REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A5026/2017

COURT *A QUO* CASE NO: 32681/2013

(1)	REPORTABLE: (YES) / NO	
(2)	OF INTEREST TO OTHER JUDGES: (YES)/NO	
(3)	REVISED. ✓	
27/3/19		
DATE		SIGNATURE

In the matter between:

DAWID JOHANNES DE BEER Appellant

and

ROAD ACCIDENT FUND Respondent

JUDGMENT

WEINER, J (Twala J and Nkosi Thomas AJ concurring)

Introduction

[1] This matter comes before us as an appeal from the court *a quo*. The judgment was delivered on 4 August 2016. The court *a quo* found that the appellant had failed to show, on a balance of probabilities, that the insured driver was the sole cause of the collision. In the result the appellant's claim was dismissed with costs. The appellant contends that the trial court erred in fact and in law in this finding. In addition, it is contended that the trial court erred when comparing and deciding upon two mutually destructive versions and in finding that the appellant's version was not probable or credible.

[2] On appeal before us, the Appellant sought to overturn the judgment; alternatively he sought an 80/20 apportionment in his favour.

Evidence

[3] The appellant's evidence consisted in the main of the evidence of one Petronella Kruger (Kruger). She was a pillion passenger on a motorcycle being driven by her husband. She could see the road ahead of them over her husband's shoulder. They had left a rally on her husband's motorcycle. They were travelling along the R57 in a northerly direction, together with the appellant and one Gouws. They were in the right-hand lane. The appellant was in front of them, travelling more towards the right of the right-hand lane and Gouws was travelling in front of the appellant, more towards the left of the right-hand lane.

[4] She saw two motor vehicles in the left-hand lane, a maroon vehicle following a beige vehicle. It is common cause that the maroon vehicle was being driven by the insured driver. She testified that Gouws's motorcycle was nearest to the insured vehicle when the insured vehicle suddenly changed lanes from the left lane to the right lane in what she assumed was an attempt to overtake the beige vehicle in front of it, without signalling this intention. According to her, Gouws accelerated and in order to avoid a collision. As the insured vehicle proceeded further into the right-hand lane, it sideswiped the appellant's motorcycle, with the right rear wheel of the insured vehicle colliding with the front wheel of the appellant's motorcycle. As a result of the impact, the appellant's motorcycle swerved to the right and exited the tarred surface of the road, moving onto the gravel shoulder. The motorcycle was out of control, as a result

of which it returned to the tarred surface road and collided into the right rear main light of the insured vehicle.

[5] As a result of the impact, the appellant and his son, who was a passenger on his motorcycle, were propelled over the insured vehicle. The motorcycle, the appellant, and his son landed on the left side of the road. Kruger confirmed that both points of impact occurred in the right lane in which the appellant's motorcycle and her husband's motorcycle were being driven. Her evidence was that the collision occurred before the S-bend in the road.

[6] The insured driver's version was put to Kruger. It was stated that he would testify that he was driving in the left-hand lane in the vicinity of the S-bend. There were no vehicles in front of him; that he was overtaken by a motorcycle (presumably the one belonging to Gouws) and thereafter the appellant's motor cycle approached, lost control at the bend, and collided into the rear of the insured vehicle, after which the motorcycle hit the right side mirror of the vehicle. Kruger denied this version. It appears to be common cause that the damage to the insured vehicle was limited to the right rear corner.

[7] The appellant's evidence was that he could only remember the events prior to the collision. He had no idea how the collision occurred. As far as he could recall, he was travelling on a motorcycle and there were other motorcycles in front of him and behind him in the right-hand lane. He observed the insured motor vehicle following a white motor vehicle in the left lane in front of them. He suddenly heard an impact and woke up in the hospital. He testified, and this was confirmed by Kruger, that he did not know that Kruger was an eyewitness to the collision and only found this out a few days before the trial, when he coincidentally bumped into Kruger and mentioned the upcoming trial. She volunteered to testify.

[8] The insured driver, one Montsho Daniel Radebe (Radebe), testified that he was travelling along the R57. There was no other vehicle in front of him. He passed the bridge and looked into his rear-view mirror and saw a motorcycle approaching at a distance (presumably Gouws' motorcycle). As they approached the bend in the road, this motorcycle passed him at high speed. Immediately after that, the appellant's motorcycle collided with the right rear light of his vehicle, swung around, and collided

with the right side mirror, coming to rest on the island between the opposite lanes of the highway (that is, on the right hand side of the road). It was only after he stopped and attempted to disembark that he saw the appellant and his son being propelled over the vehicle.

[9] Radebe was cross-examined on the statement he gave to the police. He told the police officer what happened during the period before the collision and at the time of the collision. The police officer wrote it down and explained it to him. He thereafter signed the statement. Later in his evidence, he stated that the statement had been read back to him and he had confirmed the contents. It was contended by the appellant that the statement contradicts the evidence of Radebe in regard to where and at what stage the first motorcycle passed him.

[10] During cross-examination, it was put to Kruger, that Radebe had seen two approaching motorcycles. However, in his evidence, Radebe stated that he only became aware of the second motorcycle when it collided with his vehicle. In response to this contradiction, he stated that he had told his counsel and attorney that he had seen two motorcycles, the second of which was travelling at a high speed.

[11] In regard to whether or not the appellant lost control of his motorcycle, he testified that after the first motorcycle had passed him at high speed, the second motorcycle, also travelling at high speed, collided with him. He was unable to state whether the driver of the second motorcycle lost control prior to, or after, the collision. After stopping his vehicle, the motorcycle then collided with the right-hand mirror of his vehicle and swung out towards the right in the direction of the traffic island. According to the appellant, Radebe's evidence as to where the vehicle stopped and where he exited from his vehicle was also inconsistent. He stated in cross-examination that the collision had occurred beyond the S-bend and that his vehicle became stationary at a point further north.

[12] The appellant contends that the appellant's version that the insured driver attempted to overtake another car without signalling his intention, went over to the right-hand lane and thus caused the collision, is inherently more probable than that of the respondent. The latter's version is that suddenly, out of nowhere, the appellant veered into the back of his vehicle. Thus, the court is confronted with two mutually

conflicting versions, being a sideswipe caused by a dangerous changing of lanes by Radebe, as opposed to a rear-end collision.

[13] The learned judge criticised the evidence of the appellant on the basis that his warning statement differed from his affidavit and his evidence in court. His evidence in court was that he and Gouws were following each other in the right-hand lane and were in the process of overtaking the two motor vehicles in the left-hand lane. In his affidavit, he stated that he was part of a group of motorcyclists travelling in the right-hand lane. There were two motor vehicles in front of him in the left lane – a maroon vehicle and a white vehicle. He was in the process of passing these two motor vehicles when the accident occurred.

[14] In the warning statement that the appellant made to the police, he stated that he was driving towards the north and that there were two motor vehicles in front of him, a maroon car and a white car. He then heard a loud bang and woke up in hospital. The learned judge *a quo* found that the warning statement was totally different from his affidavit and evidence before the court. She stated that there was no mention made in the warning statement of the lanes in which he and the two motor vehicles were travelling. She thus assumed that it meant that the two vehicles were travelling in the same lane as he was. He did not mention the other motorcyclists and Gouws in his warning statement, nor in his affidavit. The learned judge found that he could not explain why he did not accelerate, as did Gouws, or do something else to avoid the collision, when he was on the far right of the right-hand lane, closer to the insured vehicle than Gouws was. He testified that he did not see any of the motor vehicles on the left moving to the right. She found that the only reason why he did not see this was because the insured vehicle did not move to the right as he and Kruger had testified. She found it improbable that if it did move to the right, he would not have seen it when Gouws and Kruger were able to see it. She accordingly found that he must have been driving faster than the insured vehicle and that he had failed to negotiate the bend in the road, as a result of which he collided into the right rear-end of the insured motor vehicle travelling in the left lane.

[15] The learned judge found the criticism levelled against Radebe's evidence and the contradictions mentioned therein to be based upon the fact that he did not

understand the statement, which was written in English. She found his contradictions to be explicable on the basis that, after such a period of time, he could not be expected to remember each and every detail of how the accident happened. On the other hand, she found that the detail that he did give was accurate. She thus accepted the evidence of Radebe that the appellant was driving his motorcycle at a high speed, had failed to negotiate the bend, and had collided with the rear of the insured vehicle. She also found that the collision had taken place on the left lane where the insured vehicle was travelling and that it at no stage moved to the right lane, as testified by the appellant's witness. She thus found that the sole cause of the collision was the negligent driving of the appellant.

Legal principles: Appeal on facts only

[16] It is common cause that the appellant had the *onus* to prove negligence on the part of Radebe.

[17] In *Stellenbosch Farmers' Winery Group Limited*[1] the SCA, in dealing with the approach to resolving factual disputes, held:

'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to

[1] *Stellenbosch Farmers' Winery Group Limited and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA).

experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'[2]

[18] In the event when there are two mutually exclusive versions, the court is obliged to qualitatively assess the truth and/or inherent probabilities of the evidence and ascertain which of the two versions are the more probable.[3]

[19] The estimate of the credibility of a witness is inextricably bound up with the consideration of the credibility to be judged in the light of proven facts and probabilities and not in isolation.[4]

[20] As was stated in *National Employers' General Insurance Company Limited v Jagers*,[5] it is only where the probabilities fail to indicate where the truth probably lies, that the court should have recourse to an evaluation of the credibility of the appellant and the respondent's witnesses.

Legal principles: Appeal on the facts

[21] It is indeed so that a court of appeal is generally reluctant to disturb findings which depend on the credibility of a witness, and that it will only do so where such findings are plainly wrong.[6] This is especially so where the reasons given for the finding are seriously flawed. It is equally true that findings of credibility cannot be judged in isolation, but need to be considered in the light of the proven facts and probabilities of the matter under consideration. There are well-established principles

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[2] Ibid at 14J-15E.
[3] See *National Employers' General Insurance Company Limited v Jagers* 1984 (4) SA 437 (A) at 440E-441A.
[4] See *Santam Beperk v Biddulph* 2004 (5) SA 586 (SCA) para 5.
[5] *Jagers* (note 3 above).
[6] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706.

governing the hearing of appeals against findings of fact. These principles were summarised in *Dhlumayo* as follows:

21.1 An appellant is entitled to a rehearing, but with the limitations imposed by these principles; this right is a matter of law and must not be made illusory.

21.2 The trial judge has advantages – which the appellate court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he/she had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked. Even if the trial judge has not commented on the demeanour of the witnesses, this does not place the appeal court in as good a position as he/she was.

21.3 In drawing inferences, the trial judge may be in a better position than the appeal court, in that he/she may be more able to estimate what is probable or improbable in relation to the witnesses whom he/she has observed at the trial.

21.4 There are instances, however, when the appeal court may be in as good a position as the trial judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by the trial judge.

21.5 Where there has been no misdirection on the facts by the trial judge, it should be presumed that his/her conclusion is correct; the appeal court will only reverse it where it is convinced that it is wrong. In such a case, <u>if the court of appeal is merely left in doubt as to the correctness of the conclusion, then it will uphold it.</u>

21.6 There may be a misdirection on fact by the trial judge where the reasons are either, on their face, unsatisfactory or where the record shows them to be such; there may also be a misdirection where, though the reasons are satisfactory, the trial court is shown to have overlooked other facts or probabilities. The appeal court is then entitled to disregard the findings on fact, even though they are based on the credibility of a witness, in whole or in part (depending upon the nature of the misdirection and the circumstances of the particular case) and thus come to its own conclusion on the matter.

21.7 An appeal court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, it was not considered.

21.8 Where the appellate court is constrained to decide the case purely on the record, the question of *onus* becomes all-important, whether in a civil or criminal case.[7]

[22] However, the advantages which the trial court enjoys should not be over-emphasised '*lest the appellant's right of appeal becomes illusory.*' The Constitutional Court has found that the truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors, more particularly, the probabilities. It cannot be assumed that all triers of fact have the ability to correctly interpret the behaviour of a witness. This is so because the witness may be of a different culture, class, race or gender, and someone whose life experience differs fundamentally from that of the trier of fact.[8] In *S v Kelly*[9] it was stated that—

'*...demeanour is, at best, a tricky horse to ride. There is no doubt that demeanour – "that vague and indefinable factor in estimating a witness's credibility"... - can be most misleading. The hallmark of a truthful witness is not always a confident and courteous manner or an appearance of frankness and candour. As was stated by Wessels JA in Estate Kaluza v Braeuer 1926 AD 243 at 266 more than half a century ago in this Court: "A crafty witness may simulate an honest demeanour and the Judge had often but little before him to enable him to penetrate the armour of a witness who tells a plausible story."*

On the other hand an honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person.'[10]

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[7] Ibid.
[8] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 79.
[9] *S v Kelly* 1980 (3) SA 301 (A).
[10] Ibid at 308B-D.

[23] In upholding a full bench's reversal of adverse credibility findings by the trial court in *Allie v Foodworld Stores Distribution Centre (Pty) Ltd*,[11] Navsa JA referred with approval to the following passage in the judgment of the court *a quo*:

'*In dealing with demeanour and credibility in relation to the magistrate's findings Van Zyl J said the following:*

"Of course, the judicial officer, who has sight of the witnesses and is able to assess their evidence from nearby, is the best person to gauge their demeanour. The record of such evidence, however, speaks for itself. If a witness is mendacious, contradictory or evasive, this will appear from the record. And if a judicial officer has justified criticism of a witness or of his or her evidence, the justification for such criticism will normally also appear from the record. Even more so will this be the case when a credibility finding is made against a particular witness. Although a Court of appeal is reluctant to interfere with credibility findings made by the court of first instance, it is not obliged to accept such findings if they should not appear to be justified."'[12]

[24] An appeal court would have less limitations in disturbing findings of credibility where a finding of fact does not fundamentally depend on the impression made by a witness, but more so upon inferences from other facts and upon the probabilities. In such a case a court of appeal, having had the benefit of the full record, may often be in a better position to draw inferences, particularly in regard to secondary facts.[13]

[25] There are, of course, other instances where an appeal court may interfere with a factual finding. These include, for example, where the trial court's judgment is based on an inadequate and/or erroneous assessment of the facts and the evidence; or it has taken into account matters it ought not to have considered; or it has failed to consider matters it ought to have considered and therefore arrived at an erroneous decision; or where its credibility findings are based largely on its perception of the

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[11] *Allie v Foodworld Stores Distribution Centre (Pty) Ltd* 2004 (2) SA 433 (SCA).
[12] Ibid para 38.
[13] *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* (453/2000) [2002] ZASCA 9 (22 March 2002); *Louwrens v Oldwage* 2006 (2) SA 161 (SCA).

demeanour of the witness without having regard to the probabilities.[14] In *Medscheme Holdings (Pty) Ltd v Bhamjee,*[15] Nugent JA said:

'*.... an assessment of evidence on the basis of demeanour - .... without regard for the wider probabilities, constitutes a misdirection. Without a careful evaluation of the evidence that was given (as opposed to the manner in which it was delivered), against the underlying probabilities, which was absent in this case, little weight can be attached to the credibility findings of the Court a quo. Indeed, on many issues, the broad credibility findings, ... were clearly incorrect when viewed against the probabilities.*'[16]

Findings of the court *a quo*

[26] The court *a quo* found that the evidence of Kruger and the appellant could not be relied upon. Kruger testified that Gouws was about 1.5m ahead of the appellant when he had to accelerate to avoid the collision. However, the appellant stated that he could see the front wheel of Gouws' motorcycle on his side mirror. If Kruger's version were to be accepted as correct, then the appellant should have seen the manoeuvre of the insured vehicle and avoided colliding with it, as did Gouws.

[27] The appellant made a statement to the South African Police Service regarding the circumstances of the accident. He was then charged with reckless or negligent driving as a result whereof he paid an admission of guilty fine. His explanation for doing so seems contrived.

[28] The court *a quo* also found that there were contradictions between the appellant's statement to the police, the affidavit he deposed to in support of his claim against the respondent, and his evidence before the trial court.

Failure to call witnesses

[29] The failure by the appellant to call Gouws and Mr Kruger must lead to an adverse inference being drawn against him. They were direct witnesses to the

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[14] *R v Dhlumayo* (note 6 above).
[15] *Medscheme Holdings v (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA); see also *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979 I-J; and *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5.
[16] *Mescheme Holdings* (note 15 above) para 14.

collision, yet the appellant failed to call them, when, according to him, they were available. In addition, the police were present at the scene of the collision. Their evidence was critical in relation to the point of impact and the position in which the motorcycle, and the appellant and his son, landed. The failure to call them is another factor to be taken into account.

[30] It is a well-established principle of our law that failure to produce a witness who is available and able to testify and give relevant evidence, may lead to an adverse inference being drawn. In *Tshishonga v Minister of Justice and Constitutional Development and Another*,[17] the court held as follows:

'*The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a prima facie case. But an adverse inference must be drawn if a party fails to ... place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case. ...*'[18]

[31] Although the court a quo based its finding on the probabilities and credibility of the witnesses, it must be borne in mind that Radebe's version is also problematic. Thus, it may be that the probabilities and the witnesses' credibility are equally balanced. In such a case, the principles of *Stellenbosch Wineries* are prescriptive.[19] Once the court has assessed the credibility and reliability of the witnesses and performed an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues, '*the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.*' [Emphasis added]

[32] It is trite that the appellant bears the onus to prove its case on a balance of probabilities. We hold the view that, in this case, the appellant failed to discharge the

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[17] *Tshishonga v Minister of Justice and Constitutional Development and Another* 2007 (4) SA 135 (LC); *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A); *ABSA Investment Management Services (Pty) Ltd v Crowhurst* [2006] 2 BLLR 107 (LAC).
[18] *Tshishonga* (note 17 above) para 112.
[19] *Stellenbosch Wineries* (note 1 above).

onus – hence the decision of the court a quo cannot be faulted. It must ineluctably follow, from what has gone before, that, in our judgment, the appeal must fail.

Accordingly, the following order is made:

1. The appeal is dismissed with costs.

S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

M L TWALA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

PP **L G NKOSI-THOMAS**
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 4 March 2019

Date of judgment: 28 March 2019

Appearances:

Counsel for the Appellant:	Mr Uys
Instructing Attorneys:	Mills & Groenewald
Counsel for the Respondent:	Adv. FF Opperman
Instructing Attorneys:	MF Jassat Dhlamini Inc.