

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 3645/2016
Date heard: 14 August 2018
Date delivered: 21 August 2018

In the matter between

PHILLIPUS ARNOLDUS DU PLESSIS

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

GOOSEN, J.

- [1] The plaintiff seeks leave to appeal against the judgment of this court dismissing his claim with costs. It was submitted that the court erred in failing to make a credibility finding as regards the plaintiff's evidence as opposed to that of the insured driver. It was argued that insufficient weight was attached to the fact that the evidence of the insured driver was in conflict with a version of events contained in a statement made by the insured driver to the defendant. It was further submitted that the court had erred in its assessment of the probabilities. In this regard it was argued that the probabilities established that the collision had occurred at a point approximately 45 metres from the intersection of the two roads. Once this is accepted it would follow that the 'rear-end' collision was occasioned by the negligence (whether in part or in whole) of the insured driver. It was accordingly submitted that there exists a reasonable possibility that another court would find for the plaintiff.

- [2] The essential basis for the finding made in the main judgment rests upon an assessment of the inherent probabilities and improbabilities of the two versions. It is not necessary in this judgment to canvass that assessment afresh. It suffices to state that the plaintiff's version was found to be improbable in regard to key elements, namely that he had entered Buffelsfontein Road; driven a short distance along it; left the road surface and brought his motorcycle to a halt and had placed his right foot on the ground before the collision occurred. That version offers no explanation for how the collision could have occurred. The insured drivers' version was that he had seen the plaintiff's motorcycle approach the intersection. This was never challenged. Although the insured driver's evidence regarding the fact that the motorcycle did not stop before entering Buffelsfontein Road and its path of travel was disputed, he had consistently maintained that the point of impact was on the tar surface and not off the surface on the gravel as the plaintiff had testified. In seeking to overcome this critical difference in the versions, and its impact on the outcome of the matter, plaintiff's counsel argued (both at trial and in seeking leave to appeal) that the collision occurred when the insured driver's vehicle skidded in the wet conditions, resulting in a collision with the rear of the motorcycle "which was in the vicinity of the edge of the road surface".
- [3] The test for determining whether leave to appeal ought to be granted is well established. Recent authorities suggest that the threshold has been raised by the introduction of s 17 (1) of the Superior Courts Act, Act 10 of 2013. It is now required that there be a measure of certainty that another court will differ with the court's judgment sought to be appealed against (see *The Mont Chevaux Trust (IT2012/28) v Tina Goosen and 18 Others* (LCC 14 R / 2014) (cited in Erasmus, *Superior Court Practice*, Vol 1 at A2-55, and in *Acting National Director of Public Prosecutions and Others v Democratic Alliance, In re: Democratic Alliance v Acting National Director of Public Prosecutions and*

Others 19577/09 [2016] ZAGHPHC 489 (24 June 2016) at par 25); see also *Ntshokovu v S* (157/15) [2016] ZASCA 112 (7 September 2016)).

[4] The assessment of inherent probabilities and improbabilities in evidence are matters in respect of which there is reasonable scope for difference of opinion. In this matter, where neither witness impressed and where there existed no definitive basis upon which to impeach the credibility of either witness, save on the ground that one was more probable than the other, the scope for such reasonable difference is greater. I found that the plaintiff had not discharged the burden of proving that the insured driver was negligent, on the grounds pleaded, in any respect. Although I need not be persuaded that my assessment of the probabilities upon which the finding was based, is wrong, it is sufficient if there exists a reasonable possibility that another court would find that the insured driver was in some degree negligent. I am satisfied that such reasonable possibility exists. Accordingly leave to appeal must be granted. It was common cause that in the event that leave is granted it should be to the Full Court of this Division.

[5] In the result I make the following order:

1. The plaintiff is granted leave to appeal to the Full Court of this Division.
2. The costs of the application shall be costs in the appeal.


G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances: For the Plaintiff
Adv. D. Niekerk
Instructed by Mc Williams & Elliot Inc.

For the Defendant
Adv. N. Paterson
Instructed by Ketse Nonkwelo Inc.