

IN THE HIGH COURT OF SOUTH AFRICA

'WESTERN CAPE DIVISION, CAPE TOWN

CASE NO. 14206/2014

In the matter between:

ADV E AURET N.O. obo WR KIESER

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT: 28 APRIL 2020

STEYN J

1. The plaintiff is the duly appointed curator ad litem for Warren Robert Kieser ('Warren') who was seriously injured in a motor vehicle collision at about 18h00 on Sunday 30 August 2009 in Rondebosh, Cape Town. Plaintiff claims de jure damages for and on behalf of Warren from the defendant in terms of the provisions of the Road Accident Fund Act, 56 of 1996, as amended. The damages arise as a result of the personal injuries sustained by Warren as a result of the said motor vehicle collision.

2. Issues of liability and quantum were separated in accordance with the relevant rules of court. The matter proceeded on the question of liability only, with the issues relating to the quantification of the claim, standing over.

3. It is common cause that, on the day in question:

3.1 Warren was riding, (test driving) a Kawasaki 600 super motor cycle with registration no [...] along Kromboom Road in Rondebosch, Cape Town, in a westerly direction, towards Table Mountain;

3.2 Trè Brett Kieser ('Trè), the 11-year-old son of Warren, was riding pillion on the back of the motorcycle;

3.3 The collision occurred at about 181100 on Sunday 30 August 2009, in sunny weather, with good visibility, at a bridged, robot-controlled intersection on Kromboom Road: where the road crosses over, and allows access to and from the M5 freeway;

3.4 The insured driver, Ranchhod, was driving a grey Toyota Tazz with registration number CA 599332, along Kromboom Road in the same direction as Warren and his son, in the same lane, before the collision;

3.5 The motorcycle and the Tazz were both approaching the bridged intersection on Kromboom Road, driving away from Rondebosch,

3.6 Both the Tazz and the motorcycle were travelling in the right-hand lane of the two left lanes of the highway that face west;

3.7 The speed limit on Kromboom Road, in that area, is 60km/ph;

3.8 The motorcycle with Warren and Trè was somewhere behind the motor vehicle driven by Ranchhod, who did not see the motorcycle before the collision;

3.9 When the motor vehicle and the motor cycle were both on the bridge of the intersection on Kromboom Road, in the area before a robot, the motor vehicle stopped at the intersection, to turn right onto the M5;

3.10 Warren took evasive action and swerved in an attempt to avoid a collision with the Tazz, but in the manoeuvre the back of the motorcycle connected with the left, back area of the Tazz;

3.11 The motorcycle continued driving past the stationary vehicle of the insured driver, on its left hand side, before swerving right across the intersection in front of approaching traffic, where the motor cycle collided with an unknown stationary vehicle in a driveway, on the opposite side of the road to where he had been travelling;

4. It is not presently relevant but appears to be undisputed that Warren sustained severe injuries to his head with serious consequences to him and his family, physically, financially and emotionally. He has not been able to work again and was not able to testify at the hearing.

5. In plaintiffs pleadings it is alleged that the accident occurred after Warren had to swerve to avoid a collision with the stationary motor vehicle, driven by Ranchmop (sic) ('Ranchhod'), the insured driver 'who suddenly and without warning stopped to turn off the road without indicating.'

6. The plaintiffs claim was founded on a number of alternative causes of action, the gist being that the sole cause of the collision, and the injuries sustained by Warren as a result of the collision, was the sole negligence of the insured driver who was negligent in one or more of the following respects:

- 6.1 He failed to keep a proper lookout;
- 6.2 He drove at an excessive speed in the circumstances;
- 6.3 He failed to apply the brakes of the motor vehicle timeously, adequately or at all; and
- 6.4 He failed to keep the motor vehicle under proper control; and
- 6.5 He failed to take any or adequate steps to avoid the accident when by the exercise of reasonable care and skill he could and should have done so;

7. Some of the alleged grounds of negligence by the insured driver are in contrast to the limited testimony presented on behalf of the plaintiff, such as that he was driving too fast. The matter is defended. The defendant denies that the accident occurred as a result of any negligence by the insured driver.

8. It was maintained on behalf of the plaintiff in the opening address that the legal principles relating to sudden emergency apply on the facts proffered on behalf of the plaintiff. Counsel for defendant argued that 'sudden emergency' had not been pleaded.

9. Defendant pleads that the collision was caused by the sole negligence of the plaintiff/Warren, who:

- 9.1 failed to keep a proper lookout;
- 9.2 failed to avoid a collision when by the exercise of reasonable care and skill he could have and should have done so;
- 9.3 failed to pay due regard to the presence of the traffic and the driver of the insured motor vehicle;
- 9.4 drove at an excessive speed in the circumstances; and
- 9.5 failed to apply the brakes of his motor cycle timeously, adequately or at all.

10. Defendant pleads that in the event that the court finds that the insured driver was negligent in any respect, defendant denies that such negligence contributed causally to the collision. He pleads that if the court finds that both drivers were negligent, the terms of the Apportionment of Damages Act should be applied and the quantum of plaintiffs claim should be reduced accordingly,

11. The aspect left for determination by this court is essentially:

11.1 Whether or not Ranchhod was negligent in stopping his vehicle at the robot controlled intersection on Kromboom Road, that resulted in the collision of his vehicle by the Kawasaki driven by Warren, causing Warren to swerve to avoid an accident, resulting in a further collision of the motorbike with a parked vehicle; and

11.2 if so, whether Ranchhod's negligence was the sole cause of the collision, and, if not, the extent to which his negligence falls to be apportioned between defendant and plaintiff.

12 I deal with the onus later, but emphasise that the onus to decide whether the insured driver was negligent and to what extent, rests on the plaintiff, who must show 'on a balance of probabilities that the insured driver was negligent and that the negligence was the cause of the collision from which he sustained the bodily injuries. There is no onus on the Defendant to prove anything.' ¹ He may have an evidentiary burden to rebut a prima facie case established by plaintiff.

13. The scene of the accident is important in the assessment of negligence. I have concluded, from the testimony and documentation provided, including

photographs and sketches, my knowledge of the area and the useful Google Maps, the following:

13.1 The accident occurred on a relatively busy highway, Kromboom Road, in Rondebosch, Cape Town. It has western and eastern bound carriage ways that consist of two traffic lanes in each direction, each about 3.7 meters wide;

13.2 The road runs over a bridged, robot-controlled intersection with the M5 freeway, a wide carriageway that runs in a north-south direction;

13.3 The robots on the intersection control the traffic accessing the Kromboom Road highway from the tv15 on one side, and accessing the M5 freeway from the highway, on the other side. Traffic drive straight or enter and/or leave Kromboom Road on the intersection.

14. Counsel for the plaintiff called Warren's ex-wife, Melanie ('Melanie'), and son Trè ('Trè'), as well as an accident reconstruction expert, John Craig ('Craig') to testify. The defendant called the driver of the insured vehicle, V Ranchhod ('Ranchhod').

15. Melanie Kieser, the wife of Warren at the time of the incident, (they were subsequently divorced) testified that Warren, who was in his early thirties at the time, had much experience of riding motorbikes as 'he comes from a family of bikers' and has a passion for motorbikes. He inherited a Honda CBR 400 motorbike from his grandfather in about 2005. He often went biking with his cousins, usually riding one of their bikes as the Honda was too small and slow.

16. Warren wanted to buy a more powerful motorbike and was interested in purchasing a particular second hand Kawasaki. On Sunday 30 August 2009 the

family cancelled their plans to go hiking and went to look at this motorbike instead. Warren took the bike on test drives, alone at first and later with Melanie, who rode pillion with him twice on the M5 freeway. She thought the M5 was a relatively safe road to use. Warren also took their one son, Keano, for a ride and later, at about 18h00, he took their youngest son Trè, 11 years old at the time, on a test ride.

17. Shortly after they left there was a phone call that Warren and Trè had been in an accident. Melanie went to the scene just after the Kromboom Road off-ramp

Raulinga J, in *N Felix v RAF* (29586/13) [2018] ZAGPPHC 439 (2 February 2018) paragraph 28
 over the M5. Warren was unconscious. Trè and Warren were taken to hospital in an ambulance. After Warren eventually regained consciousness, he started a slow, traumatic, recovery process.

18. To avoid trauma Melanie never asked Trè about the accident. I gathered from her evidence that she was not only upset, but angry at what her family experienced that day, and subsequently. There is statement/affidavit of Melanie,² taken just more than a month after the accident. She could not give an account of what happened. Both her husband and son received treatment for their injuries. Her husband sustained a severe head injury. There is also a statement of Trè³ not commissioned, that was taken during consultation, in her presence. She heard the details of the accident from her 'baby son' for the first time then.

19. Tre Kieser was the only witness for plaintiff on the aspect of the collision. He confirmed that at times in the past he had ridden pillion with his father on his old Honda. Replying to leading questions he said his father was always very

safety conscious. On the day in question he was 11 years old and in Primary School. He testified nearly 10 years after the event.

20. On the relevant day, when his father was test-driving the Kawasaki 600, he accompanied his father as a pillion passenger, only once. He did not know what his father intended with the ride, as regards the route or its duration. They were riding along Kromboom Road, close to where they were visiting, in a westerly direction, towards Table Mountain. There were vehicles around them. They approached the robots situated on both sides of Kromboom Road, where the road crosses the M5 freeway, in the area where one would turn right to access the M5. There was one car in front of them and cars behind them. They were travelling more or less the same speed as the car in front of them, a grey Toyota Tazz, about 8 or nine meters behind it, which equates to one and a half car lengths. The speed limit was 60

km/ph and, again in response to some leading questions, they were not travelling fast, whatever that means.

21. From where he was sitting, on the slightly elevated pillion seat, he could see over his father's right shoulder. The first robot they passed on the intersection, was green. They were travelling in the right-hand lane of the dual carriageway. There were vehicles travelling in the left lane, but 'further behind' them, not next to them. He said, 'all of a sudden', the car in front of them, (in the same lane of travel) was moving one moment, but 'the next instance' the car was not moving, it 'suddenly stopped moving'. He did 'not recall' seeing any brake lights. (Testimony that became relevant later.)

22. His father swerved left, and as he did so, they collided with the left rear of the Tazz vehicle in front of them. His father lost control of the bike, but I gather it remained upright. They passed the stationary car of the insured driver on its

left and swerved right into the oncoming traffic, with cars approaching them from the opposite side. His father swerved further to the right and bumped into a parked car in a driveway on the opposite side of the road.

23. He was referred to a photograph⁴ which shows four lanes across the wide

² Exhibit p 2, dated 5 October 2009

³ 'A' p 1

⁴ The top photograph in Exhibit 'A', p 19.

Kromboom Road, two lanes going towards the intersection, over the M5, travelling away from Rondebosch, towards Table Mountain, and two lanes visible on the opposite side, travelling towards Rondebosch, where they had come from. The collision occurred at the robot-controlled intersection on the bridge over the M5 freeway. The pictures indicate that on the two lanes approaching the intersection leading west, on the left hand lane, there was an arrow pointing forward only, while on the right-hand lane, where they were travelling, an arrow pointed forward and another arrow pointed right, as usual at many intersections on busy roads, indicating that cars could turn right into the intersection to access the M5, to approach Cape Town.

24. The bottom photograph ('A' p 19) shows the intersection facing the direction from where they had approached, from Rondebosch/Crawford. On this section of the road vehicles could either turn left towards the tv15 or go straight towards Rondebosch. He explained about the presence of other cars and that there was one car directly in front of them and no car behind them, in the same lane, when the accident occurred.

25. He was asked about his statement, that I have referred to ¹ that must have been drafted on about 5 October 2009. It was signed at the lawyer's office, after he had relayed to them, in his mother's presence, what he recalled had transpired. Events must still have been fresh in his memory.

26. In this statement he mentioned that a motor vehicle suddenly, and without warning or indicating. (which is not what he testified), stopped to turn right onto the

M5. His father took evasive action and swerved to the left, into the left lane, but lost control of the bike and, after passing the car in front of them, swerved to the right, into the lane of oncoming traffic. He said he assumed the Tazz would be turning right, although it was not indicated, as it would not have braked and stopped if it wanted to travel straight. He repeated that he did not recall seeing brake lights. He noticed that the traffic lights were green for the Tazz to drive onwards. (If conclusions are drawn, the only logical conclusion why the Tazz did not proceed, would be that it was either waiting at a red light, or it was waiting for oncoming traffic.)

27. Trè conceded in his testimony that his attention was not only on the car ahead of the them. He could not say if the motorbike's indicator lights were on. His statement did not mention a grey vehicle or a Toyota Tazz, and importantly, it did not mention any. collision with the left rear of the car that 'suddenly stopped'. Trè could not say, with reference to the photograph, on p 33 of 'A', exactly where the Tazz had stopped before the collision. Everything happened quickly. He was not prepared to agree that, if there was no car directly ahead of the Tazz, as he said, that the Tazz would have stopped on the solid white stop line. He recalled a bakkie approaching them from the front, in one of the approaching lanes.

¹ p 1 of exhibit 'A'

28. A demonstration was given with some model cars during which he reiterated that the Tazz and the bike were both travelling in the middle of the right-hand lane, going towards the robot-controlled intersection from the Rondebosch side. The back section of the bike, and his right knee, hit (clipped) the back, left, rear light and bumper area of the Tazz. It made the bike swerve out, his dad lost control of the bike, as they passed and swerved into oncoming traffic, while passing the front of the stationary car. Thece-yas-gnggmjng-tcafflg approaching and his father swerved the bike further to the right and hit a car parked on the opposite side. Tre lost consciousness. He agreed some details were vague. He was flung off the bike. He could not explain why he had not mentioned in his statement of October 2009 that his right knee and the back of the bike struck the stationary Tazz vehicle before the bike swerved, or even that the bike and vehicle had connected.

29. John Oswald Craig² is a motor vehicle accident reconstruction specialist who testified on behalf of plaintiff. His extensive technical testimony has limited value, as he based his findings and calculations on incomplete documentation and inaccurate information provided to him by plaintiffs representatives. The documents included the combined summons but does not refer to the plea. He does not appear to have noticed that nothing was said in the summons about the motor cycle colliding or connecting with the insured vehicle at the robot-controlled intersection. Nor did Trè say anything about such a collision in his 2009 statement, Craig did not deal with this aspect in his report, save that he says³ that according to the Accident Report Form, (with information provided by Ranchhod) the motorcyclist drove fast and straight and 'bumped' the insured stationary vehicle, He conceded that this version differed materially from the version of Trè in his

² 'Craig Consult' on p 9 of exhibit 'A'

³ p 13 para (f)

statement.

30. He explained how Warren must have operated the bike as he 'swerved to the left to avoid the Toyota'.³ (In fact he did not avoid the Toyota, he connected with it, caused extensive damage, and did not stop.) The only collision Craig refers to is the collision with the unknown car on the opposite end. I do not understand how he reconciles this evidence with the damage indicated on the Accident Report at the left rear of the insured car. A 'sudden emergency', that he referred to, was not specifically pleaded. He was also misinformed about the visibility on the evening in question. He had not been provided with Ranchhod's statement, dated 23 April 2015, when he visited the scene in September 2017, or when he compiled his report, in January 2018.

31. Craig made a concession, considering the later testimony of Ranchhod, and his version to the police in the Accident Report, that if a motorcycle drives into the back of a stationary vehicle, then the motor cyclist is to blame. He said he looked at the physical evidence (which was limited), and at the statements, one of which was defective, namely that of Trè. The statement of Ranchhod, he did not see. He believed the Tazz braked heavily, based on what a boy of 11 recalled years later of an accident that left him unconscious, injured, and traumatised. Ranchhod denied, not unconvincingly, that he suddenly braked heavily.

32. Craig testified that the Kawasaki that Warren rode that day was a very powerful 'superbike' and that with a passenger it would be heavier and be more difficult to swerve and manoeuvre. He testified that at 60 km/h the motorcycle would travel 25 meter in 1.5 seconds⁹ and ⁱ⁰ that 'the motorcycle just being able to avoid it (the car) by swerving; then the vehicle coming up on the left hand side; the sudden acceleration on the superbike', the bike sliding across the road at 80

km/h, etc. He mentioned in court that he heard there were no indicators or brake lights,

⁸ 'A' p 15 (h)

p 15 (h) 9 'A' p 15 (e)

that he must have accepted, but this is inaccurate. The testimony was that Trè did not recall this aspect. Ranchod said the opposite, throughout.

33. While testifying Craig made a calculation and estimated that the speed at which Warren was driving the motorbike, before being confronted with the alleged sudden emergency, must have been 80km/h, just before he finally collided with the unknown parked car some 50 meters away. He accepted that the driver of the insured vehicle suddenly braked very hard to turn right onto the off-ramp to the M5, as though that was an established fact, without considering that he had arrived at a robot, while driving in the right hand lane, where he wanted to turn right, where there was traffic approaching from the opposite direction. Craig's version, (on p 15 par (j) of exhibit 'A') that there was a vehicle in the left lane into which the motorcycle swerved, that was approaching rapidly from behind, causing Warren to accelerate rapidly to avoid this vehicle from colliding with them, was news to me. In essence his testimony and conclusions amounted to speculation not based on the full facts of the matter.

34. Vimal Ranchod testified on behalf of defendant. He was the driver of the insured Toyota Tazz He is a mechanical engineer who was working at Saldanha Steel in 2009. He visited his home near Rondebosch, close to Kromboom Road, over weekends. On Sunday evenings he returned to Saldanha, usually not late, to avoid driving in the dark. This had been his routine since about 2003, when he finished his studies at UCT. He usually drove west along Kromboom Road, took the right hand turn off to the M5, and then drove along the R 27 to Saldanha.

¹⁰ His testimony on p 60 line 25

35. He drove a grey Toyota Tazz that he had owned for about 6 years. It was serviced routinely. His brake and indicator lights were fully functional. On the day in question he was driving, as usual, west along Kromboom Road towards the bridge intersection with the M5. It was a clear Sunday evening before sunset. He approached the robot in the intersection and noticed a vehicle in front of him. There are two robots on the Kromboom Road bridge. One as you approach, in the left lane, when you could go left on the M5 to Muizenberg, and another robot as you proceed (in the right hand lane) where you can go straight or turn right onto the M5.

36. There were no cars around him on the intersection, only a stationary car in front of him, also in the right-hand lane and at the red robot, about to turn right. While stationary, another vehicle stopped behind him. He does not recall the make of either of these vehicles. He watched the vehicle behind him. He did not see the motorbike in his mirrors while driving along Kromboom Road or on the intersection. He did not hear it approaching. He waited only 3-4 seconds before he felt a jolt at the left rear of his vehicle. At about the same time, he noticed a motorbike passing/swerving, on his left, in the left lane. The bike passed him and the car in front of him, before it fell in the road, in the lanes for oncoming traffic.

37. He did not watch what happened in front of him as he was concerned about his vehicle and the jolt he felt. When the robot turned green, and the car ahead of him moved off, he crossed the intersection and parked on the left-hand side to inspect his vehicle and to see what was happening. The motor cycle was on the road in the oncoming traffic.

38. There was an indentation on the left rear of his vehicle, the left rear light was damaged, and a body panel was smashed. He had it repaired at a cost of

about R 12 000. He denied that he had brought the vehicle to a sudden stop. He maintained that he had gradually decelerated, and then stopped. It was a manual gear box. There was no way he could have avoided the collision.

39. Ranchhod was cross-examined extensively. He gave a description of the collision, contained in an Accident Report (AR) Form, to a Police Officer on the date of the incident.¹¹ The report is not very legible or instructive and I found deciphering this document not simple. It makes provision for vehicles 'A' and 'B'. Vehicle A was the motor vehicle driven by Ranchhod, while B was the motorcycle driven by Warren, its capacity incorrectly reflected as under 125cc.¹² Vehicle A was damaged at the back, left, while vehicle B had 'multiple' damage. The area of the back-left damage to motor vehicle A is clearly indicated in the middle column on p 6 of the AR form. The accident is reflected as a head/rear end collision. There is an accident sketch, not to scale, where the B cycle is shown connecting with the far-left rear of vehicle A, at the robots on the Kromboom Road intersection. No other vehicles are indicated.

40. Ranchhod said he was not present when the sketch and description were completed. No other vehicles were involved in the collision or accident. In fact, the vehicle that Warren had ultimately crashed into, was not depicted either. Ranchhod described the accident in 'brief' by relating that his vehicle was stationary waiting for the robots to open for him 'and indicating to the right' to join the M5, when B, the (motor cycle) came from behind 'driving fast traveling straight'

¹¹ Exhibit A p 5

¹² P 6 of 'A' para 11.

and 'bumped the stationary vehicle A.

41. He was referred to a statement he made on 23 April 2015 to an assessor of RAF relating to the collision. In that statement he repeated what has already been stated, including that, as he approached the robot-controlled intersection in the right-hand lane, he was indicating 'to turn right towards the M5 Freeway.' He added that, as he approached the robot, there was already a stationary vehicle in front of him and after he had stopped, another vehicle, that had followed him for a while, stopped behind him. He had not noticed the motor cycle while travelling along Kromboom Road.

42. After a few seconds he heard an impact at the rear of the vehicle and noticed a motor bike passing him. and the vehicle ahead Qf him, on his left, in the left lane. He noticed the motor bike fall on the tar road in the lanes of oncoming traffic. He moved forward when the robot turned green and parked on the other side. He noticed the damage to his vehicle, to the left rear light and the boot. He commented in this statement that there were 'no vehicles in the left lane prior to the collision'. He spoke to the police and the wife of the motor bike rider on the scene. He could not explain why the motorbike rider passed the vehicle behind him and collided with his vehicle, as they were both stationary, before the collision occurred. He agreed that he had not provided this description of three vehicles to the police on the scene. He had only been concerned with himself and his vehicle, as he was the person whose vehicle was involved in a collision with the bike.

43. He was referred to the actions by the motorcycle after it had bumped into his car. He said, repeatedly, that he could not see what happened when the bike passed him. He did not see the motor bike before the impact. He looked in his rear-view mirror and just saw the vehicle behind him. He was referred to a sketch of the accident scene, depicting three vehicles at the robot, (p 36, exhibit 'C'), part of

discovery in terms of rule 36(10) by defendant's attorney, or the RAF claims handler, dated 19 May 2015. He had not seen this document and it was not his handwriting. He could not recall if he had any input in the document. He had no recollection about the make or colours of the other vehicles.

44. He repeated, repeatedly, that the other two vehicles drove off, as far as he recalled, and he was the one involved in the accident. He specifically recalled the first one moving off, as he had to wait for him to leave so he could cross over the road and check the damage to his vehicle. This aspect, of two alleged versions by Ranchhod, was traversed ad nauseam. Ranchhod said that what he said to the police, was in response to questions. He did not see what was written or drawn on the form:

'I said my vehicle was present, I didn't mention another vehicle, two vehicles, beside me, because / was only concerned about those vehicles involved in the accident, and that's what the police actually asked me. '

45. Later Ranchhod stated again that his version to the police only related to the vehicles involved in the accident, not all the vehicles on the scene, and then, later, he was required to give a detailed description to defendant's representative.

46. It was put to him that his sudden stopping created a sudden emergency as a result of which the motorbike had to swerve and struck his car at the rear. The remainder of the cross-examination was often cross, repetitive, argumentative and ostensibly aimed at intimidation. Ranchhod was asked, interspersed with interruptions, how it could have happened that the motorbike only connected his vehicle, not the one behind him, and not the one in front of him. His very acceptable reply was, at least three times, that he could not guarantee the alignment of the vehicle behind him; and, if it was aligned directly behind him, giving little space for the motor cycle to actually collide, then the situation may

have been as unusual, as proposed. Ranchhod remained composed and stood his ground despite the speculative cross-examination on this aspect.

LEGAL ASPECTS

47. The plaintiff bears the onus of proving negligence on the part of the insured driver on a balance of probabilities ⁴The court, in deciding whether the plaintiff has succeeded in discharging this onus, will consider the evidence presented during the trial holistically.

48. There are two versions before court that are mutually destructive on some material aspects. The version of the plaintiff is that the collision was caused by the insured driver who, while travelling in the right hand lane of two lanes on a busy intersection, suddenly, without any warning, applied brakes and came to a standstill at a green robot, where he could turn right to access the M5, as the arrow on the road plainly indicated. The accident, according to plaintiff, happened so quickly that there was nothing he could do to avoid it. (There was no explanation why the Tazz would slam on brakes to turn right, and stop, when the robot was green, as alleged.)

49. The version of the insured driver on the other hand is that he was travelling on the right hand lane as he was about to turn right onto the M5, as usual on his way to his home in Saldanha. The robot was red and there was traffic approaching from the other side. He received a bump on the rear end of the vehicle. After the motor cyclists had fallen in the area of the approaching traffic, the insured driver was still waiting at the robot for the vehicle in front of him to move off.

⁴ Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (AD) at 576C; and Madyosí & another v SA Eagle

50. The approach to be adopted when dealing with mutually destructive versions was succinctly set out in the case of *National Employers General Insurance Co Ltd v Jagers*¹⁴ where Eksteen AJP noted:

‘... 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, 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.’

Insurance co Ltd 1990 (3) SA 442 (E) at 4440 - F.)

¹⁴1984 (4) SA 437 (E) at 440E - G

51. In the oft-quoted *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others*,¹⁵ the SCA explained how factual disputes should be resolved to ascertain, as far as possible, where the truth lies between conflicting factual assertions:

'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 probability or improbability of each party's version on each of the disputed issues.

In light of the 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 a 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'⁵

52. In this matter the motorbike connected with the rear end of the vehicle. The inference to be drawn, as stated by Craig, is that the plaintiff is the cause of the accident, unless the contrary is shown. In dealing with the issue of rear end

2003 (1) SA 11 (SCA) at para 5
collisions, this court, in *Van Der Berg v Road Accident Fund*,¹⁷ held that:

'[14] The general approach to adopt when dealing with rear end collisions is set out by the author H B Kloppers in *The Law of Collision in South Africa* (7th Ed) page 78 as follows:

"A driver who collides with the rear of a vehicle in front of him is prima facie negligent unless he or she can give an explanation indicating that he or she was not negligent."

[15] The driver who collides with another from the rear end can escape prima facie liability for negligence by providing an explanation that shows that the collision occurred because of the negligence of the driver

⁵ See also *African Eagle Life Assurance CO Ltd v Gainer* 1980 (2) SA 324 (W).

of the other vehicle or due to other intervening circumstances. The example of the exception to the general rule of rear end collision is said to be where for an example, as stated by Klopper, the driver in the front suddenly swerves immediately and applies the breaks (sic). '13

53. This court must ascertain who was responsible for causing this very tragic accident, and to determine if there was any contributory negligence by the other party. In this matter the version of the motorcyclist/plaintiff is compromised. The motorcyclist himself was not available to testify. The only witness, apart from the insured driver, of the collision itself, was his young son, then aged 11, who sat on the back of the motor cycle; it is his now seriously impaired father's motorcycle riding that he must comment on. The statement that he made shortly after the accident, also contained in the summons, and as far as I can gather, also the

(35504/11) 12013] ZAGPJHC 94 (20 March 2013)

IS See Klopper footnote 447.

version provided to the expert, failed to mention that the bike had connected with the back of the vehicle of the insured driver, around the time or just before his father took evasive action to avoid a collision,

54. What he could not explain is why his father was riding his bike in the right hand lane, unless he also wanted to turn right onto the M5 for the test ride, where his mother had twice travelled with his father. If that was his intention, he should have been driving slower, ready to stop and/or turn. If not, he should not have been in the right-hand lane, provided mainly for turning traffic. If the vehicle could stop, a careful motorcycle should have been able to stop too.

55. Ranchhod explained that he decelerated before stopping at the robot, that was red. He denied suddenly applying his brakes. Apart from the testimony of Trè sitting behind his father on a motor bike, and the fact that a collision occurred between the back of the bike and the left, back of the car, a fact that the boy did not consistently relate in his version of events, there is no explanation why the bike connected with the vehicle so forcefully, that in 2009 R 12 000 worth of damage was incurred by a Toyota Tazz

56. Ranchhod faced extensive cross-examination, repeatedly being asked about the same points to bolster the case of the plaintiff, unfortunately not always factually completely accurate. He did not deviate from his version. He testified that he slowed down and indicated before he came to a stop. He said his

indicator and brake lights were fully functional and explained how he knows that. He was prepared to make concessions, such as that he did not see the motorcyclist before coming to a halt at the robot. It needs to be remembered that the accident occurred at a major intersection, with various robots and vehicular traffic, coming and going in different directions. The insured driver was in the far right hand lane, as one should be, when intending to turn right, as indicated with a big white arrow, pointing right.

57. Anyone behind him should be cautious at that point, as cars turning right across the traffic should be anticipated, and there is the inherent danger of vehicles turning right into the path of oncoming traffic. After the impact Ranchhod was anxious to inspect his vehicle. He did not immediately ascertain the seriousness of injuries to the motor cyclist and his son, although he did qualify that they were being assisted by bystanders. He said he did not see what exactly happened in front of him when the cyclist veered across the road. The reason is apparent: There was a vehicle in front of him. He had to wait for this vehicle to drive away, before he was able to cross the road, and park on the other side. That the insured driver was required to wait at the robot, even if it was green, stands to reason. Trè also testified that there was traffic approaching from the opposite side. Ranchhod confirmed this.

58. Ranchhod's version of how the collision occurred was corroborated by his statement and his report to the police on the scene, contained in the Accident Report, although other vehicles were not mentioned, which he explained quite satisfactorily. In my view the version of the plaintiff is not more plausible or 25

probable than that of the defendant. The probabilities point to the fact that the accident occurred as the motorcyclist drove too fast and did not keep a proper lookout. He should have been a lot more alert. If he intended to turn right at the robot, he should have been driving slower, mindful of traffic ahead of him and approaching, if he intended travelling straight, he should have been travelling slower and he should, for safety reasons, have been in the left lane.

59. To summarise, in determining the issues of negligence and contributory negligence I must consider that the only evidence directly supporting the version of the plaintiff was the evidence of his young son, who himself was involved in the collision and who cannot be categorised as an impartial, independent witness. He was shocked and traumatised by what happened to him and his father. When the particulars of claim were prepared, the details of the collision were cursory. When he testified about the event, it was nearly ten years later. In addition, and importantly, he did not state in his statement to the lawyers, shortly after the collision, that they had collided with the vehicle of the insured driver.

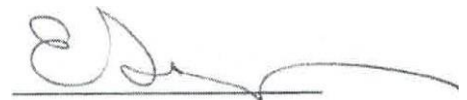
60. In plaintiffs particulars of claim the only collision by the motor cycle actually referred to, is the one with the vehicle with the unknown registration number. Even after the plea was filed, referring to a collision between the vehicle driven by Ranchhod and the motor cycle driven by Warren, the plaintiffs pleadings were not amended to rectify the error, if error it was. It was pleaded on behalf of the plaintiff that the insured driver drove at an excessive speed, a version never testified to by Trej who said that the vehicle and the motorcycle drove roughly the same speed.

61. The tragic circumstances of the matter were often emphasised, creating much justified emotion and sympathy. I do not think Tre was a dishonest witness, but i am not satisfied that his testimony is reliable, considering his age, his relationship with the plaintiff and the passage of time, and the fact that he did not alert the plaintiffs representatives to the full facts of the matter. When considering the combined evidence of the witnesses, the version of the insured driver was credible, probable, not far-fetched and not a version that could be rejected, in favour of the version of the plaintiff.

62. In conclusion I find that the accident in this matter was caused solely by the negligent driving of the motor cycle. It would not be appropriate to, in view of sympathy with the plaintiff, make a small contributory negligence order, as argued, as an alternative on behalf of the plaintiff, burdening the insured driver with such an unjustified responsibility and burdening the strained RAF fund with an unjustified payment. There is no reason why costs should not follow the result.

ORDER

63. The plaintiffs claim for damages against the defendant is dismissed with costs.



E STEYN
JUDGE
HIGH COURT
CAPE TOWN