THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 797/10

In the matter between:

JAMES D BIDDLECOMBE Appellant

and

ROAD ACCIDENT FUND Respondent

Neutral citation: *Biddlecombe v Road Accident Fund* (797/10) [2011] ZASCA 225 (November 2011)

Coram: HEHER, MALAN and WALLIS JJA.

Heard: **22 November 2011**

Delivered: 30 **November 2011**

Summary: Motor collision at robot controlled intersection – approach to evidence – apportionment of blame.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Maluleke J sitting as court of first instance) it is ordered that:

The appeal is dismissed with costs.

JUDGMENT

WALLIS JA (HEHER and MALAN JJA concurring)

[1] Shortly after 10 am on Sunday 6 April 2008 a collision occurred at the robot-controlled intersection of Malibongwe Drive and River Road, Randburg, between a 750 cc Suzuki motorbike being ridden by the appellant, Mr James Biddlecombe, and a 12 ton MAN truck, laden with tiles, being driven by Mr T P Motaung. Unfortunately Mr Biddlecombe's motorbike burst into flames on impact with the truck and he suffered serious burn injuries. In his claim against the Road Accident Fund (the Fund) his damages were agreed at R14 million plus his medical costs. In the trial court Maluleke J apportioned blame for the collision equally, with the result that Mr Biddlecombe would be entitled to recover half of the agreed damages and half of is medical costs. This appeal by him, with the leave of the trial court, is against that apportionment. There is no cross-appeal by the Fund.

[2] Malibongwe Drive is a major arterial road with a dual carriageway carrying north and southbound traffic in the vicinity of its intersection

with River Road. There are two demarcated lanes in each carriageway and the carriageways are separated by a traffic island. The road is straight with a very slight upward inclination towards the north. Visibility in a northerly direction from the traffic lights at River Road extends for some 312 metres. The intersection is a substantial one where the road widens to provide lanes for traffic from both directions in Malibongwe Drive to filter left into River Road and similarly to allow traffic to filter left from both directions in River Road into Malibongwe Drive. At the intersection there are also additional demarcated lanes in both north and southbound carriageways for traffic wishing to turn right from Malibongwe Drive into River Road across the face of oncoming traffic. Each lane in Malibongwe Drive is approximately 3.5 metres wide. Between the ends of the two traffic islands the intersection is 21 metres wide, with the stop lines for traffic being set back a little over three metres on both sides of the intersection.

[3] The day of the accident was sunny, the road was dry and visibility was excellent. The traffic lights at the intersection were in working order. The sequence in which they functioned is relevant. Starting from a position where they are red for traffic travelling in either direction in Malibongwe Drive, there is first a flashing green turning arrow (referred to in evidence as a leading arrow) to enable vehicles coming from either direction to turn right into River Road. Through traffic faces a red light during this period. After thirteen seconds the green turning arrow is replaced by an amber arrow and after a further four seconds that disappears. There is then an interval of two seconds after which the lights for through traffic in both directions change to green and remain green for 24 seconds. During this period there is no turning arrow for traffic to turn right into River Drive. Vehicles wishing to do so and turn across

oncoming traffic may, however, turn when it is safe for them to do so. The lights in both directions then turn amber for five seconds and then red.

[4] Mr Biddlecombe was returning home after meeting some motorcycling friends and travelling south in the lane adjacent to the traffic island. His version was as follows. As he approached the intersection the lights were green in his favour. When he was about 150 metres away, he saw Mr Motaung's truck stop in the turning lane for traffic from the south wishing to turn right into River Road. He says that he was travelling at between 60 and 70 kilometres per hour (kph), well within the speed limit of 80 kph. He assumed that, as the truck had stopped, its driver had seen him and, as the lights were in his favour, he proceeded on the basis that he would drive straight through the intersection. When he was about 50 metres away, the truck pulled off and turned in front of him. He braked, using his rear brakes only, as he had been taught, but this was insufficient to avoid a collision. As a result of his braking the motorbike skidded and left a skid mark, some 34 metres long, on the surface of the road. He has no recollection of the accident itself, only of its aftermath when he was trapped under the motorbike, which had caught fire.

[5] As one would expect, Mr Motaung's version of the accident corresponded in some respects with that of Mr Biddlecombe and differed in others. He agrees that he approached the intersection from the south and stopped in the turning lane. According to him he did so because the turning arrow, which had been green as he approached, had turned off and so he was not entitled to turn across oncoming traffic until it was safe to do so. He intended to turn right into River Road in order to fill up at a

nearby service station. He says that three vehicles travelling south went through the intersection while he was waiting there, the last one as the lights turned red.[1] At this point he pulled off to complete his right turn and clear the intersection. He had seen Mr Biddlecombe's motorbike when it was about one hundred metres away and thought that it was slowing down and would stop. He had almost completed his turn and the cab of his vehicle was across the furthest lane of the southbound carriageway when Mr Biddlecombe's motorbike collided with his vehicle in the vicinity of the rear wheels. He was alerted to the collision by the flames from the fire.

[6] Apart from Mr Biddlecombe and Mr Motaung the only eyewitness to the collision was Ms van Eeden, who was a passenger in a Renault Scenic motor vehicle travelling south in the lane behind the motorbike, but separated from it by either two or three other vehicles. The trial judge did not find her a convincing witness. The focus of much of the argument before us was on whether he erred in this. It was submitted that her evidence should have been accepted as reinforcing the correctness of Mr Biddlecombe's version of events and warranting the rejection of Mr Motaung's version. In particular it was contended that her evidence that at the time of the collision the traffic light was green for southbound traffic should have been accepted and that this should have been decisive of the case. I will revert to her evidence in greater detail in due course.

[7] Both parties called an expert witness, Mr Grobbelaar for Mr Biddlecombe, and Mr Verster for the Fund. Before the hearing the experts met and prepared a joint minute of matters on which they were

[1] This refers to the lights for through traffic, which are synchronised in the fashion described in paragraph 3. In other words when they are red for traffic travelling north they are also red for southbound traffic.

agreed. In it they said that the collision occurred because the truck had turned right across the intersection in front of the lane of travel of the motorbike. They were unable to express any view on the state of the traffic lights at the time the truck turned. They inferred from the skid mark that Mr Biddlecombe had seen the truck and attempted to avoid a collision by applying his brakes. They agreed that when the brakes were applied the motorbike was travelling faster than 58 kph on the basis that otherwise, after skidding for 34.1 metres, it would have come to a halt before colliding with the truck. In order to allow for reaction time they accepted that Mr Biddlecombe must have seen the truck and realised he was in a situation of potential danger one to one and half seconds prior to the application of his brakes. Assuming a reaction time of one second at 58 kph he must have become aware of danger when he was approximately 50 metres from the intersection. If one assumes a slightly longer reaction time or a higher speed that distance increases. In addition in their reports, as explained in their oral evidence, they gave figures on speeds and stopping distances that were uncontroversial and unchallenged.

[8] The trial judge appreciated that there were mutually destructive versions given by the eyewitnesses on the state of the traffic lights at the time of the collision. That raised the question of the proper approach to such evidence in the light of the expert evidence. Basing himself upon the decision in *Abdo NO v Senator Insurance Company Limited*[2] he said that he would provisionally assess whether Mr Biddlecombe had discharged the onus of proving on a balance of probabilities that Mr Motaung had been negligent on the basis of the eyewitness evidence, and then consider and take into account the expert evidence. In *Abdo* Kannemeyer J said[3]

[2] *Abdo NO v Senator Insurance Company Limited* 1983 (4) SA 721 (E) at 725D-F.
[3] At 725E.

that it was 'convenient at the outset to consider the approach to be adopted if one is faced with both expert evidence and the testimony of eye witnesses in a case such as this'. He then went on as follows:

'In *Putzier v Union and South West Africa Insurance Co. Limited* 1973 ECD (unreported) ADDLESON J was faced with such a problem. The decision in *Putzier's* case was reversed on appeal on the facts. The judgment of the Appellate Division is also not reported but the approach adopted by ADDLESON J in the following terms is not questioned therein:

''Counsel did not refer me to any authority dealing directly with the correct approach to a dispute between the experts and the eyewitnesses. It seems to me however that unless the opinion of the experts is either uncontroverted or incontrovertible, one should look first at the evidence of the eyewitnesses, if any. If such eyewitnesses are unacceptable then naturally the Court is bound to decide, if possible, which of the opinions of the various experts is preferable and to found its judgment on such opinion. On the other hand, where a choice can be made on a balance of probabilities and on accepted principles between two sets of eyewitnesses, the Court should first make a provisional assessment of which of the versions of the eyewitnesses is acceptable. Having provisionally accepted one or other version, the Court should then consider the expert evidence and decide whether that evidence displaces the provisional findings made on the evidence of the eyewitnesses. In this regard, where the *onus* is on the plaintiff and where there is a dispute between the experts, it is my view that, if the eyewitnesses favour the plaintiff, the evidence of the defendant must be shown to displace that of the plaintiff's eyewitnesses; but, if the eyewitnesses favour the defendant, the plaintiff must show that the evidence of his experts must be accepted in preference to the experts and the eyewitnesses for the defendant. If, at best, the court is left in doubt as to whether the experts for the plaintiff have advanced opinions preferable to those of the defendant, then it seems to me that the plaintiff has failed to displace the findings made in respect of the eyewitnesses and has consequently failed to discharge the *onus* on him."'

Kannemeyer J adopted that approach subject to a qualification that 'in the final result, a decision must be reached on the evidence as a whole and the above approach must be no more than a convenient method of analysis of that evidence'.

[9] However helpful that approach might have been in *Putzier* and *Abdo*, a matter on which I express no opinion, I share the view expressed in *Stacey v Kent*,[4] that '[i]t may be that the statements are too general and

[4] *Stacey v Kent* 1992 (4) SA 495 (C) at 497C-E.

that one should treat each case on its own merits'. In every case it is necessary for the trial judge to identify an appropriate point at which to commence the analysis of the evidence. In some cases that may be the eyewitness evidence, but in others it may be more appropriate to commence with the expert evidence. For example there may be physical evidence, such as skid marks, collision damage to the vehicles, the position of the vehicles after the collision or the location of debris that, when viewed in the light of established scientific data, such as the distance that a motor vehicle will travel at a particular speed, provides a definitive factual background against which to weigh the merits of the eyewitness accounts of what occurred. The evidence of the experts may be of great assistance in understanding and giving appropriate weight to this evidence. In such a case, to start with the eyewitness evidence and reach a provisional conclusion that the expert evidence must then 'displace' burdens the expert testimony with an onus that is not warranted and separates into two discrete enquiries what is a single enquiry.

[10] This is not to say that the caution with which our courts have always approached expert evidence on the mechanism by which motor accidents occur and their expressed preference for eyewitness testimony is not on occasions justified. As Eksteen J said in *Motor Vehicle Assurance Fund v Kenny*:[5]

'Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training. Strange things often happen in a collision and, where two vehicles approaching each other from opposite directions collide, it is practically impossible for anyone involved in the collision to give a minute and detailed description of the combined speed of the

[5]*Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (E) at 436H-I. Followed in *Stacey v Kent* 1995 (3) SA 344 (E) at 348-349.

vehicles at the moment of impact, the angle of contact or of the subsequent lateral or forward movements of the vehicles.'

The expert tasked with reconstructing what occurred is often dependent for the reconstruction not simply on the application of scientific principle to accurate data but on calculations based on imperfect human observation. The fact that the reconstruction rests on a potentially imperfect factual foundation is the reason for caution in determining its evidential value.[6] However, whether that is so in any particular case will depend upon an assessment of the degree to which it rests upon ascertainable and measurable facts and the application of scientific principles to those facts. It is undesirable for a court to adopt an *a priori* approach to its task of weighing eyewitness and expert testimony where the two conflict.

[11] In the present case it is convenient to start by considering some of the undisputed factual and expert evidence. That evidence was based primarily upon photographs and measurements taken shortly after the accident and secondarily upon measurements and calculations performed by the experts at a later stage. The photographs showed that the motorbike came to rest in the intersection at a point that was agreed to be some 15 to 17 metres from the stop line for northbound traffic and therefore some 11 to 13 metres from the stop line for southbound traffic. In other words it occurred slightly to the northern side of the intersection. The photographs show that the motorbike came to rest more or less in front of the lane in which Mr Biddlecombe said that he was travelling prior to the collision. Running northward from that point and approximately in a straight line is the skid mark that was measured at 34.1 metres. There are photographs of the truck showing that it is a

[6] In *Van Eck v Santam Insurance Company Limited* 1996 (4) SA 1226 (C) at 1229 it was said that the expert evidence is 'inevitably based on reconstruction'.

conventional horse and trailer, the latter having only a double rear axle and two sets of rear wheels and no front wheels at the point where it is supported by the horse. The photographs show marks on the foremost tyre at the rear of the trailer indicating that the point of impact was about two to two and a half metres from the rear of the truck. That means that the cab and the bulk of the trailer had already passed in front of Mr Biddlecombe's motorbike before the collision occurred.

[12] If one pauses at this stage to compare this evidence with that of Mr Biddlecombe and Mr Motaung, it shows that the accident occurred much as they described. It also shows that on either version of the collision the trial court was correct to find that Mr Motaung was negligent in that he 'moved rather precipitately across the plaintiff's lane of travel'. On his own version, even if the lights had changed and Mr Biddlecombe should have stopped because the lights were red, he misjudged the speed at which the latter was travelling, the distance he had to cover and both his intentions and his ability to stop. If the lights were still green for southbound traffic that merely compounded the problem, because he had no reason to think that Mr Biddlecombe was planning to stop at the intersection. Whilst it was permissible for him to turn right in the face of oncoming traffic it was not safe to do so. Of course, if, contrary to his evidence, he simply did not see the oncoming motorbike, he was equally negligent, the only difference being that the negligence consisted in his failure to keep a proper lookout.

[13] That conclusion does not necessarily assist Mr Biddlecombe's case. If one accepts that he and Mr Motaung are correct in saying that the truck vehicle was stationary at the intersection waiting to turn right, that means that the truck pulled off from a stationary position and crossed over two

and nearly three lanes of the southbound carriageway before the collision occurred. Bearing in mind that it was a fully laden twelve-ton vehicle, somewhere between ten and twelve metres long, and that it travelled at least fifteen metres forward and nearly ten metres across the intersection,[7] it must have been in and moving across the intersection for several seconds prior to the collision. Such a vehicle is not capable of accelerating rapidly from a stationary position. Assuming in favour of Mr Biddlecombe that it travelled at an average speed of 20 kph,[8] it must have taken at least four to five seconds from the time it started moving to the point where his motorbike collided with it. In that time at an average speed on his part of 40 kph he would have travelled between 40 and 50 metres.[9] If the estimate of the truck's speed is high then it was moving into and across the intersection for longer than four to five seconds and Mr Biddlecombe would have been able to observe it for longer and from a greater distance.

[14] Once those relatively simple calculations are done, based on incontrovertible scientific data as to the time it takes for a vehicle to travel a known distance at a particular speed, one reaches the inevitable conclusion that Mr Biddlecombe could see the truck moving into and across his path of travel when he was at least 40 to 50 metres away from the intersection and, making full allowance for the width of the intersection, some 25 to 30 metres from the stop line on the northern side. This is not harsh on him because his own evidence was that he saw the

[7] According to Mr Grobbelaar's measurements the total width of the three southbound lanes was 10.5 metres. The collision occurred no more than two to two and a half metres from the rear of a truck that was some 12 metres long according to Mr Motaung. That means that he was correct in saying that when the collision occurred the front of his cab was more or less fully across the left hand lane for southbound traffic.
[8] This is a very high estimate for a vehicle of that size moving from rest up a very slight incline and turning at the same time. At 20 kph a vehicle covers slightly more than 5.5 metres per second.
[9] On his own version he was slowing down from 60 to 70 kph in consequence of his sharp braking. The experts said that he was travelling at 58 kph or faster when he applied his brakes.

truck start moving when he was some 50 metres away from the intersection. But then he is faced with the unchallenged evidence of Mr Verster that at a speed of 60 kph he should have been able to stop with normal braking in about 18 metres and using the rear brakes alone within about 28 metres. At a speed of 65 kph Mr Verster said these distances became 20 metres and 33 metres respectively.

[15] The inevitable question that arises from this is why Mr Biddlecombe was unable to stop in the ordinary course, with the application of conventional braking, prior to colliding with the truck. The day was clear and his visibility unimpeded. He was aware of the truck and the fact that it wished to turn right across the face of oncoming southbound traffic in Malibongwe Drive. The only possible source of danger to him was if it started to do so before he had passed it and cleared the intersection. He should therefore have kept it under observation. On his own evidence as to the speed he was travelling and the time when he observed the truck, he should have been able to stop without any particular problem before a collision occurred. Only two possible reasons exist for his not doing so. The one is that he was travelling at a much greater speed than he said and the other is that he was not keeping the truck under proper observation and only realised that it was moving much later than he said. It is of course possible that it was a combination of both reasons.

[16] The conclusion from this is that Mr Biddlecombe was himself negligent in one or other or both of the respects I have mentioned. Even if one accepts in his favour that the initial fault lay with Mr Motaung, this is not a case of a vehicle suddenly emerging ‘from nowhere’ in the parlance of many of those involved in motor accidents. It is a situation of a vehicle

that is perfectly visible, and has been visible for some time, starting to commence a manoeuvre that it was obvious to oncoming motorists it intended to undertake, and doing so in circumstances where an alert motorist driving at a reasonable speed would have been able to let it pass in front of him without incident.

[17] These conclusions are entirely independent of the state of the traffic lights at the time of the collision. If they were green for southbound traffic, then they were equally green for northbound traffic and Mr Motaung was entitled to turn right across the oncoming traffic if it was safe to do so. Southbound traffic should have been aware of this possibility and alert to the risk of a vehicle undertaking a turn, having misjudged the distance and speed of oncoming vehicles, and creating the potential for a collision. Drivers of southbound vehicles could not proceed on the blithe assumption that such an event would not happen, as it is one of the ordinary risks of everyday driving. In a perfect world it would not happen, but experience teaches us that it does. If the traffic lights had changed to red, as Mr Motaung said they had, the position is reversed. It was perfectly proper for him to expect to be able to proceed to complete his turn before traffic in River Drive could proceed, but he could not simply assume that traffic in Malibongwe Drive would stop to enable him to do so. The phenomenon of vehicles speeding up to try and go through traffic lights as they change from green to amber and amber to red is sufficiently commonplace for any driver in Mr Motaung's position to recognise it as a risk and guard against it.

[18] If it were necessary to choose between Mr Biddlecombe and Mr Motaung as to the state of the traffic lights at the time of the collision I do not think it would be possible to do so and I think that the trial court was

correct not to do so. The judge found Mr Motaung to be ‘a particularly candid, credible and truthful witness’. There is nothing to refute that finding and it must be afforded the respect that appellate courts always afford to trial courts on matters of credibility. That is not to say that Mr Biddlecombe was an unsatisfactory witness. No such finding was or can be made. It simply means that the court was unable to choose between them in the sense of preferring the version of the one to that of the other on the basis of the inherent probabilities.

[19] That brings me to Ms van Eeden’s evidence. She said that she and friends or family were on their way to the Rand Show. They were in a Renault Scenic, a small vehicle of the type popularly referred to as a ‘people carrier’. It is about the same size as a mid-range saloon car with a bench seat in the rear and a small rear-opening boot. It sits slightly higher off the ground than the average saloon car, but a person sitting in one by no means enjoys the position of vantage of a passenger in a sports utility vehicle, of which there are many on our roads, or in the ever-present taxis in which most of South Africa’s working population travels on a daily basis. There were five adults and two children in the car, with Ms van Eeden occupying the centre of the back seat.

[20] Ms van Eeden said that the Renault Scenic was travelling in the same lane as the motorbike and separated from it by two or perhaps three other vehicles. Her evidence left the impression that all these vehicles had been stationary at a traffic light further north in Malibongwe Drive and had set off together moving fairly sedately towards River Drive. When the traffic lights at River Drive came into view she said that they were red for southbound traffic such as themselves, but when they were approximately 200 metres away they turned green in their favour.

According to her this caused all the cars to accelerate and her impression was that the motorbike accelerated somewhat faster than the cars. In regard to the collision between the motorbike and the truck she had little to say. She became aware of the truck turning in front of the motorbike immediately prior to the collision, but was not conscious of what it was doing prior to that. After the collision the motorbike burst into flame and the vehicle she was in and others in the southbound traffic stopped on the southern side of the intersection and went to render assistance. It is unclear whether they first stopped on the northern side of the intersection and then crossed over when it was safe for them to do so, or whether they drove past the scene of the collision without stopping until they had crossed River Drive.

[21] The one thing about which Ms van Eeden was adamant was that the lights had changed to green as they travelled down towards them and remained green in favour of southbound traffic up until the time of the collision. It is correct that in this respect her evidence accords with that of Mr Biddlecombe, but I cannot accept that it provides a reason for disregarding the trial judge's favourable credibility findings in regard to Mr Motaung or that it displaces any of the conclusions on negligence set out above, which I stress are not dependent upon the state of the traffic lights.

[22] It was submitted that for Ms van Eeden to be wrong there must have been a conspiracy between her and Mr Biddlecombe to mislead the court in a dishonest fashion. That is incorrect. They could both be wrong as a result of honest error on their part. Mr Biddlecombe only had a partial memory of events, which is quite understandable given the trauma he suffered in consequence of his injuries. Turning to Ms van Eeden I

have sufficiently described the vehicle in which she was travelling and its situation on the road in relation to the motorbike, with other vehicles in between obscuring her view, for it to be apparent that she did not have an ideal vantage point to observe matters. Nor was there any reason for her to do so as a rear seat passenger in a small and somewhat crowded motor vehicle. The fact that she was unable to testify about the truck's movements prior to the accident suggests that her attention cannot have been entirely on the road. The court must bear in mind that in a statement she provided to the Metro Police Department some six weeks after the collision it is clearly stated that the driver of the truck drove into the intersection in front of the motorbike without stopping. Both the police report and Mr Grobbelaar's expert opinion were furnished on this basis, but her evidence at the trial did not support this. The trial court had to be alert to the risk that, faced with the undeniable fact that the collision occurred because the truck had turned in front of the motorbike, a person travelling behind the motorbike and having been vaguely aware that the traffic lights had been green, might not have noticed that they had changed shortly before the collision. What clearly focussed her attention was the immediate prospect, when she saw the truck moving, that there might be a collision. Some significance should also be attached to the fact that neither the driver nor the front seat passenger in the Renault Scenic were called as witnesses, when they would presumably have been in a better position to have seen what happened. Weighing all this up it seems to me that the prospect of honest error cannot be excluded. The argument based on a conspiracy is unsound.

[23] That leaves a conflict between the witnesses on either side as to the state of the traffic lights. The trial court was unable to resolve that conflict and in my view there are no probabilities either way that would

enable us to disturb that conclusion. At the end of the day, however, this would only affect the extent of the apportionment and not the question of negligence. Whatever the state of the traffic lights Mr Motaung should not have sought to cross the intersection when he did. It was not safe to do so in the light of the oncoming traffic. Equally, given the uninterrupted visibility and the obvious presence of the truck intending to turn across into River Drive, Mr Biddlecombe should have been alert to the risk that the truck might try to cross when it was not safe to do so and been careful to ensure that if it did so he would be able to bring his motorbike safely to a halt. As with many collisions there was fault on both sides. The trial judge apportioned it equally and it was not submitted that there were grounds for interfering with the exercise of his discretion if his factual findings were left undisturbed.

[24] In the result the appeal is dismissed with costs.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	J J Wessels SC Instructed by: Munro, Flowers & Vermaak, Johannesburg Claude Reid Inc, Bloemfontein
For respondent:	M Patel Instructed by: De Buys Human, Johannesburg Symington & De Kok, Bloemfontein.