to its approach on this aspect of the case.

Before this Court appellant's counsel once more undertook a detailed criticism of Van Taak's evidence. I agree with the view of the Court a quo that it is not without substance. However, counsel's argument does not satisfy me that the Court a quo either misdirected itself, or erred in any manner whatsoever in concluding that the rejection of Van Taak's evidence was not justified.

In conclusion, I remain unpersuaded that the Court a quo erred in holding that plaintiff had not discharged the onus of establishing negligence on the part of Van Taak. There was no acceptable evidence justifying a finding that he had not kept a proper look-out, and that had he done so he would have had a reasonable opportunity of avoiding the collision. Pita's version was rejected by the Court a quo, and rightly so in my opinion. In so far as a plaintiff may

rely on the defendant's version in order to discharge the onus of proof resting upon him, Van Taak's evidence does not justify a finding that, on the basis thereof, he was guilty of any form of negligent conduct.

The appeal is dismissed with costs.

M. Wassel.

Muller, J.A. )
Hofmeyr, J.A. ) concur.
Diemont, J.A. )
Trengove, A.J.A.)