



**IN THE HIGH COURT OF SOUTH AFRICA**  
**(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
16/10/2019	

**Case No: 44691/2017**

In the matter between:

**PHOHU M BRIAN**

**Plaintiff**

and

**ROAD ACCIDENT FUND**

**Defendant**

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**JUDGMENT**

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**CORAM VAN ONSELEN AJ:**

**A. INTRODUCTION:**

- [1] The matter was enrolled for hearing on 2 October 2019. During opening address counsel for Plaintiff, which was confirmed by counsel for Defendant, advised the Court that the parties had agreed to proceed on the aspect of liability only and requested a separation of issues in terms of Rule 33(4). The Court granted a separation Order and the quantum of the claim was postponed *sine die*.
- [2] The Court was referred to the paginated documentation and advised that certain documents contained in Bundle "B" would be refer to during trial. On questioning from the Court as to the status of the documents which will be referred to the Court was advised by counsel that the Plaintiff's statutory affidavit in terms of section 19(f) of the Act<sup>1</sup> as well as the Plaintiff's warning statement to the SAPS were admitted by the parties with specific reference to the signatures of the Plaintiff on these documents and their content. Counsel for Plaintiff advised that the SAPS accident report was not admitted by the Plaintiff. Counsel for Defendant advised that the SAPS official who completed the document would not be called to testify by the Defendant.

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<sup>1</sup> Road Accident Fund Act, 56 of 1996

**B. EVIDENCE BY THE PLAINTIFF**

- [3] The evidence was led through an interpreter. The collision occurred on 9 September 2016 at approximately 17h20 in the afternoon. The collision occurred on the M18 Roadway in Olifantsfontein (South of Centurion near Pretoria). At that stage the Plaintiff was working as a security guard at the Midstream Estate (near Midrand) and was on route to his employment for the nightshift.
- [4] He testified that he was travelling at approximately 50km per hour and that a vehicle approached him from behind and slightly rear-ended him. The vehicle was a brown Cressida type of vehicle. He then slowed down and almost came to a standstill but had a hunch not to stop. On observing the occupants of the vehicle which collided with him he was suspicious and had a sense of insecurity. He then decided to drive off and proceed with his journey. After a while he heard the sound of a gunshot and proceeded none the less. A short while thereafter the same vehicle again collided with him from behind on the left rear side and he lost control of his vehicle to his right-hand side and the vehicle rolled. He was ejected from the vehicle and bystanders who were unknown to him,

contacted emergency services and he was transported by ambulance to Thembisa Hospital.

- [5] He confirmed his signature and the content of both his statutory affidavit<sup>2</sup> and his SAPS warning statement.<sup>3</sup>
- [6] During cross-examination he stated that he could only notice the colour of the car and its general shape and that there was more than one occupant in it. He stated that his speed remained the same (approximately 50km per hour) when the second collision occurred. He was specifically asked during cross-examination why he felt insecure and/or was suspicious. He said that he thought these people were attempting to rob him from his vehicle *i.e.* hi-jack him. He was asked whether he proceeded to travel to avoid or flee from this vehicle to which he answered that he was continuing to work. He was asked whether he thought that after the first collision and upon hearing the gunshot why he did not accelerate and flee in haste from this vehicle. He replied that he was under the impression that they could or would not attempt to hi-jack him in motion.

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<sup>2</sup> See: Bundle B, p.161

<sup>3</sup> See: Bundle B, pp. 166-173

[7] He testified that SAPS officials were on the scene after the collision and that he gave no statement to any such official. He was questioned when he went to the SAPS to open a case and report the incident and he replied he went the next morning after having been discharged from hospital. Counsel for the Defendant then referred him to the Bundle and the Accident Report to cross-examine on that document. The cross-examination was not allowed by this Court as the document was not admitted and was not going to be proven by the Defendant. In any event, the Plaintiff testified that he gave his version orally to the SAPS official and was not asked to peruse any completed document nor was any document or its content read back to him. During cross-examination he was questioned as to why approximately three years had lapsed from date of incident until when his statutory affidavit and warning statement were completed and signed. The Court pauses here to mention that both documents were signed on the 11<sup>th</sup> of July 2019. He testified that he received no follow-up of the developments after incident so he returned on that day to the SAPS to enquire as to the status of the matter.

[8] He was extensively cross-examined regarding the content of his statutory affidavit as opposed to his warning statement. He was asked why there was no mention of a gunshot made in his warning

statement as opposed to his *viva voce* evidence. He replied that he gave the version orally and the SAPS official must have omitted same. On a question posed by the Court he said that he can only read a little bit of English and that when he read the statement before signing same he did not realise or notice the omission. He was also asked during cross-examination why his statutory affidavit made no mention of the gunshot and he replied that he did not include it into the statutory affidavit as he wanted to keep same brief and that it was intentionally omitted to shorten such affidavit.

[9] No further cross-examination was posed to the Plaintiff and upon prompting from the Court Mr Chauke for the Defendant finally in a nutshell put to the witness that it was a single vehicle collision and that the presence of the other vehicle was in essence a fabrication. The Plaintiff denied this.

[10] The Court asked further questions to the Plaintiff regarding further glaring omissions between the various statements and his *viva voce* evidence which was not addressed by counsel. The Plaintiff was asked by the Court why paragraph 3.2 of his statutory affidavit omitted any reference to the second collision as testified by the Plaintiff. In line with his previous answer the Plaintiff replied that he was desirous to keep his statutory affidavit short. He was asked

whether he thought the omission of this detail was not relevant and he replied that he was under the impression that all aspects as given orally by him to the SAPS would be incorporated. The Court then asked the Plaintiff who prepared the typed statutory affidavit. Surprisingly, the Plaintiff testified that he typed this document himself. He further confirmed that both documents were completed and signed at the same place on the same day at the SAPS station.

- [11] Neither counsel posed any further questions based on the questions of the Court and the Plaintiff closed his case. The Defendant then also closed its case. Counsel for both parties then addressed the Court and dealt with questions posed by the Court.

### **C. EVALUATION OF EVIDENCE**

- [12] This Court is in untenable position of adjudicating this matter on the evidence before it. Unfortunately no photos of the scene of the collision were available or of the damage to the Plaintiff's vehicle. No interrogatories were posed by counsel regarding any insurance claims or if Plaintiff even had insurance at date of collision. The Court has the evidence of the Plaintiff and two documents, namely

the Plaintiff's statutory affidavit and warning statement to the SAPS.

[13] In general the Plaintiff seemed a reliable witness and answered questions directly without hesitation. No contradictions were elicited during his *viva voce* evidence. His version during evidence in chief, cross-examination and questions posed by the Court remained in essence consistent. This Court has no reason to evaluate or criticise the *viva voce* evidence given by the Plaintiff. Having said that, there are numerous glaring and relevant discrepancies when comparing the *viva voce* evidence of the Plaintiff and his affidavit and statement. His affidavit falls woefully short of detail in comparison to his evidence and statement. His evidence and statement are in essence similar except that the statement omits a reference to a gunshot. This Court is of the view that this difference is not material when considering the evidence and the statement in conjunction only. The content of the statutory affidavit poses the problem in adjudicating this matter. The Plaintiff's version regarding the affidavit was that he omitted certain relevant detail in an attempt to keep the affidavit succinct. He did not deem it relevant as he orally gave the full version to the SAPS on 11 July 2019. Although this explanation is rather unsatisfactory and strange, it is not



totally implausible. However, the evidence that the Plaintiff himself typed this affidavit is simply unfathomable. The Plaintiff testified that he has very limited reading skills in the English language and has no advanced education or qualifications. The affidavit appears to be computer generated<sup>4</sup>, uses near perfect grammar and contains no spelling errors. This Court completely rejects the Plaintiff's version that this document was generated by himself. This Court can only speculate as to why the Plaintiff would present this version as to who the author of the document was and what information was provided to such person in compiling the document.

- [14] This Court also rejects the Plaintiff's evidence that after the first collision from the rear and upon being suspicious and afraid that the occupants of this vehicle had criminal intent that the Plaintiff normally without any panic proceeded with his journey without taking cognisance of the actions of that vehicle. Even more so after hearing a gunshot. This Court would expect the Plaintiff to have testified that he was panic stricken and sped off in haste in an attempt to flee this potential hi-jacking. The calmness with which the Plaintiff acted during this incident on his testimony is rather astounding.

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<sup>4</sup> See: *Bundle B, pg.161*

[15] In essence the Court needs to decide whether the balance of the Plaintiff's evidence can be accepted in light of the rejection of certain portions of his evidence as referred to above. In other words, can this Court accept the Plaintiff's general version that the collision was caused by the negligence of an unidentified vehicle.

#### **D. LEGAL PRINCIPLES APPLICABLE**

[16] The starting point was succinctly described by Van Heerden R as follows:

*"... the evidence of the Applicant would normally, in the absence of any contradictory evidence, be accepted as been prima facie true. It does not however follow that because the evidence is uncontradicted therefore it is true. The evidence may be so improbable in the light of all the evidence that it cannot be accepted."*<sup>5</sup>

[17] The Defendant failed to lead any evidence but this is understandable as the alleged insured driver is unidentified. No

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<sup>5</sup> See: *May v Kirner* 1974(4) SA90 (N) at (93H) and *Da Mata v Otto* NO 1972(3) SA 858(A) at 869 B-E

negative inference can be drawn from this against the Defendant. However, where there is more than one possible conclusion to be drawn out of the facts, the conclusion which is most detrimental to the party who fail to lead any evidence can be made. Schreiner JA described it as follows:

*"...it seems fair to say that in an accident case where the Defendant was himself the driver of the vehicle the driving of which the Plaintiff alleges was negligence and caused the accident, the Court is entitled, in the absence of evidence from the Defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the Plaintiff as opposed to the Defendant".<sup>6</sup>*

- [18] There are two possible alternatives based on the evidence before this Court. The collision occurred as testified by the Plaintiff and was the result of the negligence of another driver or the collision involved only the Plaintiff's vehicle without any other negligence to be ascribed to another person or driver. The *Galante*-Rule (referred to above) does not assist the Plaintiff in this regard as the Defendant was in the untenable position that no potential available

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<sup>6</sup> See: *Galante v Dickenson*, 1950(2) SA 460(A) at 465 and *Mpapeea v Rondalia Versekeringskorporasie van SA Bpk*, 1979(2) SA 967(O) at 971

evidence could be adduced to counter the version of the Plaintiff. In other words, the version of the Plaintiff cannot be accepted as the probable possibility for this reason alone.

[19] Mr Chauke urged this Court to approach the evidence circumspectly due to the cautionary rule against single witnesses. This cautionary rule is primarily used in criminal matters but can also enjoy application in civil actions.<sup>7</sup> Although the rule could potentially be applicable this Court is of the view that it is not that relevant but nevertheless was considered.

[20] When contradictions appear in the evidence of a witness it does not *per se* mean that the evidence as a whole must be negated or rejected. A Court has to make an evaluation, taking into account the contradictions, their number and importance, as well as their bearing on the other parts of the witness' evidence in reaching a decision.<sup>8</sup> In *casu* we are not specifically dealing with contradictions in the oral evidence but discrepancies between the *viva voce* evidence and documentary evidence. This Court is of the view that this general principle enjoys applicability in *casu*.

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<sup>7</sup> See: *Woji v Santam Insurance Co Ltd* 1980, Vol.2, SA 971 (SOK)

<sup>8</sup> See: *Normandele v S* (2007)1 ALL South African Law Reports SA 506(E)

[21] The Supreme Court of Appeal has ruled that when there are inconsistencies in evidence together with a doubt regarding the honesty of a witness this will lead the Court to approach such evidence with caution.<sup>9</sup>

#### **E. CONCLUSION**

[22] This Court has considered all the evidence in totality and wade up the *viva voce* evidence of the Plaintiff as opposed to his statutory affidavit and statement. As previously stated, the *viva voce* evidence and statement in essence corroborate the same version. The statutory affidavit is woefully undetailed but still has a version of a rear-end collision by an unidentified vehicle causing the Plaintiff to lose control and his vehicle to roll.

[23] This Court also notes that the statutory affidavit was not deposed to at the Olifantsfontein SAPS station where the warning statement was. The statutory affidavit was deposed by a certain Nkuna (ostensibly a Commissioner of Oaths) in Kempton Park on 11 July 2019. The warning statement was taken at the Olifantsfontein Police Station on the same date. This was never addressed during evidence but this Court is of the view that nothing material turns on this to change the outcome of the case.

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<sup>9</sup> See: *Meyer v DPP Kwa-Zulu Natal*, (2006) 4 ALL SA Law Reports 598 SCA

[24] This Court is particularly interested in the content of the Plaintiff's warning statement.<sup>10</sup> The detail in this statement could only have been elicited orally from the Plaintiff by the official who took the statement. There is no evidence that this statement is in the Plaintiff's handwriting and his version that he orally conveyed same and it was recorded is accepted. The statement is detailed and save for a reference to the gunshot (which Plaintiff testified he did convey) it corroborates the Plaintiff's *viva voce* evidence.

[25] This Court is therefore of the view, after due consideration and application of the aforementioned legal principles, that the version of the Plaintiff cannot be rejected because of the discrepancies between his evidence and statutory affidavit. The fact that the Court rejects his version as to the production of the affidavit is in the view of this Court also not sufficient to reject his evidence in totality. Certain portions of his evidence as highlighted, more particularly the production of the affidavit and his evidence of his demeanour and actions during this purported hi-jacking, are improbable. This Court has considered this but is of the view that it is insufficient to reject the Plaintiff's version and to favour the version proposed by the Defendant. The Plaintiff's claim must therefore succeed.

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<sup>10</sup> See: *Bundle B*, pp.166 - 173

**The order**

[26] This Court makes the following Order:

1. The Defendant is liable for 100% of the Plaintiff's proven or agreed damages.
2. The Defendant is ordered to pay the Plaintiff's taxed or agreed costs relating to the adjudication of the issue of liability.

SIGNED AT PRETORIA ON THIS THE 16<sup>th</sup> DAY OF October 2019.

  
**CR VAN ONSELEN AJ**  
**ACTING JUDGE OF THE HIGH**  
**COURT GAUTENG DIVISION, PRETORIA**

Counsel for the Plaintiff: Adv F.P Phamba

Counsel for First Defendant: Adv M.I Chauke