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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

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

CASE NO: HCAA07/2018
 6/2/2019

Signature

Date.....

In the matter between:

TSHIVHASE NKHANYELENI ELVIS

APPELLANT

and

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

MAKGOBA JP

[1] This is an appeal against a decision of a single Judge in the Limpopo Local Division, Thohoyandou (AML Phatudi J). The Appellant was successful with

his claim to the extent that the Court a *quo* ruled on 8 February 2017 that an apportionment of 90% of damages in a motor collision be attributed against the Plaintiff and that the Defendant be liable to pay 10% of the proven damages to the Plaintiff. The appeal is with leave of the Court a *quo* granted on 1 March 2018.

[2] It is common cause between the parties that a collision occurred between a BMW motor vehicle with registration number [...] there and then driven by one Lameck Dugishi (“the insured driver”) and a motorcycle with registration number [...] driven by the Plaintiff. The collision occurred at the Shayandima T – junction with the Louis Trichardt / Thohoyandou road on the 14 September 2013 at about 01H30. The road from Louis Trichardt to Thohoyandou consists of four lanes, two eastbound lanes are from Louis Trichardt to Thohoyandou and two westbound lanes are from Thohoyandou to Louis Trichardt. The collision took place at the T – junction where the road from Shayandima in the south ends in the road from Louis Trichardt to Thohoyandou.

[3] The Appellant testified that he travelled in the inner lane from Thohoyandou to Louis Trichardt, that is from east to west on his motorcycle. He reach a robot in front of him at the T – junction. On his left side, that is on the outer lane there was a BMW vehicle being driven in the same direction. The Appellant could not recall any further incidents and only regained consciousness later in hospital.

- [4] A witness for the Appellant, one Lawrence Ramogashe, testified that on that particular night and at that particular time he was on his way driving from Shayandima and stopped at the T – junction of Louis Trichardt / Thohoyandou road. The robot that he was facing was red for him. He could observe the area of the T – junction well because there were street lights and because of the lights of his motor vehicle. While he was stationary, a BMW vehicle appeared from the direction of Thohoyandou (east) to Louis Trichardt (west) in the outer lane and, in the T – junction it made a U – turn from the outer lane. As the BMW made a right turn and still in the process of making a U – turn, a motor cycle that was driving in the inner lane a few meters behind the BMW came and collided with the BMW on its right rear door.
- [5] One witness, Mr Lameck Dugishi (the insured driver) testified for the Respondent. He testified that on that particular date and time he was driving the BMW motor vehicle on his way from Shayandima to Thohoyandou and he was approaching the intersection (T – junction) on the road from Louis Trichardt to Thohoyandou. The robot was green for him and he did not observe any other vehicles. He proceeded to turn to his right at the T - junction. When he turned, and when he was already facing the direction of Thohoyandou (eastwards), he heard a huge sound from the rear of his vehicle. He later discovered that it was a motor cycle that collided with the rear of his vehicle.

- [6] On the basis of the evidence outlined above, the Court a *quo* made a finding that the collision was caused mainly by the conduct of the Appellant. An apportionment of 90% / 10% was made against the Appellant.
- [7] The Court a *quo* made a finding that the Plaintiff's version relied on that of a single witness. The Court disregarded the testimony of the Appellant and concluded that the testimony of the Plaintiff did not contribute to the adjudication of the claim in any way. In my view, the Court a *quo* erred in this regard. It is clear from the evidence as outlined above that the evidence of the Appellant is relevant to the issue and his version is corroborated by the testimony of the independent witness, Mr Lawrence Ramogashe.
- [8] Furthermore the Court a *quo* made a finding that the version of the insured driver (who is of course a single witness) is corroborated by his own earlier statement to the police which is substantially in agreement with his testimony in Court. With respect, the Court a *quo* erred in this regard by accepting and using a prior statement of the insured driver as corroboration of his testimony in Court. There is a well-established common law exclusionary rule operating against the acceptance of a previous consistent statement of a witness.

D Zeffert et al: The South African Law of Evidence (2003) at page 403, laid the principle thus:

“A witness may not, at common law, be asked in chief whether he or she has made some previous statement which tend to confirm his or her testimony. This rule applies whether the earlier statement was oral or in writing. Nor may

he or she be confirmed by calling someone else to prove that the witness made such a statement. This is often called the rule against narrative or self-corroboration. The principal reason for the rule is that a witness's previous consistent statements are insufficiently relevant. It does not ordinarily add anything to the value of his or her evidence to be told that he or she had always adhered to the same law."

See also **Holtzhansen v Roodt 1997 (4) SA 766 (W) at 774.**

[9] The Court *a quo* relied on the contents of the accident report to come to a conclusion that the version of the insured driver is corroborated by what was noted in the accident report. The accident report was never proved in evidence by either the Plaintiff or Defendant and should, for that reason, not have been considered by the Court *a quo*.

[10] For reasons set out above, the Court *a quo* erred in its approach to the evidence. At the end of the day the Court *a quo*, and this Court too, are faced with two mutually destructive versions as to whose negligence contributed to or caused the collision, the Appellant or the insured driver.

[11] It is trite law that when faced with two mutually exclusive versions, the Court has to resolve the factual disputes by making findings on the credibility of the various factual witnesses, their reliability and the probabilities.

See **Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Others 2003 (1) SA 1 (SCA) at par [5].**

[12] In order to resolve this impasse, I have to consider and weigh the probabilities to determine which version is more probable than the other. I also have to consider the credibility and reliability of the witnesses who testified for the Appellant and those for the Respondent. The test to be applied in such a case was enunciated lucidly as follows in **National Employers' General Insurance v Jagers 1984 (4) SA 437 (ECD) at 440D – 441A:**

“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 criminal cases, 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-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee 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 that means 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 constitutes 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."

- [13] The version of the Appellant is corroborated by the version of Lawrence Ramogashe to the effect that the BMW and the motor cycle were driving from the same direction when they reached the T – junction. One was in the outer lane (the BMW) and the other was in the inner lane (the motor cycle). The

witness, Lawrence Ramogashe is an independent witness who had no motive to lie or side with any of the parties.

[14] The point of impact in respect of the BMW is on the right rear door. The version of Lawrence Ramogashe that the BMW was making a U – turn at the T – junction and that it had already turned and facing Thohoyandou (eastwards) when the motor cycle collided with it, is therefore probable. The evidence of Ramogashe that his vehicle was the only vehicle coming from the direction of Shayandima destroys the version of the insured driver that he too was coming from that direction of Shayandima.

[15] The version of the Appellant is supported by the version of the independent witness, Ramogashe, and both of them testified satisfactorily in all respects. Their credibility was never destroyed. They are both reliable witnesses who testified on what they saw happening and without any exaggeration. The Appellant did not claim to have seen all what happened at the scene of the collision. He was honest and reliable in this regard. Their version should be accepted.

[16] Having accepted the testimony of the Appellant and Ramogashe, no conclusion can be drawn other than that the insured driver acted grossly reckless by making a U –turn in the face of the motor cycle. It cannot be said that the Appellant contributed, even minimally, to the occurrence of the collision. The appeal should therefore succeed.

[17] I accordingly grant the following order:

17.1. The appeal is upheld with costs.

17.2. The order of the Court *a quo* is set aside and substituted with the following order:

“Judgment is granted in favour of the Plaintiff and the Defendant is liable to compensate the Plaintiff 100% of his proven or agreed damages arising from the motor collision that occurred on the 14 September 2013 at Louis Trichardt / Thohoyandou road”

**E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**

I agree

**M G PHATUDI
ACTING DEPUTY JUDGE
PRESIDENT OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE**

I agree

**G C MULLER
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES

Heard on : 01 February 2019

Judgment delivered on : 06 February 2019

For the Appellant : Adv G J Diamond

Instructed by : Diamond Inc

For the Respondent : Adv. M B Madavha

Instructed by : Mathobo Rambau & Sigogo Attorneys