IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 62174/2013

DATE OF HEARING: 13 NOVEMBER, 8 DECEMBER

Not reportable

Not of interest to other judges

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

....08/03/2016..... DATE

..... SIGNATURE

In the matter between: DATE: 8/3/2016

W H HUMAN Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

OLIVIER, AJ

[1] The plaintiff and the defendant agreed to have the merits and the quantum of the action adjudicated separately in terms of Rule 33(4) of the Uniform Rules of Court. The court ordered that the merits and quantum be separated. I have to decide only the merits. There was an attempt at settlement, which was unsuccessful.

[2] The plaintiff, Mr Human, was injured in a motor vehicle accident on the evening of 13 July 2012 at around 20.30 on the Van der Hoff Road, Pretoria, involving motor vehicle registration number B…GP of which he was the driver. The vehicle left the road and rolled, resulting in injuries to the plaintiff.

[3] There were no witnesses to the accident.

[4] The plaintiff contends that the accident was caused by an unidentified vehicle.

[5] This court essentially has to determine whether the unidentified vehicle was involved in the accident, or whether this was a sole-vehicle accident.

[6] It is trite that the plaintiff bears the onus to prove on a balance of probabilities that the insured driver was negligent in causing the accident.

[7] Two witnesses testified for the plaintiff: the plaintiff personally, and Mr S S Bezuidenhout, an accident investigator.

[8] Mr Human testified that he had been on route to collect a part for a cash-in-transit vehicle, as part of this job as an operational manager of Rens Cash-In-Transit, when the accident occurred. He was familiar with the road as he regularly drove it – approximately once every two days. The road was in good condition, it was straight with one lane in every direction and without potholes. He never encountered animals on the road which could pose a risk to drivers.

[9] As he was travelling, he noticed a vehicle approaching from the rear at a faster speed than what he (the plaintiff) was driving. It looked as if the vehicle wanted to overtake him. The vehicle then collided with his vehicle at the right rear, resulting in the plaintiff's vehicle skidding. He has no further recollection of the event and woke up only a few days later in hospital.

[10] The plaintiff was asked during cross-examination whether he knew that he would have no claim against the RAF in the absence of negligence by another vehicle's driver. He answered in the negative, saying that he did not know how the RAF operates.

[11] The content of a number of the expert reports to the effect that the plaintiff had said that he had no recollection of the accident or the events leading up to the accident, and that he had been told later that he had been hit from behind by another vehicle, were put to the plaintiff.[1] He did not deny the content of the reports but could not explain this discrepancy.

[12] The affidavit of the plaintiff dated 17 March 2013 was also put to him. Defendant's counsel argued that this contradicts the reports, even though the affidavit pre-dates the reports.

[13] Next to testify was Mr S S Bezuidenhout, a forensic collision homicide reconstructionist of many years' standing. He compiled a report of 37 pages based on documents, photographs and reports made available to him. I am satisfied that he qualifies as an expert.

[14] In support of his testimony Mr Bezuidenhout relied on several photographs of the accident scene and the vehicle. As Mr Bezuidenhout did not examine the vehicle personally, he was dependant on photographs of the vehicle and accident scene taken some time after the collision to draw his conclusions and to compile his report. Defendant's counsel, in closing argument, challenged the admissibility of the photos on the basis that they had not been properly proved as correct in terms of s 34 of the Civil Proceedings Evidence Act 25 of 1965. There was no oral evidence to authenticate these photographs. I shall deal with the probative value of the photographs later.

[15] Mr Bezuidenhout described the accident as a 'vehicle roll-over collision'. He testified that damage had been caused to the right rear and left front of the plaintiff's vehicle, and that this was due to an impact with another vehicle. He methodically dealt with each photograph of the vehicle and pointed out how he had come to his conclusions. During cross-examination he conceded that other possible causes for the accident could not be excluded.

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[1] See Dr Birrell, the orthopaedic surgeon p 62 part C of the Bundle; Dr Daan de Klerk neurosurgeon. P 31 part C of the Bundle.

[16] He conceded that he did not visit the accident scene as he had been told by the plaintiff's attorneys that it was unnecessary for him to do so. In his report he stated that no evidence would be available at the scene due to the passage of time.

[17] The defendant called no witnesses and at the conclusion of the case argued in favour of absolution from the instance. In order to escape absolution, the plaintiff must have adduced sufficient evidence to establish a prima facie case.

[18] This case is unusual in that there were no witnesses to the incident who could testify to the presence of another vehicle. There is only the evidence of the plaintiff.

[19] Plaintiff's counsel contended that the court can make a finding in favour of the plaintiff in the absence of eyewitness testimony. In **Motor Vehicle Assurance Fund v Dubuzane 1984 (1) SA 700 (A)** there were no witnesses to an incident involving a pedestrian, and no version of the events, and it therefore had to be reconstructed. The Appellate Division confirmed the finding of the court a quo that on the probabilities a motor vehicle had caused the death of the pedestrian, rather than an alternative cause, eg assault.

[20] In respect of a single witness, the fact that his evidence is not contradicted does not mean that it is therefore true. **Siffman v Kriel 1909 TS 1 538 at 543.** And similarly in **Daniels v General Accident Ins Co Ltd 1992 (1) SA 757 (C)** it was said that "the single witness, more particularly where he is one of the parties, must be credible to the extent that his uncorroborated evidence must satisfy the court that on the probabilities it is the truth." Related to this is the following from **S v Sauls and Others 1981 (3) SA 172 (A)** at 180F:

> The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.

[21] The plaintiff was a nervous witness and seemed to me to be slightly overwhelmed by having to testify. Demeanour and impression are only two of various assessment factors to consider in determining the credibility of a witness.

[22] In his analysis of the plaintiff's testimony, Plaintiff's counsel submitted that the plaintiff had demonstrated no motive to fabricate a version. He had made several concessions, which plaintiff's counsel says points to his truthfulness. Also, he was not argumentative. Plaintiff had conceded during cross-examination that he could have informed experts that he had had a loss of recollection of events a day prior to the accident. However, this admission does not mean that he suffered total memory loss the day before the accident and night of the accident. He specifically remembers what happened prior to the accident, says counsel. None of these experts were called to testify to this. The "versions" in reports are unreliable, says counsel, submitting that the information in expert reports is for purposes of injuries and employment to determine quantum, not merits and that "background information contained in the medico-legal report has very little or no probative value."[2] He submitted that the versions in the medico-legal reports were at variance with the objective facts. There could never be merit in the suggestion that the plaintiff informed the doctors that he was later told that a car had driven into him from the rear, his vehicle was forced off the road and it overturned. There were no witnesses to the accident.

[23] Defendant's counsel, on the other hand, submitted that the plaintiff was untruthful, either in his testimony to the court, or in his interviews with the medical experts, considering the contradictions between his evidence and the medico-legal reports. He characterised the plaintiff as an unreliable witness.

[24] Defendant's counsel also pointed out the following in closing argument. It took the plaintiff approximately eight months to depose an affidavit. There is no evidence of any police report or an insurance claim referring to the unidentified vehicle. The Employer's Report of an Accident describes the accident as loss of control of the vehicle and "rolled vehicle".[3] The first medical report indicates that he "lost control of the care + car rolled".[4] The hospital admission record simply states "MVA car rolled 5 times". It seems to me that from these reports, however, it cannot necessarily be inferred that there was not another car.

[25] Plaintiff's counsel contended that defendant's counsel during cross-examination did not suggest to the plaintiff that he was not telling the truth or that his version was improbable, as he should have done.

[2] Heads of argument.
[3] Bundle F p 32 item 38.
[4] Bundle F p 27 item 2.

[26] I need to consider the significance of the inconsistencies measured against the whole of the plaintiff's testimony in determining his credibility and reliability. The mere fact that there were contradictions in parts of his evidence is not in itself sufficient ground for rejecting the plaintiff's evidence in its entirety. Despite these inconsistencies, I nevertheless believe his version of what happened on the night of the accident. Victims sometimes muddle their testimony and imperfect recollection of traumatic events is not uncommon.

[27] I now turn to the evidence of Mr Bezuidenhout, who used certain photographs as one of the bases of his report. Defendant's counsel made certain submissions regarding the admissibility of these photographs as evidence at the end of the trial. A photograph is a document and there must be proof of its accuracy from the photographer or someone else to show that the photo is indeed a true likeness of the subject of the photo.

[28] Defendant's counsel conceded that the vehicle shown in the photos are indeed of the vehicle that the plaintiff was driving on the evening of the accident. But the photos of the accident scene, the alleged point of impact or the final resting position of the vehicle were contested.

[29] I do not attach any weight to the photographs of the general scene, the alleged point of impact or the final resting position of the vehicle. Neither the plaintiff nor the expert witness could testify to the authenticity of these photographs and related details. However, the photos of the vehicle are in order.

[30] Eksteen J in **Motor Vehicle Assurance Fund v Kenny 1984 (4) SA 432 (E)** at 436/7 said the following regarding eye witness testimony and expert opinion:

> Direct or credible evidence of what happened in the collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training.
>
> An expert's view of what might probably have occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eye witness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the court to his view.

[31] In the present case there were no witnesses to the incident other than the plaintiff, who testified that he can remember only some of the details of the accident. In such an instance, it is particularly important to pay close attention to the opinion of the expert to determine whether his analysis and reconstruction of the accident supports the evidence of the plaintiff as the sole witness to the accident. Without the acceptance of the testimony of the expert, the plaintiff cannot succeed in his claim.

[32] The expert witness performed well under sustained cross-examination. He conceded several points during cross-examination, including that the damage to the vehicle of the plaintiff could have been caused by something other than a collision with another vehicle. He was truthful. He carefully considered his answers. Considering the totality of his evidence, I deem him to be a credible witness.

[33] I need to determine the probative value of his evidence. He was thorough in explaining the reasons for his conclusion. But I cannot simply accept his evidence that another vehicle had been the cause of the accident. I need to satisfy myself personally that his conclusions are correct. Experts are there to assist the court in making its findings, but it is the court that makes findings of fact, not the expert. **S v Gouws 1967 (4) SA 527 (EC)**.

[34] Admittedly, there are concerns about the way that the expert conducted the enquiry. He never visited the scene. His entire report is based on the photographs he was given. The expert witness sent his original report of August 2015 to the plaintiff's attorneys for consideration and their input, which could be a factor to consider in the independence of the report. This first report was never produced despite requests from the defendant; only the final report was placed before the court. However, these shortcomings are not necessarily fatal.

[35] The expert should be independent, and uninfluenced by the party calling him as an expert witness in support of his or her case. In **Schneider NO and Others v Aspeling and Another** 2010 (5) SA 203 (WCC) at 211-212, Davis J provided a summary of the duty and role of the expert:

> In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the

> expert from providing the court with as objective and unbiased opinion, based on his or her expertise, as is possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor give evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."

In my opinion the expert was sufficiently independent for me not to exclude his evidence. I accept his evidence and his conclusions.

[36] Plaintiff's counsel submitted that it is very difficult to think of a situation where the plaintiff's vehicle could have impact to the front as well as the back under circumstances where it was only a single vehicle accident. The damage to the vehicle was consistent with the plaintiff's version, and so the probabilities should favour the plaintiff.

[37] The expert's evidence has convinced me that the probabilities favour the plaintiff's version. The sum of his evidence leads me to the conclusion that the plaintiff's vehicle was hit from behind by another vehicle.

ORDER

[38] In the result I make the following order:

1. The defendant is liable for the plaintiff's agreed or proven damages.
2. The defendant must pay the costs, including the costs of counsel.