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Judgment No. S.C. 2/99
Civil Appeal No. 259/97

EPHIUS MAKAUDZE v JULIET ANN GREYVENSTEIN

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & SANDURA JA
HARARE, JANUARY 19 & FEBRUARY 11, 1999

W Ncube, for the appellant

D P Carter, for the respondent

McNALLY JA: This is a claim for damages arising out of a road traffic accident at the intersection of Robson Manyika Avenue and Second Street, Harare, at about 11 am on Friday 23 June 1995.

In the court *a quo* the plaintiff's claim was dismissed on the basis that he had failed to discharge the *onus* of proving that the collision was due to the fault of the defendant. He now appeals against that finding.

Robson Manyika Avenue was a one way street, east to west, while at that time Second Street carried two way traffic, north and south.

Both cars were in Robson Manyika Avenue facing west. It is common cause that Mrs Greyvenstein was stationary at the intersection, governed by a red

traffic light, while the commuter omnibus driven by an employee of the plaintiff was coming up behind her. (I will call him "the driver").

Mrs Greyvenstein says she was in the right-hand lane with her indicator flashing to show her intention to turn right into Second Street. The driver says she was in the centre lane with no indicator.

The light turned green; Mrs Greyvenstein moved forward preparatory to turning right; as she turned right the commuter omnibus came up on her right, struck her angled car near the front of its right-hand side, proceeded out of control across the intersection, and hit an emergency taxi disgorging passengers on the far corner of the intersection. The emergency taxi promptly burst into flames, rammed into a car parked beyond it which hit another, which hit another. In the end four cars other than the two protagonists were damaged.

I find it remarkable and disturbing that neither counsel in the court *a quo* (they were not those who appeared before us) addressed what seems to me to be the central and critical issue in this case. Perhaps for that reason the learned judge ignored it in his judgment, although almost by chance the issue was addressed at the very end of the defence case.

The issue was simply this: How wide was the right-hand turning lane in Robson Manyika Avenue? How wide were the two vehicles? Could they have fitted side by side in that lane? If they could not, Mrs Greyvenstein's case had a huge hole in it.

Fortunately for a proper appreciation of the merits, Mr Greyvenstein was called at the last minute to deal with a point which had arisen unexpectedly. After he had dealt with it he was asked about the width of the lane. He said it was particularly wide, with ample room for two vehicles because it was a dual purpose lane for turning and for straight-through traffic.

This prompted the judge to enquire about the width of the lane, which in turn prompted the defendant's counsel to offer to prepare a sketch. That sketch was put before the court by consent. It seems the only reliable documentary evidence. It shows that at the line at which Mrs Greyvenstein would have been halted the lane was 7.2 metres wide. No evidence was led as to the width of the two vehicles, but we can take judicial notice of the fact that their combined width could not have been more than about four metres. So there was ample room for both vehicles in that lane.

The case started off in a most unsatisfactory way with the production by the plaintiff's counsel of an alleged police plan. I say alleged because there is nothing on it to say it was drawn by the police apart from a rubber stamp on it saying "Zimbabwe Republic Police: Traffic Administration 28 July 1995". That shows only that it was in their possession. There are also typed the words "Plan drawn from TAB Extract".

Counsel for the plaintiff produced this plan, relying on the provisions of s 12 of the Civil Evidence Act. I am far from convinced that this document is covered by the section. Firstly, we do not know that it is a document "made by a

public officer". It is unsigned. Second, if it was made by a policeman, how do we know it was made "pursuant to duty to ascertain the truth of the matters stated in the document"? Those words would apply to the original Traffic Accident Book, but this man, whoever he was, was concerned only to make a professional sketch based on the rough job done by the man who was at the scene. He had no duty to ascertain the truth.

To my mind, this is the sort of evidence which, even if it were admissible, should have been excluded by the learned judge under s 48 of the Act.

The sketch was very misleading in showing, as it did, that there were three lanes of approximately equal width in Robson Manyika Avenue. As we now know, the left-hand and right-hand lanes were 7.3 and 7.2 metres wide respectively, and the centre lane 3.3 metres wide. In the circumstances that is a hugely importantly difference from the plan put in by the plaintiff.

I have spoken before about undiscriminating reliance on the provisions of the Civil Evidence Act. See *Mutimwinyi v Mutimwinyi and Anor* S-192-95 at p 4; *Pocock v AFC* 1995 (2) ZLR 365 (S) at B-C. I repeat that practitioners should be discouraged from adopting this slipshod approach to the serious business of discharging the *onus* of proof.

In the event we are left with two possible versions. We have no objective facts against which to measure the probabilities either way. It may be probable that Mrs Greyvenstein, intending to turn right, would be in the right-hand

lane. She may have been somewhat to the left in that lane because of the parking bays to her right as she came up to the stop line. It is likely she would have her indicator flashing, though many Zimbabweans either do not signal or signal as they turn, which is useless. She strengthens her case by saying she had been thinking of turning even before she got to the Second Street intersection. She stopped at the lights and proceeded when they were green. She went forward slowly, allowing for pedestrians (who have right of way against a turning vehicle). As she began to turn she heard "an incredible wind to my right". The commuter omnibus, loaded with eighteen instead of the permitted fourteen passengers, came up "with most incredible speed" on her right and struck "my right front centre".

It was argued that she should have seen the commuter omnibus coming up behind her, in her rear view mirror. She says she looked. But the commuter omnibus was moving, on the evidence of the driver, at 50-60 km/h. She was moving slowly away from a stationary position. He must have been catching up on her very fast. He could have been too far away to notice when she looked. Or in her blind spot.

Much was made of a so-called "admission" in her pleadings that she was in the centre lane. The admission, however, is very obscure. She originally admitted the first four paragraphs of the declaration. These paragraphs were amplified by further particulars. These particulars in turn annexed the sketch plan allegedly prepared by the unknown police draftsman. The sketch showed her to be in the centre lane. It was not otherwise alleged in words. But within two weeks the

discrepancy was noticed and amended. In any event, she had already denied in her plea the allegation that:-

"She changed lanes when it was not safe to do so".

It seems to me that the admission, if it was an admission, was made inadvertently, and nothing turns on it. Again I may remark in passing that the defendant's legal adviser dealt with the amendment without any regard for the rules of court, in particular Rule 132. The matter should have been finalised at the pre-trial conference.

The case for the plaintiff was presented by the driver, a Mr Mandipota. He said he was in the right-hand lane and Mrs Greyvenstein was ahead of him, waiting at the lights, in the centre lane. He slowed down, the lights turned green, he accelerated, and as he was about to pass her on her right, she turned right across him and his vehicle struck hers.

His version was supported by his conductor and a passenger. But none of them were very clear about the lane in which Mrs Greyvenstein was travelling. Moreover, since they were all being guided by (and misled by) the so-called police sketch, they must have thought she was in the centre lane, because there was no room, on that sketch, for two vehicles to be in the right-hand lane.

The learned judge was satisfied, for good reason, that the passenger was not at all certain that the other vehicle was in the centre lane. He found that, insofar as he could place any reliance on the alleged point of impact, it tended to

favour the defendant's version. Moreover, he inclined to the view that the driver was travelling excessively fast in the circumstances.

It is unfortunate that, no doubt because of the way the matter was argued, the learned judge made no finding as to the lane in which Mrs Greyvenstein was travelling. Nor did he make a finding as to whether her indicator was on or not.

However, in the final analysis one cannot disagree with his conclusion that the plaintiff had failed to establish his case on a balance of probabilities. In order to find for the plaintiff he would have had to find that the defendant was a liar. He did not do so. His verdict must stand.

The appeal is dismissed with costs.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners