**IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE LOCAL DIVISION : EAST LONDON**

**CASE NO. EL 136/14**
**ECD 436/14**

**In the matter between:**

**BONGA CHRISTOPHER MNTONITSHI** **Plaintiff**

**and**

**ROAD ACCIDENT FUND** **Defendant**

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**JUDGMENT**

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**GRIFFITHS, J.:**

[1] The plaintiff in this matter has instituted action against the defendant for damages arising out of a collision which occurred on 3 September 2011 on the Brakfontein road near East London. It was agreed between the parties at the outset of the matter that, at this stage, all I am to deal with is the question of the liability of the defendant for whatever damages the plaintiff might ultimately prove to have suffered as a consequence of the collision. I accordingly made a ruling to this effect in terms of Rule 33(4).

[2] During the course of the proceedings it became clear that the main point in issue between the parties was as to whether or not the insured vehicle had been travelling on its incorrect side of the road or, at the least, straddling the centre of the road so that portion of this vehicle entered upon the lane of travel of the plaintiff, or whether, obversely, the plaintiff had been on his incorrect side of the road, alternatively straddling the centre thereof.

[3] The plaintiff relied on the evidence of a single witness, that is, of the plaintiff himself, whilst the defendant called the evidence of two witnesses, one Ms. Venske and one Mr. Symons, the driver of a white Ford Bantam bakkie which collided with the plaintiff's red Opel Cadet.

[4] It was common cause that a form of head on collision occurred between these two vehicles at about 20 past midnight on the day in question. It was dark, there being no streetlights and the road was tarred although it was very narrow without any shoulders and, according to the undisputed evidence of Symons, was 5 m wide. Thus the lanes of travel in either direction were 2.5 m wide. There was apparently an extremely faint line in the centre of the road which was not visible at night time. For all intents and purposes therefore when travelling on that road at night it was very difficult to discern precisely where the centre of the road was or as to whether or not there was a barrier line or a broken line. On either side of the road there appear to have been either trees and/or bushes which were apparently fairly close to the road and at different points there were turnoffs to farms and to a school known as Lilyfontaine.

[5] On the plaintiff's version he had left a prayer meeting which had been held on a farm adjacent to the Brakfontein road. He had been driving his vehicle from the farm back to his home in Beacon Bay. He had had four passengers in the vehicle totalling a contingent of five people in his vehicle at the time. He

had been travelling at a reasonable speed of 40 to 50 km/h and had not yet changed out of second gear when he noticed the lights of another vehicle coming at great speed towards him on his side of the road. Things happened so quickly because of the "manner in which the other vehicle drove" and it was within an extremely short time after he had noticed these lights, which were on bright, that there was a collision and he lost consciousness. He was adamant that he was on his correct side of the road whilst the other vehicle was in his lane of travel. Because it was dark he was unable to say whether the other vehicle had been in the curve which was up ahead of him immediately prior to the collision.

[6] The version of the defendant was that Venske had requested Symons to accompany her from Beacon Bay to her home on a farm off the Brakfontein road which was adjacent to the farm where the plaintiff had attended the prayer ceremony. They had left the freeway and were travelling on Brakfontein road with Venske approximately 200 m ahead of Symons with her headlights on bright, and his on dim. Shortly before the turnoff to her home there was a very long and continuous curve and it was whilst she was travelling through this curve that she noticed a vehicle travelling in the opposite direction directly in her path of travel. This vehicle had its park lights on with no headlights and she was forced to leave the road to her left where there was a grass verge in order to avoid a collision. She continued to her home and whilst doing so, tried to phone Symons who was travelling approximately 200 m behind her to warn him of the impending danger. Because of a lack of reception she could not contact him and it was only when she turned into her driveway that Symons contacted her to tell her of the collision. She returned along the road and found that Symons had collided with the very vehicle that had forced her off the road. Symons himself testified that when he, in turn, came around the same corner he noticed a vehicle in front of him on the incorrect side of the road. This vehicle was 30 to 40 m away from him and he did not notice any lights but conceded that it may have

had some lights on but that he had not noticed them. Because of the fact that there was no verge on the left-hand side of the road, as there were trees and bushes situated there, he had no option but to take evasive action by swerving to the right hand side of the road where he knew there was some form of a verge as he had been approaching a turnoff to the right. He also applied his brakes but notwithstanding these evasive measures, his, and the plaintiff's vehicles collided. He ascertained from the positioning of the vehicles post the collision that the point of impact must have been slightly towards his side of the centre of the road.

[7] Because of the paucity of independent evidence, such as evidence from the policemen who attended the scene or perhaps accident reconstruction experts or the like, I am placed in the invidious position of having to decide which of these two versions is the correct one, they being mutually destructive. Furthermore, apart from the evidence of Symons as to the width of the road, there is no independent evidence describing the precise and objective nature of the road, it's exact dimensions, the precise nature of the verges on either side of the road and the nature, density and height of the bushes and trees on either side of the road, precisely how tight the corner was, the nature of the damage to the vehicles so as to indicate precisely where each vehicle was struck or indeed precise evidence as to exactly where the vehicles ended up after the collision. I do not even have the assistance of a set of photographs.

[8] The approach to dealing with mutually destructive versions was dealt with in the case of **National Employers General Insurance CO Ltd v Jagers 1984 4 SA 437 (E) at p 440 as follows**:

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to

> support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.
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> This view seems to me to be in general accordance with the views expressed by COETZEE J in Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens (supra ) and African Eagle Assurance Co Ltd v Cainer (supra ). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable."

[9] The plaintiff's case, as I have mentioned, rests on the evidence of the single witness who clearly has an interest in the success of his case, that being the plaintiff. Before I can find in his favour on the point in issue, I must find that his evidence is credible, true and accurate to the extent that I can safely reject that of the defendant's witnesses. In analyzing his evidence, it must be remembered that the plaintiff cannot wish away the fact that Venske was also

travelling on the same road in the opposite direction to him and that he must have passed her very shortly before the collision occurred. He did not see her despite the fact that she was travelling with her lights on bright and it was a dark night.

[10] I watched the plaintiff closely during the course of his evidence. It did appear to me that he was attempting, at the very least, to give an accurate description of what had happened but it very soon became apparent that he was extremely confused with regard to a number of matters. At a later stage during his evidence when he again appeared to be confused, he candidly admitted that since the accident happened, and presumably because of his injuries incurred during the course thereof, he had been having a memory problem. There were a number of aspects of his evidence which clearly could not have been true and about which he was clearly confused. Obvious examples of this were the fact that he was determined that Symons vehicle was travelling at a high speed although he only saw the lights of the vehicle coming towards him at the very last moment. Precisely how he could have ascertained the speed of the oncoming vehicle in the circumstances is anyone's guess but to make matters worse he testified that Symons was indeed travelling at 170 – 180 km/h. Given the nature of the road, the type of vehicle Symons was driving, his reason for being there that night, the time of night and Symons sobriety, it seems almost impossible that he could have been travelling around a tight curve at those speeds. The upshot of all this is that, in my view, whether or not the plaintiff was in his own mind telling the truth as he knew it, he was not by any stretch of the imagination, a reliable witness.

[11] As against his evidence is the evidence of both Venske and Symons. Venske had no reason whatsoever to be untruthful to the court and her evidence fits hand in glove with that of Symons. They testified that the reason they were

following one another with Venske taking the lead was precisely because of the fact that it was dangerous to travel that road at that time of night. Venske mentioned that there were often cattle in that road at night and in the circumstances it would be most surprising had both of them, or either one of them, been travelling at a high speed. Whilst they were unable to testify as to the precise speed because they did not look at their speedometers, they estimated that they were travelling at a speed of 70 to 80 km/h which appears to have been reasonable. Furthermore, both of these witnesses readily made concessions where concessions were due, as, for example, when Mr. Symons conceded that although he could not remember seeing any lights on the plaintiff's oncoming vehicle, they may have been on but that he did not see them. Although Mr. Bester, who has appeared on behalf of the plaintiff, submitted that I should not allow Venske's evidence to affect my decision as she did not see the actual collision, it is so on her evidence, at the very least, that shortly before the collision with Symons the plaintiff was travelling on his incorrect side of the road so much so that he forced Venske off the road and onto the verge. Because they were some 200 m apart and travelling at 70 to 80 km/h, it would have been seconds later that Symons would have encountered the plaintiff and the probabilities are overwhelming that he would have still been on the incorrect side of the road as testified to by Symons himself. Venske's evidence is furthermore of importance in highlighting the unreliability of the plaintiff's evidence. Not only did the plaintiff, on his version, not see any other vehicle passing him prior to the accident but he had no knowledge and indeed denied that he had been on the wrong side of the road causing Venske to swerve to her left so as to avoid his vehicle. Accordingly, once one accepts Venske's evidence, as I do, such evidence simply cannot square with the evidence of the plaintiff and one must accept that he was either telling an untruth or that his memory as to these events is so bad that one simply cannot rely on it.

[12] Mr. Bester furthermore pointed to certain contradictions as between the evidence of Symons and Venske and as between an affidavit made by Symons and his evidence in court. To my mind, whilst it is so that there are certain contradictions, these contradictions serve to do nothing more than support the credibility of these two witnesses in that they establish that there has clearly been no collusion between them with regard to their evidence. In fact, Symons testified that when Venske returned to the scene of the collision she was upset about what had happened and that the two of them had not even spoken to one another.

[13] When one weighs the evidence of the defendant as against the quality of the evidence of the single plaintiff, I have to conclude that the version tendered by the defendant is the far more probable version. In fact, it seems to me that the manner in which the plaintiff testified lends itself to a conclusion that the plaintiff did indeed see Venske who had bright lights on when she swerved to avoid him and that very shortly thereafter Symons came around the corner and, as the plaintiff himself said, swerved not because he lost control in coming at high-speed around the corner as testified to by the plaintiff, but indeed as Symons said, in an effort to avoid the collision with the plaintiff. It must be remembered that all these things happened very quickly and that this was an extremely narrow road with no clear demarcation as to where the centre was. When one rolls all these factors together, it seems that the only conclusion one can come to was that indeed the plaintiff was on the wrong side of the road but that he has since lost his memory as to precisely what occurred and that all these facts have become gelled into one, in his mind.

[14] It follows from what I have said that I accept the defendant's version and find that the plaintiff has not established his version on a balance of probabilities.

[15] However, the matter does not end there. Mr. Bester has submitted that even on the evidence of Symons, there is room for a finding that he was negligent in failing to avoid the collision by taking reasonable measures in the circumstances. He has pointed to the fact that Symons said that he had seen the plaintiff's vehicle when it was 30 to 40 m ahead of him and had swerved to his right. Had both vehicles been travelling at the speeds testified to by the plaintiff and Symons, he ought to have had time to swerve completely out of the path of travel of the plaintiff.

[16] Ms. Ayerst, who appeared on behalf of the defendant, has submitted the contrary pointing me to the case of **Road Accident Fund v Grobler (2007 (6) SA 230 SCA)** amongst others where it was said that where a driver who is faced with an emergency situation such as where another driver enters upon his lane of travel, each case must be measured on its own facts but that as a point of departure a driver ought not in the normal course to drive onto his incorrect side of the road in order to avoid the oncoming vehicle. It was, however, stressed in those cases that each case must be decided on its own facts and it is necessary also to take into account the options available to the driver faced with such a situation. For example, where there is a clear and open verge on the left-hand side of the road and there is time for such driver to brake and to move off to safety on the left side, driving onto his right hand side would, in the circumstances, amount to contributory negligence.

[17] In my view, having examined this case very closely, Symons had very little option but to move on to the right hand side of the road, or attempt to do

so. On his evidence the left-hand side was not viable due to the fact that there were trees and bushes which, on his evidence, "hung right over the road". In addition, the road was an exceptionally narrow one with no shoulders on either side to provide a margin of safety. In these circumstances, an attempt to swerve to the left would almost certainly have resulted in his colliding with the bushes or a tree and there is no certainty at all that he would have avoided the collision with the plaintiff in any event. I accordingly, and as I have said after examining this matter very closely, conclude that Symons evasive action cannot be questioned in these circumstances.

[18] In the result, I have to find that the plaintiff has not established his case on a balance of probabilities and, accordingly:

**The plaintiff's action is dismissed with costs.**

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**JUDGE OF THE HIGH COURT**

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| **HEARD ON** | **:** | **02 JUNE 2015** |
| **DELIVERED ON** | **:** | **04 JUNE 2015** |
| | | |
| **COUNSEL FOR PLAINTIFF** | **:** | **Mr Bester** |
| **INSTRUCTED BY** | **:** | **Matyeshana Moodley Inc.** |
| | | |
| **COUNSEL FOR DEFENDANT** | **:** | **Mrs Ayerst** |
| **INSTRUCTED BY** | **:** | **Bate Chubb & Dickson Inc.** |