IN THE HIGH OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED: **YES**

Date: **23 NOVEMBER 2022** Signature:

Case No: **A282/2018**

In the matter between:

NARAINSAMY NAICKER

Appellant

And

ROAD ACCIDENT FUND

Respondent

JUDGMENT

NEUKIRCHER J:

1] On 1 June 2005 the appellant[1] was injured in a motor vehicle collision

opposite the Springbok Farm Stall, Gonubie, Eastern Cape. When his motor vehicle collided with a truck driven by the insured driver. The plaintiff was the driver of his own vehicle.

2] The plaintiff sustained numerous injuries and sued the defendant (the RAF) for damages. At the trial, merits and quantum were separated in terms of Rule 33(4) and the trial proceeded on the issue of liability only.

3] Only two witnesses gave evidence – the appellant and the insured driver. Judgment was handed down on 1 November 2011 in which the court *a quo* found that the appellant had failed to discharge his onus of proving, on a balance of probabilities, that the insured driver drove his vehicle in a negligent manner. Consequently, the appellant's claim was dismissed with costs.

4] It is against this finding that this appeal lies.

THE TEST

5] "*[147] ... It must accordingly be borne in mind that the test for permissible interference by a court of appeal with a trial court's factual findings imposes a high threshold. It is, of course, trite that*

[1] Who was the plaintiff a quo

the powers of a court of appeal factual findings are limited. There must be demonstrable and material misdirection by the trial court before a court of appeal will interfere.

[148] In Mashongwa, it was unanimously held that it is undesirable for this Court to second-guess the well-reasoned factual findings of the trial court. Only under certain circumstances may an appellate court interfere with the factual findings of a trial court. What constitute those circumstances are a demonstrable and material misdirection and a finding that is clearly wrong. Otherwise, trial courts are best placed to make factual findings.

[149] This Court has also explained that the principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is recognition of the advantages that the trial court enjoys that the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading "the cold printed word", the main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to "tie the hands of appellate courts". It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the

conclusion reached by the trial court is clearly wrong, it will reverse it."[2]

CONDONATION

6] Before the appeal may be considered, the appellant has applied for condonation for his failure to prosecute the appeal within the time frames set out in Rule 49. This is so because of the inordinate delays his attorney experienced in obtaining a copy of the transcribed record[3], and also because the appellant had issues with placing his attorneys in funds in order to prosecute this appeal. The appeal is not opposed. I am of the view that the explanation provided is sufficient and there are also good prospects of success on appeal[4] and therefore condonation is granted.

THE MERITS

7] According to the appellant, he was travelling from Mulberry, East London to Durban in a Mercedez-Benz Vito motor vehicle with his cousin, his father and his daughter. He was on his way to Gonube to collect a package for a friend which he would then leave in Durban.

8] The road is a tarred, single carriage-way in both directions with a gravel verge. The speed limit was 80kmph and his evidence was

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[2] South African Human Rights Commission obo Jewish Board of Deputies v Masuku and Another 2022 (4) SA 1 (CC)

[3] Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers CC 2010 (5) SA 340 (GSJ) at par 28 – although there is no application to compel the record *in casu*, I am satisfied that the appellant's attorney did all he could to ensure timeous receipt of the transcript

[4] Immelman v Loubser 1974 (3) SA 816 (A)

that it was approximately 06h30, a clear day and he was travelling at 50 or 60kmph. He also testified that the road was busy in both directions as it was peak hour.

9] As he was travelling towards Gonube, he saw a yellow construction vehicle (the truck)[5] in front of him but to his left travelling on the gravel verge in the same direction. His evidence was that he noticed it when he was about 1km away and then when he was about 2 car lengths from the truck, opposite the Springbok Farm Stall, the truck moved into his direct path in the road. It had no indicator on and it came to a stop to turn right into the Springbok Farm Stall. The appellant's evidence was that he was unable to veer to the right because of the oncoming traffic in the opposite direction, and he was also unable to veer to the left – his evidence was that there were vehicles *"coming and going"* in all lanes. He tried to apply his brakes but he collided with the insured driver's truck. The more prominent damage was to the front driver's side of his vehicle.

10] The insured driver's version is that he had thoroughly checked his truck before embarking on his journey and that everything was in working order. He was travelling on the same road as the appellant but had been stopped (with his indicator on) opposite Springbok Farm Stall for 5-7 minutes in order to execute a u-turn. He had to stop because the flow of traffic in the opposite direction was heavy

[5] A 7 tonne truck – it's a "tipper truck"

at that time of the morning, it being peak-hour traffic. The next he felt a collision at the back of his truck. When he went to check, he saw that the appellant's vehicle had collided with his truck. His version was also that the was enough space on the gravel verge for the appellant to have safely passed him –the inference being that the appellant failed to keep a proper look-out.

THE JUDGMENT

11] The court *a quo* correctly found that the versions of the two parties are mutually destructive and that the test is therefore whether, on a preponderance of probabilities, the plaintiff has satisfied the court that his version is true and accurate and acceptable, and that the defendant's version is therefore false or mistaken and falls to be rejected.

12] *"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, 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."[6]

13] In **Stellenbosch Famers Winery Group Ltd and ANOTHER V Martell Cie and Others**[7]**,** the test was articulated thus:

"The technique generally employed by courts in resolving factual disputes of this nature may be conveniently summarised as follows. To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities...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..."

14] In applying the above principles, the court *a quo* found the following:

14.1 that the version presented by the insured driver was believable in that he seemed to be meticulous in giving the details pre- and post- accident right up to the point of impact;

14.2 the insured driver's version is corroborated by the appellant's version that the morning traffic from the opposite direction was heavy just before the collision; which supports the former's version as to why he was stationary for 5-7 minutes opposite the Springbok Farm Stall;

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6 National Employees General Insurance Co. Ltd v Jagers 1984 (4) SA 437 € at 440E-G

7 2003 (1) SA 11 (SCA) at 14I – 15E

14.3 that, as a result, the insured driver's vehicle could not have been in motion as he would have collided with the heavy oncoming traffic;

14.4 that the appellant attempted to bolster his evidence by presenting a sketch plan to depict the scene immediately prior to the collision which shows the truck virtually at right angles to the appellant's vehicle, and with its front standing across the centre line – but when asked how this could be so in light of the oncoming traffic, the appellant could not explain;

14.5 that the appellant's vehicle is (according to the sketch plan) standing on the left lane facing east yet the appellant's version is that he applied his brakes and tried to swerve. But had he actually have done so, his vehicle would be skewed toward the left and he had no satisfactory explanation for this;

14.6 he failed to call any witness, despite the fact that there were other passengers in his vehicle;

14.7 if the appellant was travelling at 50kmph, he would have been able to swerve out of harm's way;

14.8 that the damage to his vehicle was "massive" and his injuries and the fact that he was found slumped over his steering wheel shows that the he was travelling much faster than he admitted to.

15] Accordingly, the court *a quo* found that a) the appellant had acted negligently and b) that his version that the insured driver was

travelling on the shoulder of the road just before the collision was *"nothing but a figment of his imagination"* and he was trying to create an opportunity to impute culpability on the part of the insured driver, and c) this was a classic rear-end collision caused solely by the appellant's negligence.

16] The appellant's claim was consequently dismissed with costs.

THE APPEAL

17] I am of the view that the court *a quo* erred in the above analysis and conclusion as:

17.1 the appellant's version - that the truck was travelling on the left hand gravel verge in front of him and when he was about 2 car lengths away it moved suddenly into his lane without any indication and stopped to turn into Sprinkbok Farm Stall - should be accepted;

17.2 the appellant attempted to apply his brakes but was too late. In any event, and as counsel submitted, being 2 cars lengths away from the truck would have given the appellant a split second in which to successfully either swerve or apply his brakes – neither of which is feasible in the circumstances;

17.3 the photographs bear out the evidence that the appellant's vehicle sustained damage across the front with the worst of that on the front driver's side;

17.4 the likelihood is that if the truck had indeed been standing for 5-7 min waiting to turn right, cars would have been dammed up behind it (or passing it on the gravel verge) given the fact that it was early morning peak traffic on a busy road – there was no such evidence;

17.5 had the insured driver been stationary for 5-7 minutes, and given the fact that it is common cause that there were no other vehicles in front of the appellant other than the truck, it is highly unlikely that the appellant would not have seen the stationary truck as he was approaching it;

17.6 the common cause evidence was that the truck had stopped on the white line of the lane in which both it and appellant were travelling – this lends credence to the appellant's version as to where the truck was stopped in the road.

18] Whilst I agree that the appellant's evidence was not satisfactory in all respects (for example the sketch plan), in my view the objective evidence, such as the photographs, and the common cause facts, tip the probabilities in the appellant's favour. Furthermore, I disagree that the failure to call corroborating witnesses was either fatal to, or a factor against, the success of the appellant's case.[8]

19] I therefore find that the appellant's evidence that the truck suddenly moved across his path from the gravel verge approximately 2 cars

[8] Pexmart CC and Others v Home Construction (Pty) Ltd and Another 2019 (3) SA 117 (SCA)

lengths away from him, and that it came to a stop at the white line in an attempt to turn right into Springbok Farm Stall, is the more probable version.

20] I am therefore of the view that the appeal should succeed.

THE ORDER

21] The order that is made is the following:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following:

"1. The defendant is ordered to pay 100% of the plaintiff's proven or agreed damages arising from the collision of 1 June 2005."

B NEUKIRCHER
JUDGE OF THE HIGH COURT

I agree

C SARDIWALLA
JUDGE OF THE HIGH COURT

I agree

D MALUNGANA
ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 23 November 2022.

Appearances:

For the Appellant	: Adv HA de Beer SC
Instructed by	: Shireen Amod and Company
For the Respondent	: No appearance
Date of hearing	:16 November 2022