IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO 488/03

In the matter between

ROAD ACCIDENT FUND **Appellant**

and

WZ MGWEBA **Respondent**

CORAM: **BRAND, VAN HEERDEN JJA et ERASMUS AJA**

Date Heard: 11 November 2004

Delivered: 26 November 2004

Summary: **Motor vehicle collision with pedestrian – Negligence – proof of excessive speed – Circumstantial evidence based on physical evidence – limits to reconstruction by court – distinction between conjecture and acceptable deductive reasoning – Reaction time – Stopping distance – Evidential value of fact that witness untruthful on collateral issue.**

J U D G M E N T

ERASMUS AJA

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[1] The respondent sustained bodily injuries when he was struck by a motor vehicle while crossing a road. He claimed damages from the Road Accident Fund, the appellant, in the Johannesburg High Court for his losses arising from those injuries. The trial proceeded on the question whether the driver of 'the insured vehicle' was causally negligent in relation to the collision; and, if so, whether there was contributory negligence on the part of the respondent. The trial court declared that the collision was caused solely through the negligence of the 'insured driver'. An appeal to the full bench succeeded to the extent that it held that the accident was occasioned through the negligence of both the insured driver and the respondent, which negligence was apportioned 80% to the driver and 20% to the respondent. The appellant was granted special leave to appeal further to this court.

[2] At the trial there was no dispute about the physical features of the scene of the accident. The collision occurred at the intersection of two major urban roadways, Columbine Ave and Rifle Range Rd. The former runs west-east, the latter north-south. Both roads, up to the point of their intersection, are divided down the centre by traffic islands, with traffic proceeding in opposite directions on either side of the islands. It is of particular relevance that Columbine Ave has three lanes for traffic passing through the

intersection from west to east. (For the sake of convenient reference, I number these lanes 1, 2, and 3 from left to right.) Lanes 1, 2 and 3 continue beyond the intersection, with lane 3 running immediately to the left (north) of the centre traffic island. To the east of the intersection there is a fourth lane, to the left of lane 1, for traffic filtering from Rifle Range Rd into Columbine Ave from the north. The intersection is controlled by traffic lights positioned on the centre traffic islands on all four approaches, as well as at all four corners of the intersection. Pedestrian crossings are demarcated on the perimeter of all four sides of the intersection. There was, however, no evidence regarding distances in respect of the physical and topographical features outlined above.

[3] In the main, the facts of the accident were common cause. The collision occurred at the peak traffic hour of about 08:15 on a Monday morning. The insured vehicle struck the respondent at a point in Columbine Ave immediately east of the intersection in the lane immediately north of the centre island (lane 3). The vehicle had travelled from west to east across the intersection. It was driven by Ms CR Bailey.

[4] The respondent described the accident as follows. On the morning in question he was vending newspapers at the intersection. He kept his supply of papers at the foot of the pole bearing the traffic lights on the centre island

on the eastern side of Columbine Ave. Immediately prior to the accident he had sold a newspaper to a motorist stopped in the traffic lane for vehicles turning left (east) out of Rifle Range Rd into Columbine Ave. After he had completed his sale, he proceeded to return to his supply of papers on the traffic island. He walked past the vehicle, stopped, looked at the robot and seeing that it was green for Rifle Range Road, commenced crossing Columbine Ave. He proceeded along the pedestrian crossing. He was walking fast but not running. He was about to put his foot on the island, when he heard the sound of a motor vehicle. It struck him and he lost consciousness.

[5] The traffic officer who attended the accident, a Mr Jacobs, testified in the respondent's case. He had no independent recollection of the incident, and based his evidence – which was not contested – on a report completed by him at the time. He arrived at the scene at 8:20 and was informed that the collision had occurred at 8:15. He found the vehicle and the pedestrian that had been involved in the collision. The left side of the windscreen was shattered. The alleged point of impact was pointed out to him by the driver of the vehicle. The road surface was hard and 'normal', and dry at the time. He observed a set of skid marks. He paced off certain distances relevant to the accident and thereafter prepared a report which included a sketch

depicting Columbine Ave immediately to the east of the intersection. It indicated the following points:

E: The skid marks. These commence in the intersection and extend eastwards more or less straight along lane 3, across the pedestrian crossing.

X: The alleged point of impact. This was where the skid marks ended.

A: The motor vehicle. This was shown as a rectangle in lane 3, to the east of X.

P: The pedestrian. He was shown as lying in lane 3, east of A.

The following was recorded by Jacobs:

E – X = 16 paces (length of skid marks)

X – A = 16 paces (distance between impact point and vehicle)

X – P = 22 paces (distance between impact point and pedestrian)

It would seem to follow that the distance A – P was 6 paces. This measurement is uncertain, however, because it is unknown from what point of the motor vehicle (A) the measurement X – A was taken.

[6] Jacobs paced off the distances himself. A pace is of course a relative measurement, and he was asked to indicate the length of his stride. This was agreed upon as being 'just a bit more than half a metre'. On that basis, the skid marks of 16 paces on the diagram were 9 to 10 metres in length.

[7] The evidence of the further witness for the respondent can be disregarded for reasons that are not relevant to adjudication of the appeal.

[8] The first witness for the appellant was a police inspector, one Madocks. He had stopped his vehicle in Rifle Range Rd north of the intersection, because the traffic lights were red for him. As he was waiting he heard the screeching of tyres. When he looked in that direction he saw that a white Toyota had hit a newspaper vendor. He put on his police light and cut across the flow of traffic in Columbine Ave to get to the accident. It was clear from the evidence of this witness that, at the time of the collision, the traffic lights were red for Rifle Range Rd and therefore green for Columbine Ave, and remained so for some seconds after the collision.

[9] Ms Bailey told the court that she was driving to work that morning in an easterly direction in Columbine Ave. Her speed was between 50 to 60 kph. As she approached the Rifle Range Rd intersection, she was travelling in the far right-hand lane (lane 3). The traffic lights were green in her favour. As she entered the intersection, she observed two pedestrians running across the road, the one behind the other. (The one in the rear proved to be the respondent.) They were not in the pedestrian crossing. When first she saw the respondent, he was ‘maybe four car lengths’ from her. She could not say how many metres that was. He was in the far left hand lane (lane 1, it would

seem). She was still travelling at between 50 to 60 kph. She applied her brakes strongly. The first pedestrian crossed the road successfully, but the respondent ran into the left side of her vehicle. He fell onto the windscreen. The car came to a dead stop as she still had her foot on the brake. Her windscreen was damaged in the collision.

[10] Bailey stated that the accident occurred between 07:30 and 07:45, because that was the normal time that she went past there. In cross-examination, she was confronted with her police statement in which it was recorded that the accident had happened at approximately 08:15.

[11] Counsel for respondent put it to her (without factual foundation for the proposition) that the length of the substantial skid marks indicated that she was not travelling at 50-60 kph. She replied:

'Sir there is no ways that you can travel faster than 60 in that place at peak period, in peak traffic, you cannot. There is no ways that you can travel faster than that. I drive there every day of my life, I have worked there for eight years, eight solid years I drive there every day of my life. … I always look at my speedometer when I drive that I do not exceed speed limits. Because I travel in a company car and if I get any fines for the company car I am liable for the fines.'

Counsel put it to her (again without factual basis for the proposition) that according to the diagram the pedestrian was 'flung' 22 paces from the point of impact. The cross-examination continued:

'…Can you explain why he was flung so far on collision? --- If I may ask how do you mean by flung? ---Well possibly not flung, he finished up – perhaps flung is the wrong – according to the diagram he finished up 22 paces down the road from the point of collision. --- He rolled off my car, he was not flung nowhere, he rolled off my car. You say that you carried him on your bonnet? --- On the impact of the accident when my car came to a stop he rolled off the car.'

[12] On this evidence then, the trial court ruled that Bailey was solely to blame for the collision. His reasoning is reflected in the following comments:

'I must also point out that the length of the skid marks as well as the distance from the point of impact up to where the plaintiff fell must mean that Bailie was travelling at a far greater speed than 50/60 km. It is simple logic that if indeed Bailey was travelling at between 50 and 60 km per hour the vehicle would not have made skid marks that long and could not have necessitated that the plaintiff land some 22 paces away from the point of impact.

Based on Madock's testimony, it appears more probable that the robot was green for Baillie as she approached the intersection i.e. for vehicles travelling west to east in Columbine Avenue. Probabilities point to the robot having changed from green to amber

before Bailey entered the intersection. Because she was in a hurry she clearly must have tried to cross the intersection as fast as possible before the robot turned red. … When the robot changed from green to amber for Bailie at the same time the plaintiff must have seen the robot change to green for him and started crossing the intersection from north to south. …

In my view Bailie entered a busy intersection at high speed and when the robot had already changed from green.'

The learned judge found that Bailey must have been rushing in order to report for work on time.

[13] The court *a quo* held that the trial judge had erred in his finding that the traffic lights were red for Bailey and green for the respondent. The court accordingly held that the respondent was negligent in crossing the road. The court, further, held that the trial court was correct in its finding that Bailey (too) was negligent in the driving the insured vehicle. The learned judge who delivered the judgment of the court reasoned that -

'… the cumulative weight of the following factors:

(i) The distance from the traffic lights (which were green for the insured driver) to the pedestrian crossing used by the plaintiff at the other end of the intersection;

(ii) The length of the skid marks of the insured vehicle;

(iii) The distance between the point of impact with the pedestrian and the point where he fell;

(iv) The insured driver's untruthful testimony about the time of the accident; and

(v) The insured driver would have been seriously late for work.

compel the conclusion that the insured driver was travelling at an excessive speed in the circumstances. Put differently, had she been travelling at between 50 and 60 kilometres per hour, as she said she had, she would easily have been able to stop before hitting the plaintiff. … Had she travelled more slowly she would also have avoided colliding with the plaintiff. Therein lies her negligence. An examination of her evidence also reveals that there were aspects of the failure to keep a proper look out and the failure to take reasonable steps to avoid the collision in her negligence as well. It should be borne in mind that she herself said that there was no vehicle in her lane behind her. Accordingly she could have applied her brakes sooner than she did.'

[14] Bailey's evidence as to her speed was not controverted by direct evidence. Both the trial court and the court *a quo* relied on circumstantial evidence for rejecting her version that she was travelling at 50 to 60 kph when she entered the intersection. In my view, both courts, with respect, failed properly to analyse the evidencial material.

[15] I deal first with point (iii) of the court *a quo*: the distance between the point of impact and the point where the pedestrian fell. Both the trial court and the court *a quo* simply mentioned that the distance between these two points was 22 paces, without further comment or elaboration. Both apparently assumed that the force of the impact somehow caused the respondent to be propelled this distance. This assumption does not however

accord with the evidence. On Bailey's evidence (*see* para [11] above) the respondent was conveyed on the bonnet of the motor car for some distance beyond the point of collision: the vehicle was decelerating and came to a stop; the respondent was a free-moving body that continued on its eastwards course beyond and over the front of the vehicle, until his contact with the road surface brought him to a stop in front of the car. This description accords with the shattered windscreen and the relative positions of the motor car and the pedestrian after the collision, as indicated by Jacobs. On his report the distance between the motor vehicle and the pedestrian was 6 paces (but *see* para [5] above). Nothing in this scene conflicts with Bailey's evidence regarding her speed of travel. It follows that the trial court misconceived the evidence on this aspect, and the court *a quo* uncritically adopted that misconception.

[16] I deal next with the skid marks (point (ii)). The trial court, as well as the full court, simply assumed that the length of these marks constituted evidence that Bailey was travelling at a speed in excess of 50-60 kph. In doing so, with respect, they indulged in accident reconstruction without the benefit of expert evidence. Accident reconstruction is a branch of dynamics requiring special knowledge in the discipline of physics. A court may venture into that field but only at a level that can properly be said to be a

matter of common sense falling within common human experience. It is often a fine line (and frequently a debatable one) that separates unacceptable conjecture from acceptable deductive reasoning based on proven physical facts.

[17] A court could, in my view, take cognizance of the fact that skid marks are caused by the wheels of the motor vehicle locking in the application of its brakes. It is, further, a matter of basic and obvious logic that there is some correlation between the length of the marks and the speed at which the vehicle was travelling when the skidding commenced: the higher the velocity, the longer the marks will be. However, calculating the speed of the vehicle from the length of the skid marks is beyond the ability of the non-expert that is the court. That calculation will require evidence regarding the stopping distance of the particular vehicle at a given speed in the particular physical circumstances. In this case, there was no evidence regarding the facts relevant to that computation, nor of the mathematical formula based on such information. In the circumstances, the fact that the insured vehicle left skid marks of 9-10 meters does not have the precise probative value placed upon it by the trial court; and the court *a quo* followed it into that error.

[18] Both the trial court and the full court found that, had Bailey been travelling between 50-60 kph, she would have been able to stop her vehicle

before striking the appellant. Neither court, however, examined the factual basis underlying this reasoning. An essential factor in such deductive process is distance, here the distance between Bailey and the respondent when she first saw him. That measurement was, however, unknown. The court *a quo* described this distance as 'considerable', which was an imprecise measure on which to base the finding that Bailey could have stopped her vehicle timeously.

[19] Furthermore, we are dealing with two moving objects converging at right angles on a point of collision. Bailey had to take evasive action. The phenomenon of reaction time is frequently mentioned in motor accident cases. In the above crisis situation, it would be an important factor in assessing whether Bailey could have avoided the collision. However, in the absence of physiological or empirical evidence regarding human reflexes, a court should be hesitant to attribute a precise time to that factor: in short, Bailey's reflex ability was unknown. Nevertheless, the court could and should have had regard to what the reaction process logically entails. In an emergency, the motorist must first observe and then assess the nature of the looming danger. She must thereafter decide upon the proper evasive action to take. In Bailey's case this involved a choice between swerving and braking. She decided upon the latter (which appears to have been the most

appropriate action in the circumstances). She then had to take that action. This involved removing her foot from the accelerator and thereafter depressing the brake pedal. All this would of course happen very quickly: but then we are here concerned with time measured in seconds, even fractions of a second. In the meantime, prior to the deceleration, Bailey would, at 60 kph, have been proceeding at 16,7 metres per second, decreasing at an unknown rate as the vehicle decelerated. It was furthermore unclear at what point the braking action took effect, as this could have occurred prior to the wheels locking.

[20] In view of the lack of precise information regarding Bailey's stopping distance and her reaction time, there was insufficient factual basis for the conclusion that the reasonably competent driver in her position would have avoided the collision by timeous reaction and appropriate action.

[21] One can look at the position also from the perspective of the pedestrian's movement. The respondent had sold a newspaper to a motorist stopped at the corner of Rifle Range Rd and Columbine Ave. He was standing – so it seems – in the filter lane in Columbine Ave, presumably at the driver's window (*see* paras [2] and [4] above). From there he moved towards the centre island. When Bailey first observed him (on her evidence) he was in the extreme left-hand lane of Columbine Ave. He was running

across the road (according to her) or walking fast (according to him). He proceeded as far as lane 3, where he was struck. The distance across Columbine Ave was not measured, nor do we know precisely how long it took him to traverse the road: it would have been a matter of seconds (on either version of his actions). Clearly, there was no factual basis for holding that Bailey could, let alone should, have brought her vehicle to a stop in that time.

[22] That leaves the fact that Bailey was untruthful about the time of the collision and was in fact late for her work (points (iv) and (v)). This aspect impacts adversely upon her credibility. However, her evidence regarding the collision was consonant with the established facts. There was no evidence – either direct or circumstantial – that in any way contradicted her version of the accident. The fact that she had a motive for travelling fast did not *per se* constitute evidence that she was travelling beyond the speed limit. By itself, the fact that she was untruthful about being late for work was devoid of probative value.

[23] Finally, there is a suggestion in the judgment of the court *a quo* that Bailey failed to keep a proper look-out. The judge did not elaborate on the issue. There is no factual basis for such a finding. On the respondent's evidence, there was nothing in his actions that would have suggested to an

onlooker that he was about to rush blindly against the red light across the busy road, into the path of oncoming traffic. In the circumstances, a careful motorist would not have had reason to take evasive action prior to the respondent commencing to cross Columbine Ave, which was when Bailey noticed him.

[24] In view of my findings on the question of negligence on the part of the insured driver, I need not deal with the further substantial hurdle in the path of the appellant, ie causation.

[25] For these reasons, I find that both the trial court and the court *a quo* erred in finding negligence on the part of the driver of the insured vehicle. The trial court should have found that the respondent had failed to prove negligence on the part of the driver of the insured vehicle, and should therefore have granted the appellant absolution from the instance.

[26] In the result, the appeal succeeds with costs. The judgment of the court *a quo* is set aside and the following order is substituted therefor:

'1. The appeal succeeds with costs.

2. The whole of the order of the trial court is set aside, and substituted by the order that the defendant be absolved from the instance with costs.'

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AR ERASMUS
ACTING JUDGE OF APPEAL

CONCUR:

BRAND JA

VAN HEERDEN JA