**REPUBLIC OF SOUTH AFRICA**

**GAUTENG HIGH COURT**
**(LOCAL DIVISION JOHANNESBURG)**

**CASE NO: 139004/12**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

**15 October 2013** **FHD VAN OOSTEN**

In the matter between

**THEMBA ERIC MASINGI** **PLAINTIFF**

and

**ROAD ACCIDENT FUND** **DEFENDANT**

*Trial – negligence – motor vehicle collision – evidence – two mutually destructive versions - no probabilities – nature of onus - credibility of witnesses - plaintiff's evidence unsatisfactory in material respects - onus not discharged - claim dismissed with costs*

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**JUDGMENT**

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**VAN OOSTEN J:**

[1] This is an action in which the plaintiff claims damages from the defendant in respect of personal injuries arising out of a motor vehicle collision which it is common cause, occurred on 31 July 2011, on Mageva road between Giyani and Tzaneen. At the commencement of the trial and by agreement between the parties, I ordered a separation of merits and *quantum* in terms of Rule

33(4) and the matter accordingly proceeded on the merits of the plaintiff's claim only. The plaintiff and the defendant, who respectively were the drivers of the two vehicles involved in the collision, were the only witnesses called to testify.

[2] The fact of the collision was not in dispute. The common cause facts are these: On 31 July 2011 at approximately 20h30 the plaintiff was driving a Golf motor vehicle in the direction from north to south, on Mageva road towards Tzaneen. It was dark and the tarred road surface, allowing for a single lane in each direction, divided by a broken white line. The insured driver was driving a Chevrolet Aveo model motor vehicle in the opposite direction, *ie* from south to north. Both vehicles had their lights on. A collision occurred between the motor vehicles. The damages caused by the collision are in respect of both vehicles, and as depicted on four cell phone photographs taken after the collision, on the right front extending to the right front fender and the driver's door. It is apparent from the evidence as a whole that either one of the two vehicles must have encroached onto its incorrect lane for the collision to have occurred. The only dispute between the parties is which vehicle crossed the midline: the plaintiff's case is that it was the insured driver and the insured driver blamed the plaintiff for doing so.

[3] Two mutually destructive versions are before me and there are no probabilities. The only probabilities that could possibly arise are from the nature of the damages caused to the motor vehicles. To the layman's eye and by merely looking at the photographs the inference that the plaintiff's vehicle collided with the insured driver's vehicle may well be justified. But, that in my view is a matter for expert evidence of which none was led. I accordingly refrain from making any further comments in this regard. The credibility of the witnesses is decisive to a determination of the dispute: the plaintiff, in order to succeed, must discharge the burden of proof that his version is true and that of the insured driver false (see *Stellenbosch Farmer's Winery Group Ltd and another v Martell et CIE and others* 2003 (1) SA 11 (SCA); *Selamole v Makhado* 1988 (2) SA 372 (V); *Mabona and Another v Minister of Law and Order and others* 1988 (2) SA 654 (SE); and *Kamakuhusha v Commander,*

*Venda National Force* 1989 (2) SA 813 (V); CHW Schmidt & H Rademeyer *The Law of Evidence* 3-5). On the question of a court's approach where it is faced with two mutually destructive versions, reference can also be made to the judgment of Eksteen AJP (as he then was) in *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (ECD) 440 to 441, where the following is stated:

'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. This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-öperatiewe 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. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the

truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.'

[4] The plaintiff testified that he was driving along Mageva road at normal speed, which was between 70 and 75 *kph*, when he observed the insured vehicle approaching which swerved onto its incorrect side of the road and collided with his vehicle. He thought at the time that the insured vehicle had attempted to avoid a pothole in the road. He was rendered unconscious and taken to hospital where he was admitted and discharged 5 days later. The insured driver's version mirrors that of the plaintiff except that the plaintiff, he maintained, crossed the midline onto his side of the road and there collided with his vehicle. He added that having observed the plaintiff's vehicle approaching on its incorrect side of the road he had swerved to his left almost onto the gravel shoulder portion of the road, that he had applied brakes and flashed lights to caution the plaintiff.

[5] The plaintiff's version was less than satisfactory. Some 9 days after the collision he made a statement to the police. In dealing with the collision he stated as follows:

'I was driving on my lane and normal speed. At between Maphata and Mageva tar road is where the accident occurred, but I never remember exactly what happened there. I found myself at Nkhesani Hospital. where I [was] informed that I was involved with an accident with the other car.'

The plaintiff's explanation of the apparent contradiction is seemingly unsatisfactory: he testified that he was still in pain at the time as well as confused as to what had happened. It does not bear scrutiny: had this been so, one would have expected him to have said so to the police. But it goes further. The plaintiff has proffered different versions as to the occurrence to the plaintiff's expert witnesses. Two examples thereof will suffice. According to the industrial psychologist, Dr Moses, the plaintiff (during the assessment on 17 July 2013) described the collision to her as follows:

'Mr Masingi reported he was driving from home, when a car that lost control collided into him head-on. His car stopped 80m from the spot where he was knocked.'

To the occupational therapist the plaintiff reported (on 11 July 2013) that he was admitted to hospital 'following a pedestrian vehicle accident on 12 August

2011'. Although from a reading of the report as a whole the date appears to be a typographical mistake the contradictions, in my view are material to the issue at hand and cannot be reconciled with the plaintiff's version in this court. The plaintiff conceded that the reports were significantly at variance with his version in court. The possibility of recent fabrication, having regard to the plaintiff's pecuniary interest in the matter, accordingly, cannot be discounted.

[6] The insured driver's version on the other hand cannot be and has not been criticized. On his version the plaintiff was clearly at fault. Even the acceptance of the plaintiff's version does not assist the plaintiff in discharging the *onus*. The possibility of an apportionment does not arise. I accordingly find that the plaintiff's negligence was the sole cause of the collision. The plaintiff must accordingly be non-suited.

[7] In the result the plaintiff's claim is dismissed with costs.

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**FHD VAN OOSTEN**
**JUDGE OF THE HIGH COURT**

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| ***COUNSEL FOR APPELLANT*** | ***ADV JT ZITHA*** |
| ***PLAINTIFF'S ATTORNEYS*** | ***TEMBA & ASS INC*** |
| ***COUNSEL FOR DEFENDANT*** | ***ADV C SNOYMAN*** |
| ***DEFENDANT'S ATTORNEYS*** | ***SISHI INC*** |
| ***DATE OF HEARING*** | ***14 & 15 OCTOBER 2013*** |
| ***DATE OF JUDGMENT*** | ***15 OCTOBER 2013*** |