IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES/NO.

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED.

Aug. '05

DATE

SIGNATURE

CASE NO: A3115/04

In the matter between:

CEBISILE MICHAEL SITHUKUTHEZI Appellant

and

ROAD ACCIDENT FUND Respondent

JUDGMENT

MATHOPO, AJ:

[1] This is an appeal against a decision of the magistrate who dismissed the appellant's claim against the respondent for damages sustained when he was knocked down by a hit and run motorist. In the course of the trial the magistrate separated the issues of merits and quantum. This appeal is confined to the merits of the appellant's claim.

[2] The appellant was injured at approximately 16h45 on 24 January 2001. At the time, he was a pedestrian walking in the emergency lane of the N12 highway in the vicinity of Naturena. The road was busy as people were making their way home. At the point of impact, the N12 is a two-lane highway with tarred emergency lanes marked by a solid yellow line. The highway has no sidewalk or footpath. To the left of the emergency lane there is a gravel and a grass verge. While walking in the emergency lane, the appellant was struck from behind by a hit and run motorist. According to the appellant he was dressed in khaki trousers and a white tracksuit top. The visibility was good. The road surface was wet due to a light drizzle.

[3] A trial on this issue ensued before a magistrate sitting in Johannesburg, who found that the appellant had failed to discharge the *onus* of proving that the accident was caused by the negligence of the hit and run motorist.

[4] The present appeal is against that finding.

[5] The primary question in this appeal is whether the appellant proved that the driver of the hit and run motor vehicle was negligent. If this was proved, the next question would be whether any contributory negligence on the part of the appellant was proved.

[6] It was the appellant's case that his injuries resulted from the negligence of the driver of the hit and run motor vehicle. In deciding this issue, the magistrate found that the test is "*whether the pedestrian would have foreseen*

that he might suffer harm, material facts being a pedestrian's relative immobility and the degree of his visibility". While parts of this test could possibly have a meaning when deciding whether there was contributory negligence on the part of the pedestrian, this test is otherwise wholly inappropriate and meaningless when the issue to be decided is whether the pedestrian was injured as a result of the negligent acts of the driver of the vehicle that collided with him. The question the magistrate should have asked was whether the appellant had discharged the *onus* of proving that the hit and run driver was negligent. Having asked the wrong question, the magistrate gave a wrong answer.

[7] The National Road Traffic Act of 1996 deals with road markings. Marking 4.1 provides for a yellow line indicating to a driver the left edge of the roadway. It is also said that subject to Regulation 298A, a driver shall not drive to the left of such marking. In terms of Regulation 298A(2)(b) such driving is permitted between the hours of sunrise and sunset if the driver "*can do so without endangering himself or herself, other traffic, pedestrian or property on such road*". See *Trencor Services (Edms) Bpk v Loots & Loots en Andere* 2001 (1) SA 324 (NC).

[8] Regulation 316(2) states that:

> "*A pedestrian on a public road which has no sidewalk or footpath abutting on the road walk, shall walk as near as is practicable to the edge of the road on his or her right-hand side so as to face oncoming traffic on such roadway, except where the presence of pedestrians on the road is prohibited by a road traffic sign.*"

[9] There is no sidewalk or footpath running next to the emergency lane. The appellant was accordingly entitled to walk where he did. He should however have been facing oncoming traffic. That he did not do so is not an offence. There was accordingly nothing unlawful in the appellant walking in the pedestrian lane. That the appellant a layman, admitted under cross-examination that it was unlawful is irrelevant.

[10] In terms of Regulation 316(5) "*No pedestrian on a public road shall conduct himself or herself in such a manner as to or is likely to constitute a source of danger to himself or herself or to other road traffic which is or may be on such road*". The appellant was not a danger to himself or other road-users because prior to the collision he had been walking approximately one metre inside the yellow line towards the grass parallel to the road. He had no reason to believe that the motor vehicle will collide with him because he had used that road daily for a period of seven months without any incident.

[11] At the time of the collision there was nothing to impair the hit and run driver's visibility of what was ahead of him. What was ahead of him was the appellant, who would have been seen to be walking in the emergency lane by any motorist keeping a proper lookout. Nonetheless, this driver drove in the emergency lane and collided with the appellant. In terms of Regulation 298A(b) he had no right to drive in the emergency lane. Of itself, this evidence creates a *prima facie* inference of negligence on the part of the driver. (See *Arthur v Bezuidenhout* 1962 (2) SA 566 (AD) at 574-575 and *South African Law of Evidence* Zeffertt *et al* 5th edition at page 502.) The

defendant did not seek to rebut this *prima facie* evidence. In the absence of any rebuttal, the magistrate should have found that the collision was caused by the negligence of the hit and run driver, who was negligent in that at the very least, he failed to keep a proper lookout or failed to avoid the collision when by the exercise of reasonable care and skill he could and should have done so.

[12] In the absence of any evidence to indicate negligence on the part of the appellant, there is no basis for an apportionment.

[13] It follows that the appeal must succeed. The following order is made:

13.1 The appeal is upheld with costs.

13.2 The respondent is ordered to pay the appellant's costs of the appeal.

13.3 The magistrate's order is set aside and substituted to read:

13.3.1 It is declared that the defendant is liable to pay such damages as the plaintiff may in due course prove.

13.3.2 The defendant is to pay the costs to date.

R MATHOPO
ACTING JUDGE OF THE HIGH COURT

I agree:

I W SCHWARTZMAN
JUDGE OF THE HIGH COURT