

Case No 189/91
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

PATRICIA LEINE N.O.

Appellant

- and -

NATIONAL EMPLOYERS' GENERAL
INSURANCE COMPANY LIMITED

Respondent

CORAM:

HEFER, VIVIER, VAN DEN HEEVER JJA
et NICHOLAS, HARMS AJJA.

HEARD:

17 November 1992.

DELIVERED:

8 January 1993.

J U D G M E N T

VIVIER JA.

VIVIER JA.

At about nine o'clock on Saturday evening 3 September 1983 Bernard Leine, then 15 years old, was walking on or near the eastern sidewalk of Moseapoa Street in the township of Huhudi near Vryburg when he was struck by a Datsun light delivery vehicle driven by one Liso. As a result of the collision Bernard sustained severe brain injuries. During November 1985 Mrs Patricia Makgosi Leine, in her capacity as Bernard's mother and natural guardian, instituted an action in the Northern Cape Division against the respondent as the authorised insurer of Liso's motor vehicle under the Compulsory Motor Vehicle Insurance Act 56 of 1972 ("the Act"), claiming compensation in terms of sec 21 of the Act for loss and damage suffered as a result of the bodily injuries which Bernard had

sustained. During the course of the trial, on 19 May 1989, Mrs Leine and Mr Johan Schoon were appointed *curatores bonis* in Bernard's estate with the power, *inter alia*, to assist him in the said action and to control and administer his property. The necessary consents to the substitution, for the plaintiff, of the *curatores bonis*, were subsequently filed. They must consequently be regarded as the plaintiffs and the persons entitled to any compensation awarded in the said action. I shall refer to them as the appellants.

The trial came before **ERASMUS J** who was asked by the parties to decide only the question of liability, leaving the issue of the quantum of damages for later determination. After hearing evidence on the issue before him, **ERASMUS J** found that the

collision had been caused solely by the negligence of Liso. The parties thereafter settled the quantum of damages and an order was made by ERASMUS J awarding compensation in an amount of R275 000-00 with interest thereon and costs. With the leave of ERASMUS J the respondent appealed to the Full Bench of the Northern Cape Division on the ground that it had not been shown that Liso was negligent. The appeal was upheld and an order for absolution from the instance with costs substituted for that granted by ERASMUS J. With the special leave of this Court the appellants now appeal against the order granted by the Full Court.

Where the collision occurred the roadway of Moseapoa Street is 8 metres wide and runs from south to north, carrying traffic in both directions. It has a

tarred surface. The sidewalk on its eastern side is two-and-a-half metres wide with a gravel surface, and is separated from the roadway by a kerbstone.

It was common cause at the trial that immediately prior to the collision Bernard was walking in a northerly direction when he was struck by Liso's vehicle which was travelling in the opposite direction. Due to his injuries Bernard was unable to testify at the trial. However, it is clear from the evidence of two eyewitnesses who testified on his behalf, Moloki and Vorster, that at the time Bernard and some friends of his were on their way to a function which was being held that night at the community hall which is situated some three street blocks to the north of where the collision occurred and on the eastern side of Moseapoa

Street. The evidence of Moloki and Vorster was clearly to the effect that Bernard was walking on the eastern sidewalk just prior to the collision and that Liso's vehicle mounted the eastern sidewalk and collided there with Bernard.

Liso, who was the only witness called by the respondent, was unable to say where exactly the point of impact was or how the collision occurred. His evidence was to the effect that he had turned into Moseapoa Street at its intersection with Church Street, which is the street immediately to the north of where the collision occurred, and that he was driving south in Moseapoa Street when he noticed three persons on the eastern sidewalk of Moseapoa Street about 50 metres ahead of him. He was momentarily blinded by the lights of an oncoming car and he flicked his own lights. At that stage he was driving in second gear

at a speed of between 35 to 40 km an hour and the left side of his car was about one metre away from the eastern kerbstone. He had just passed the oncoming car when he heard the sound of a blow to the left side of his car. He immediately stopped, got out of his car and saw a person lying in the roadway, half a metre away from the eastern kerbstone. Liso's evidence was that, after observing the three people on the eastern sidewalk shortly after turning into Moseapoa Street, he did not notice them again. He at no stage of his evidence positively testified that the collision occurred in the roadway as opposed to the sidewalk. In his evidence in chief he denied that he went on to the sidewalk by saying that he would have felt it had his vehicle left the roadway. Under cross-examination he conceded that he could possibly have mounted the sidewalk without noticing it. His evidence in this

regard leaves one with the distinct impression that he cannot really say how the collision occurred or where the point of impact was and particularly whether or not his car went onto the sidewalk. His evidence with regard to where Bernard ended up after the collision was equally uncertain. Moreover, counsel appearing for the respondent at the trial very fairly informed the Court at the end of his evidence that Liso had told him in consultation that Bernard was lying on the eastern sidewalk after the collision.

Liso did not favourably impress the trial Court as a witness. His evidence that he had stopped after the collision and that Bernard had ended up in the roadway after the collision was rejected. In its judgment granting leave to appeal to the Full Bench the trial Court pointed out that it had wrongly found that Liso was travelling from south to north in Moseapoa

Street just prior to the collision, but that this did not affect either its finding that Liso did not stop or its rejection of his evidence that Bernard had landed in the roadway after the collision. The evidence of Moloki and Vorster that Bernard landed east of the sidewalk was accepted by the trial Court.

The trial Court found Vorster generally to be a reliable witness. It held that Moloki had made a previous inconsistent statement to a Mr Serfontein, an insurance assessor, and that not much weight could therefore be attached to his evidence except where it was corroborated by Vorster's evidence.

The basis of the trial Court's decision was that the versions of Moloki and Vorster, on the one hand, and that of Liso, on the other hand, as to the point of impact were mutually destructive and that it had not been established that the collision occurred

on the sidewalk as opposed to the roadway. It held, however, that Liso was negligent on his own version by paying no further attention to the pedestrians after having observed them on the sidewalk when he was still some 50 metres away. The Court *a quo* agreed with the trial Court's finding that it had not been shown that Bernard was hit on the sidewalk. It held further that it could not be said that Liso ought reasonably to have anticipated that one of the pedestrians he had observed on the sidewalk would suddenly and unexpectedly emerge onto the roadway. It had therefore not been established that Liso was negligent.

Counsel for the appellants submitted in this Court that both the trial Court and the Court *a quo* erred in not finding that Bernard was struck by Liso's car while he was on the sidewalk. Mr de Bruin, for

the respondent, conceded the correctness of the evidence given by Vorster and Moloki that Bernard was walking on the eastern sidewalk shortly before the collision. He contended, however, that for some unknown reason Bernard moved into the roadway immediately prior to the collision and was then struck by Liso's vehicle. In order to deal with Mr de Bruin's submission it is necessary to refer more fully to the evidence of Vorster and Moloki.

According to Vorster he was on his way to the community hall when he noticed Bernard in the company of two others on the eastern sidewalk of Moseapoa Street about seventy metres ahead of him. Bernard was on the left of his two companions. There were other people about three metres ahead of Bernard. Vorster saw a vehicle approaching them a few hundred metres away and to the north of the intersection of

Moseapoa and Church Streets. The vehicle was swerving from side to side across the road and was continually flicking its lights from dim to bright. Vorster saw no other car on the road. As a result of the vehicle's irregular movements Vorster stood still and he then saw the oncoming vehicle swerving to its left towards and onto the eastern sidewalk. Vorster was adamant that the vehicle had mounted the sidewalk and said that its left headlight was then in line with his own position on the sidewalk. He heard a dull sound as if the vehicle had struck something on the sidewalk. The vehicle moved back into the roadway, changed down from top gear and continued without stopping. When it drove past him he noticed that it was a Datsun light delivery van. Vorster continued on his way and found Bernard lying just to the east of the eastern sidewalk.

It is clear that the effect of Vorster's

evidence was that Bernard was struck by Liso's vehicle while he was on the eastern sidewalk. He was seen there by Vorster immediately before and after the collision and Vorster saw Liso's vehicle on the sidewalk when he heard the sound of the impact. The trial Court said in its judgment, however, that Vorster was unable to say whether Bernard was on the sidewalk when he was struck by Liso's vehicle. This finding is incorrect. It is based on one solitary passage in the record where Vorster was asked during cross-examination to say where Bernard was when he heard the sound of the impact. The passage reads as follows :-

"Toe jy daardie geluid hoor, kan jy vir die Hof sê waar was Jomo op daardie oomblik? --- Ek sal nie kan vir die Hof sê waar was Jomo gewees nie."

It will be seen that the question is ambiguous as it

does not distinguish between the sidewalk and the roadway, and in my view the reply, if read with the rest of his evidence, means no more than that Vorster was unable to say where on the sidewalk the collision occurred.

Vorster's evidence was corroborated fully by Moloki, who was with Bernard when the collision occurred. According to Moloki, six of them were walking together in Moseapoa Street on their way to the function. He and two others were in front, followed by Bernard, one Setibe and one Merafe, with Bernard on the left. A car approached them from the north in Moseapoa Street and when it was still some two street blocks away, he noticed that it was swerving from side to side across the road. They all moved on to the eastern sidewalk. As the car came near them, he was blinded by its headlights and it seemed to him as if it

was going to hit him. He pushed his two friends, who were next to him, to the right and jumped out of the way. Had he not done so the car would have hit him. As the car passed him he heard a sound. He looked back, saw nothing on the ground and they continued walking. It was then said that someone was missing and when they stopped and looked back they saw Bernard lying some distance to the east of the eastern sidewalk. The car did not stop. Moloki's evidence that Bernard was on the eastern sidewalk shortly before he was hit by Liso's vehicle, was not inconsistent with what he had previously told the insurance assessor, and provides strong support for the evidence of Vorster. It is true that Moloki did not actually see Liso's vehicle on the sidewalk and that he obviously could not see Bernard at the moment of impact as he was walking ahead of him. The possibility that

Bernard moved off the sidewalk at the last moment before the collision is so remote, however, that it may be discounted. There was no reason for him to do so. On the contrary, there was good reason for staying on the eastern sidewalk. His destination that evening lay on that side of Moseapoa Street and it can safely be accepted that, like Moloki and Vorster, he would have noticed that the roadway was unsafe as a result of the oncoming vehicle's irregular movements. There is simply no factual basis for Mr de Bruin's suggestion that Bernard moved into the roadway immediately before the collision. Moloki's evidence that Bernard landed well to the east of the eastern sidewalk after the collision, which was accepted by the trial Court, is another indication, in my view, that the collision occurred on the eastern sidewalk. Considering the slight damage caused to the vehicle,

it seems unlikely that the force of the impact was sufficient to have thrown Bernard from the roadway to where he ended up after the collision.

I do not regard Liso's version on the essential issues as being necessarily inconsistent with that of Vorster and Moloki, as both the trial Court and the Court a quo have found. The three people noticed by Liso on the eastern sidewalk when he was still some distance away were in all probability Moloki and his two friends, with Bernard and the other two members of the group behind them. Liso paid no further attention to the people on the sidewalk and did not see them again. As I have said he never positively testified that the collision occurred in the roadway as opposed to the sidewalk and he conceded that he might well have driven on to the sidewalk. His instructions to respondent's counsel regarding

Bernard's position after the collision were in accordance with the evidence of Vorster and Moloki. His version on these issues does not, therefore, conflict with that of Vorster and Moloki. Moreover, his evidence generally was vague and uncertain and parts of it were rejected as untrue by the trial Judge who found him an unreliable witness. His evidence thus does not, in any event, carry much weight.

The trial Judge preferred Vorster's evidence, to that of Liso. On the strength of Vorster's evidence that the collision occurred on the sidewalk, which was fully supported by the evidence of Moloki, and in the absence of any acceptable evidence to the contrary by Liso, the trial Court should have found that the collision occurred on the eastern sidewalk. Once that is established it is clear that Liso was negligent in that he failed to keep his car under

proper control and that such negligence was the sole cause of the collision.

In the result the following order is made:

1. There is substituted for the plaintiff the following -
 "Patricia Makgosi Leine and Johan Schoon NNO, in their capacity as curatores bonis for Bernard Leine, having been appointed as such in terms of the order dated 19 May 1989 in Case No 505/89".
2. The appeal is allowed with costs, such costs to include the costs of the application to this Court for leave to appeal.
3. The order of the Court a quo is set aside and the following substituted -
 "The appeal is dismissed with costs, such costs to include the costs of opposition to the application to the trial Court for leave to appeal as well as the costs of the Rule 34A application which were reserved by the trial Court".

W. VIVIER JA.

HEFER JA)
 VAN DEN HEEVER JA) Concur.
 NICHOLAS AJA)
 HARMS AJA)