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Case No. 360/1982

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

KATHLEEN MARAIS, N O (born Minnies) Appellant

and

SHIELD INSURANCE COMPANY LIMITED Respondent

CORAM: RABIE CJ, JANSEN JA et HEFER AJA

HEARD: 9 MARCH 1984

DELIVERED: 16 MARCH 1984

JUDGMENT

/HEFER AJA ...

HEFER AJA:

On 23 November 1978 Clarence Jaftha drove a truck belonging to Vibracrete (Pty) Limited (Vibracrete) in a northerly direction along Vibra Street, Cape Town. His intention was to turn left through a gate into the Vibracrete premises which were situated on the western side of the road. At the same time two other employees of Vibracrete, James Marais and Abe Anthony, were wrestling on the eastern side of the road. As the truck was passing them, Anthony threw Marais to the ground. He fell under the rear wheels of the truck and was killed.

Marais's widow (the present appellant) sued

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the respondent (the insurer of the truck in terms of the Compulsory Motor Vehicle Insurance Act, No. 56 of 1972) in the court below for the recovery of the damages which she and her minor children had allegedly suffered as a result of Marais's death. The parties came to an agreement on the quantum of damages and eventually went to trial on the simple issue of Jaftha's negligence which had been alleged by the appellant and denied by the respondent. The trial court found that such negligence had not been proved and granted judgment in respondent's favour with costs. Against that order the appellant has now appealed.

/Appellant's

Appellant's counsel made no point of the fact that judgment was granted in respondent's favour instead of absolution from the instance which should have been decreed. He aimed his argument at the finding that no negligence on Jaftha's part was found and the correctness of that finding is the only question which this Court has been called upon to decide.

The only eyewitness to the incident called at the trial was one Mampies who was with Jaftha in the cab of the truck. His evidence was that shortly after they had turned into Vibra Street from Landsdowne Road, Jaftha said to him: "Kyk daar voor". He then

saw the two men wrestling - or fighting, as he thought. They were standing on the road surface behind a parked car on the right-hand side of the road as the truck approached, holding each other around the neck. Vibra Street is fairly narrow and, in order to execute the turn to the left and manoeuvre the large truck through the gate, Jaftha kept to the incorrect side of the road. He did not hoot and thereby warn the two grappling men of the approach of the truck of which they, according to Mampies, appeared to be quite unaware. At a stage when the cab had already passed them and Jaftha had already commenced the turn to the gate, Anthony swung Marais completely around and threw him to the

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ground. Mampies felt a slight bump, whereupon Jaftha immediately stopped. Upon investigation it was found that the right rear double wheels of the truck had passed over Marais's head.

Appellant's counsel argued that Jaftha was negligent in at least two respects, viz by failing to allow an adequate margin of safety in driving past Marais and Anthony, and to give them any warning of the approach of his truck. I will deal with these two legs of the argument in turn, but as a preliminary observation I wish to so say that the facts on which the argument is based, are only those which may be gleaned from Mampies's

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evidence (together with such inferences as may validly be drawn) and that his evidence is not reliable in all respects. The learned trial Judge, rightly in my view, found certain aspects thereof to be no more than a reconstruction rather than a clear recollection; in at least two vital respects he changed ground considerably as his evidence progressed; and in other equally important respects his evidence is so vague that it carries little weight. The result was that the learned Judge was not prepared to accept it in all respects.

I emphasised the weaknesses in Mampies's evidence in view of the dependence thereon of the

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argument relating to Jaftha's alleged negligence. The pivotal theme of the contention is that Marais and Anthony were so engrossed in fighting that they were oblivious of the approach of the truck, and is based entirely on Mampies's impression that the two men were grappling in earnest and not in play and, as Mampies put it, that "hulle het nie aandag getrek (sic) aan die lorrie wat aankom nie." That is one of the very respects in which the learned trial Judge was not prepared to accept Mampies's evidence, both on account of the improbability of a violent quarrel between these two co-employees and fast friends, and on account of his utterly vague

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description of the affray. All that Mampies saw, was -

> "Daar het 'n kar gestaan aan die oorkant van die office en hulle twee het agter die kar gestaan, so hand om die nek, so gegryp, en soos ons aangekom het, het hulle mekaar geruk."

Asked at a later stage why he had thought that they were fighting in earnest, his reply was

> "Want hoekom, met ander woorde, dit is amper soos hulle nie gesien het daar kom 'n trok aan nie."

I have not been persuaded that the learned Judge erred in declining to find on this meagre

evidence that Marais and Anthony were indeed fighting. Still less am I able to agree that the evidence justifies a finding that they were unaware of the approach of the truck. Mampies's laconic assertion for which no reason was advanced, is certainly not sufficient. I suspect that it is yet another piece of reconstruction on his part, based on the unexpectedness with which Anthony flung Marais under the wheels of the truck, but which may be ascribed to a variety of reasons including heedlessness and, if indeed they were fighting, even to wilfulness and not, as was suggested as being the most probable inference, to unawareness of the passing of the truck. For I find it extremely difficult to

/believe ...

believe that Anthony could have been unaware of the passing, within only a few metres, of such a large and probably noisy vehicle. Vibra Street is a relatively short and narrow cul-de-sac; there was no other traffic that we know of and it is improbable that it could have passed unnoticed.

Appellant's counsel nevertheless argued that Jaftha should have hooted because he had no reason for assuming that Marais and Anthony were unaware of the approaching truck. I fail to see why not. Had there been sufficient evidence that they were indeed not so aware or that Jaftha had reason to suspect that they were not, the matter

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would obviously have assumed a completely different complexion. But, as I have indicated, the available information is far too scant to justify either of these conclusions.

Finally there is the contention that Jaftha left an insufficient margin of safety in passing the two struggling men. On this aspect of the matter too there is a remarkable paucity of information. All that is known with any measure of certainty, is that the truck must have passed them at a distance of less than 3,8 metres (half the width of the road). We do not know to what extent Jaftha was driving on his incorrect side (Mampies

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merely says "Hy was halfpad oor die witstreep al"), nor where in relation to the eastern side of the road Marais and Anthony were. Whether Marais fell on or whether he rolled to the spot where the wheels crushed him, we do not know either. We only know that, if Mampies is to be believed, Anthony grabbed Marais by his clothing, heaved him completely around and flung him to the ground, and that the rear wheels then passed over him. That does not justify the inference that Jaftha was passing them too closely.

In my judgment the conclusion at which the learned Judge arrived was the correct one.

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The appeal is accordingly dismissed with costs.

J.J.F. HEFER AJA

RABIE CJ

CONCUR

JANSEN JA