IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Case No: 2405/2018

In the matter between:

BONGA KUBUKELI **Plaintiff**

And

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

Beshe J

[1] Section 17 (1) of the Road Accident Fund Act[1] provides that the defendant shall be obliged to compensate any person (the 3rd party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or owner of the motor vehicle. Based on this provision, the plaintiff instituted action against the defendant for injuries he alleges he suffered when a vehicle he was driving was involved in an accident on the 19 November 2016.

[2] At the commencement of the proceedings, I ordered that the determination of the merits of plaintiff's claim be separated from the

[1] Act 56 of 1996.

determination of the quantum of his claim and directed that the question of liability be dealt with first.

[3] In his particulars of claim plaintiff pleaded that on the 19 November 2016 near the N6 Road in Cathcart he was the driver of a white Mercedes Benz motor vehicle with Registration Number CFM 74692 when a certain motor vehicle came straight towards his direction. Plaintiff tried to avoid colliding with this motor vehicle. His vehicle left the road and he suddenly overturned. He further pleaded that the accident was solely caused by the negligence of the driver of the other vehicle. The manner in which the other driver is said to have been negligent is that:

He failed to keep a proper lookout.

He drove the insured motor vehicle at an excessive speed in the circumstances.

He failed to apply brakes timeously or at all.

He failed to keep the motor vehicle under proper control.

He failed to avoid an accident when by reasonable care and skill he could and should have done so.

Furthermore, he pleaded that as a result of the accident he suffered bodily injuries.

[4] Defendant in turn denied that the collision was due to the negligence of a second driver. It was pleaded that there was no other vehicle involved in the collision. Plaintiff's motor vehicle was the sole cause of the collision by:

Not keeping a proper lookout;

By failing to keep his vehicle under proper control;

By driving at an excessive speed in the circumstances;

By failing to apply his brakes timeously or at all; and

By failing to avoid a collision, when, by exercise of reasonable care and skill, he could and should have done so.

[5] Plaintiff gave evidence after which he was subjected to cross-examination. He thereafter closed his case. Defendant did not lead any evidence and closed its case without doing so.

[6] Plaintiff's testimony revealed the following:

During November 2016 he was working at Komani where he also resided. On Friday the 18 November 2016 he was at work and planned to visit his mother in Butterworth after work. He decided to rest before undertaking the trip to Butterworth. He fell asleep and only woke up between 23h00 and 24h00. He then set out on his journey to Butterworth and decided to drive via East London or take the route that will take him to East London first. As he was driving, he would come across other vehicles. When he was nearing Cathcart, he observed the lights of a car that was coming from the opposite direction crossing into his lane. He also observed that this motor vehicle was driving at a high speed. He sounded his hooter and swerved to the left. In the process his tyres came into contact with dirt road. When he tried to swerve back into the tarmac, lost control of his motor vehicle resulting in it overturning/capsizing. He thereafter lost consciousness. He regained consciousness at the Cathcart Hospital, having sustained some injuries.

[7] During cross-examination the following emerged:

He had knocked-off duty at 16h00 on Friday the 18 November 2016. His job involves *inter alia* developing websites. He felt tired after work, sat on a couch and watched television. He must have slept for seven hours. He left his house

after 00h00 midnight. The accident occurred ± 50km from his house and it must have been around 01h00. The weather conditions were good. The stretch of the road where the accident occurred was straight without any curves. His side comprised of a single carriage way and the opposite side comprised of a two-lane carriage way. As far as the emergency lane demarcated with a yellow line is concerned, he is only certain that there was one on his side. He thought that his motor vehicle could fit into the emergency lane. Beyond the emergency lane there was a slight slope. He saw the other motor vehicle for the first time when it was driving on its correct lane approximately 25 to 30 metres away and driving at a high speed. When asked if he observed the other motor vehicle veering into his side of the road or hearing screeching of tyres, he answered that he only saw its lights crossing to his side of the road. He was also heard to say the motor vehicle encroached on his side of the road with its right wheels already on his side of the road ± 15 metres from his car. He does not know what ultimately happened to the other vehicle. Asked if the road is fenced off, he said yes. He could not explain the reason why in his particulars of claim he pleaded that his vehicle overturned after it had left the road yet in his evidence, he states that he swerved back to the road, and then overturned. He answered that he thought it amounted to the same thing. He was also cross-examined about the account he apparently gave to a specialist orthopaedic surgeon Dr Kumbirai on 24 April 2017 about the incident. He confirmed that he told Dr Kumbirai that he was involved in a motor vehicle accident as a driver when he hit a pole whilst trying to avoid an animal on the road. He explained that he gave this account because he did not know what happened to the driver of the other vehicle. He did not know whether he had died. As indicated, the plaintiff was the only witness who testified in support of his claim. Defendant's case was closed without any witness being called.

[8] In argument it was submitted on behalf of the plaintiff that he has proved his case on a balance of probabilities, in light also of there being no

evidence to gainsay his version. It was further submitted that plaintiff gave evidence to the best of his ability and answered questions honestly, giving evidence from a layman's point of view. He gave an explanation why he told Dr Kumbirai he was trying to avoid an animal.

[9] It turns out that was not the only aspect he misrepresented. He also told Dr Kumbirai that he went back to work after the accident as he did not experience any problems at work related to the accident. Plaintiff's explanation in this regard was that he did not want to be boarded from work. And that it was still early stages after the accident.

[10] Defendant amended his plea to cater for contributory negligence on a 50-50 basis should the court find that there was indeed a second motor vehicle involved, which defendant maintained was denied.

[11] It was correctly submitted on behalf of the defendant that plaintiff can only succeed if he satisfies that court that his version is true and accurate and therefore acceptable. I was urged to subject plaintiff's evidence to the cautionary rule in view of the fact that he was a single witness. In this regard I was referred to several decided cases. All of them dealt with the evidence of a single witness in criminal cases. Be that as it may, there is no doubt that in order to avoid making a wrong finding, a court is required to view the evidence of any factual witness carefully. It is also trite that the fact that there is only positive version, plaintiff's version in this matter, the court is not obliged to accept it. See in this regard Van Meyeren v Cloete[2] where it was stated that:

"[13] The approach to this unsatisfactory and speculative evidence was incorrect. It overlooked the fact that the onus of proof rested on Mr Van Meyeren. There is no obligation on a court to accept an improbable explanation of events merely because no other positive explanation is proffered, or the alternative seems to the judge even less probable."

[2] 2021 (1) SA 59 SCA at 63 [13].

A similar warning was sounded in Denissova NO v Heyns Helicopters (Pty) Ltd[3] where it was stated:

"[33] What I have before me, for purposes of making the required determination, is the uncontested evidence of Steynberg which would normally, in the absence of any contradictory evidence, be accepted as being prima facie true. It does not, however, follow that because evidence is uncontested, therefore, it is true. The evidence may be so improbable in the light of all the other evidence that it cannot be accepted (see in this regard Meyer v Kirner 1974 (4) SA 90 (N) at 93G-H). The fact that evidence stands uncontradicted does not relieve the party from the obligation to discharge the onus resting on him. (see Minister of Justice v Seametso 1963(3) SA 530(AD) at 534 G-H). In civil matters the onus is discharged upon a balance of probabilities but, no doubt, this simplistic statement must be used with caution since, even if the onus-bearing party puts into his "pan of the scale of probability" slender evidence, as against no counter-balance on the part of the opponent, and although the scale should therefore automatically go down on the side of the onus-bearing party, the court may still hold that the evidence tendered is not sufficiently cogent and convincing (see Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (V) at 838H-I and other authorities cited therein)."

[12] The plaintiff bears the *onus* of proving that he is entitled to succeed on his claim. In other words, he must prove that the accident in question was due to the negligence on the part of the driver of a second motor vehicle. This he has to show on a balance of probabilities also referred to as a preponderance of probabilities.

[13] Regarding the discharging of the *onus*, in National Employers' General Insurance v Jagers[4] the following was stated:

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[3] [2003] 4 All SA 74 (C) [33].
[4] 1984 (4) SA 437 ECD at 440 D-E.

"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 a criminal case, 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."

[14] In turn, in SFW Group Ltd and Another v Martell et Cie & Others[5] the court had this to say:

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. 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

[5] 2003 (1) SA 11 SCA at [5].

variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's 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 extracurial 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's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to 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."

[15] In Mabaso v Felix[6] the court pointed out that the *onus* of proof relates to factual and not legal issues.

[16] It is with these principles in mind that I will assess plaintiff's evidence to determine whether plaintiff's version is on a balance of probabilities the truth. Whether he was a credible witness and whether his evidence can be relied upon.

[17] In his particulars of claim plaintiff pleaded that a certain motor vehicle came straight to the direction of his motor vehicle. In his evidence in chief, he

[6] 1981 (3) SA 865 SCA at 874 G.

testified that the lights of this second motor vehicle crossed to his side of the road. And that it was being driven at a high speed. It was only during cross-examination that he stated that the other motor vehicle crossed into his line of travel when asked if he saw it veer into his side of the road. Adding that its right wheels had already crossed into his side of the road. It is not clear why if that is the case the plaintiff did not say so in his evidence in chief. And how he was able to see that its right wheels had crossed into his side of the road. It is unclear from his evidence whether his motor vehicle capsized after he brought back into the road surface or that it left the road and capsized after he could not control it after it came into contact with loose gravel on the verge of the road. In his pleadings it was stated that in trying to avoid the said motor vehicle his motor vehicle overturned and left the road. In his evidence plaintiff stated that when he tried to swerve back to the tarmac, he lost control of the motor vehicle and it overturned. When cross-examined about this aspect he stated that he thought it amounted to the same thing.

[18] Plaintiff alleges that the accident occurred on the 19 November 2016. It is common cause that he was examined/assessed By Dr Kumbirai on the 24 April 2017 when he informed him that he was involved in an accident in which his motor vehicle left the road and collided with a pole in the process of avoiding an animal on the road. The date of that incident is said to be the 19 November 2016. The same date that plaintiff testified he was trying to avoid colliding with a motor vehicle that was driving towards his. That it is also alleged to have occurred at Cathcart. He conceded that he was recounting the same accident to Dr Kumbirai but misrepresented the facts/details because he did not know if the driver of the other vehicle died. According to his evidence, he did not do anything wrong. He was driving within the speed limit on his correct side of the road when a motor vehicle that was being driven at an excessive speed drove towards his direction. Even if the driver of the other motor vehicle had unfortunately lost their life, it would not have been his fault. The inescapable in my view, is that the plaintiff is trying to reconstruct the

accident hence the lack of clarity on the aspects I have already alluded to. This, by creating the impression that the vehicle capsized after he had tried to bring it back to the tarmac. Had he stuck with the version that his vehicle left he road and overturned, that would have accorded with the version that he collided with a pole when he was trying to avoid an animal on the road. This internal contradiction in his accounts affects plaintiff's credibility adversely. His evidence is not reliable. Coupled with a lack of clarity as to how the accident occurred, I have expressed my doubt about the probabilities of plaintiff having been able to see that the other vehicle's right wheels had encroached onto his side of the road when initially he made it appear as though he could tell it had done so through its lights that had crossed to his line of travel. The probabilities in my view seem to favour the version that there was no second motor vehicle involved. Even though according to him the motor vehicle must have been less than 20 metres away from him and driving at a high speed, it did not collide with his motor vehicle. He did not hear any screeching of tyres assuming the other motor vehicle applied brakes or swerved suddenly to avoid hitting his motor vehicle.

[19] I am not persuaded that the plaintiff has succeeded in showing on a balance of probabilities that the accident was due to the negligence of the driver of a second motor vehicle.

[20] Accordingly, plaintiff's claim is dismissed with costs.

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N G BESHE
JUDGE OF THE HIGH COURT

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