

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Appeal No.: A59/2022

Reportable: YES

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the appeal between: -

GANYANI PHANUEL CHAUKE

Appellant

and

ROAD ACCIDENT FUND

Respondent

CORAM: C. J. MUSI, JP *et* N.G. GUSHA, AJ *et* A. P. BERRY, AJ

HEARD ON: 20 MARCH 2023

JUDGMENT BY: C. J. MUSI, JP

DELIVERED ON: 31 MAY 2023

- [1] This appeal, which is with the leave of the court *a quo*, is against a judgment of a single judge of this Division. The appellant alleged that he sustained bodily injuries caused by or arising from the negligent driving of a vehicle by an unknown third party. He instituted a claim for damages against the Road Accident Fund (RAF). The merits were separated from the quantum and the claim was dismissed.
- [2] The facts as recounted by the appellant, the only witness, are as follows. On 13 January 2018, he drove from Bloemfontein to Aliwal North, a distance of

approximately 200km, to visit a friend. During the early hours of the next day (14 January 2018), at approximately 04h00 or 05h00, he drove back to Bloemfontein on the N6 motorway. This road has a single carriage way with one lane per direction of traffic. He was travelling alone in his BMW 320d. He drove at a speed of approximately 80 to 90 km/h.

[3] In the vicinity of Tierpoort, approximately 30 km from Bloemfontein, whilst it was still dark, a heavy vehicle (truck) approached from the opposite direction. When he was approximately 30 meters from the truck, a vehicle emerged from behind the truck and veered into the lane on which he was driving. In order to avoid a head-on collision, he swerved to the left and his vehicle ventured unto the gravel verge of the road. In an attempt to gain control of his vehicle he swerved to the right and in the process lost control of the vehicle, it rolled and came to a standstill on the other side (right-hand side) of the road. Both the truck and the other vehicle did not stop after the incident.

[4] After his vehicle came to a standstill he heard voices but could not recall what the people had said. He could also not remember whether there were any police officers on the scene. He was taken by ambulance to Pelonomi hospital. He could not provide any information regarding the registration details, make or colour of the other vehicle.

[5] After the arguments, whilst drafting its judgment the court *a quo* requested the parties to indicate whether it can take judicial notice of certain aspects. The parties reverted with the following agreement:

- '1. On 14 January 2018 the time of sunrise in Bloemfontein was 05h29;
2. A period of approximately half an hour prior to sunrise, i.e. from 05h03 to 05h29 could not be described as daylight, but as civil twilight.
3. Civil twilight is defined and described as follows:

“the period after sunset or before sunrise ending or beginning when the sun is about 6 degrees below the horizon and during which on clear days there is enough light for ordinary outdoor occupations.

Civil twilight is the brightest form of twilight. There is enough natural sunlight during this period that artificial light may not be required to carry out outdoor activities.”¹

- [6] In his pleadings, the plaintiff alleged that the incident occurred at 06h10. He, however, testified that he does not know what time the incident occurred. The accident report also indicated that it occurred at 06h10.
- [7] The court *a quo* reasoned that the time of the incident is extremely important because of the appellant’s testimony that it was still dark when the incident occurred and that all three vehicle’s lights were on. Additionally, it found that sunrise was at 05h29 as per the agreement between the parties. It concluded that the appellant’s version was improbable because even if he drove at 90 km/h he would have travelled 180 km in two hours and at a speed of 80 km/h he would have travelled 160 km. The distance from Aliwal North to the scene is 170 km. The appellant stopped at a filling station and at a roadworks ‘stop-and-go’ control point. Therefore, regardless of whether his time of departure was 04h00 or 05h00 he would have reached the incident scene after sunrise and not while it was still dark.
- [8] Having found that the appellant’s version with regard to the time of the incident is unreliable, the court *a quo* accepted the time on the accident report. It also accepted the incident happened on a clear day in daylight. It said ‘it does lie in the mouth of the plaintiff (appellant) to say that the AR (accident report) should be ignored completely insofar as it was not properly proven’.

¹ According to the court *a quo* these definitions were sourced from the internet at, <https://www.merriam-webster.com/dictionary/civil%20twilight> and <http://www.timeanddate.com/astronomy/different-types-twilight.html>

[9] The court *a quo* also found that his version that he was approximately 30 metres from the truck when he saw it for the first time is improbable because there would not have been enough reaction time for him to avoid a collision.

[10] For these and other reasons, that will be discussed below, the court *a quo* rejected his version, notwithstanding the absence of any contradictory evidence.

[11] It was common cause that the appellant bore the onus to prove his claim on a balance of probabilities.

[12] In **Sardi v Standard and General Insurance**² Holmes JA stated the following:

‘At the end of the case, the Court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the *onus* of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence. In the final analysis, the Court does not adopt a piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a *prima facie* case; and then (b) deciding whether this has been rebutted by the defendant’s explanation’³

[13] The preponderance of probabilities standard requires that the court be satisfied that an incident or event had happened if the court considers that, on all the evidence before it, the occurrence of the event is more likely than not. Thus for the appellant to succeed the court must be satisfied that it is more likely than not that the incident happened as recounted by him.

[14] It has been said that:

² 1977 (3) SA 776 (A).

³ *Ibid* at 780G-H.

‘On the other hand, the disconcerting truth is that, as judges, we can never actually know what happened: we were not there when whatever happened did happen. We can only do our best on the balance of probabilities, after which what we decide is taken to be the fact...’⁴

[15] A court of appeal is generally reluctant to disturb factual findings which depend on credibility. It will, however, do so if the factual findings are plainly wrong or where the reasons given for them is seriously flawed. It must be underscored that credibility findings should not be judged in isolation, but must be considered in the light of the proven facts and probabilities of the matter.⁵ I now turn to consider the evidence.

[16] The appellant initially testified that he departed from his friend’s house at ‘plus or minus 4 in the morning’. He later testified that he woke up early in the morning at ‘plus or minus 5’. He insisted that it was still dark when he departed from his friend’s house and during the incident. During questioning by the court he conceded that he consulted a Dr Vlok, an Orthopaedic surgeon, but he could not explain why the doctor indicated in his report that was attached to the particulars of claim that the incident occurred at 03h00.

[17] Assuming that the content of the accident report was admissible, it stated that the incident occurred at 06h10; that the report about the incident was received at 06h10 and that the report was completed and signed at 06h10. Was the accident report properly admitted in evidence? The parties agreed as follows:

‘The parties record that the status of documents discovered, to the extent that they are what they purport to be, should be used in evidence.’

[18] The respondent’s legal representative, at some stage, based her cross-examination on the accident report. The appellant’s counsel objected and pointed out that the contents of the accident report is, at that stage,

⁴ Re L and B (Children) [2013] UKSC 8 para 43.

⁵ Santam BPK v Biddulph 2004 (5) SA 586 (SCA) para 5; R v Dhlumayo and Another 1948 (2) SA 677 (A) at 706.

inadmissible evidence until it is proven or provisionally admitted. He requested his opponent to give an indication whether she was going to prove the contents of the accident report. There was no response and the status of accident report was not determined.

[19] Documents can be either real or documentary evidence. The purpose for which they are presented determine their nature and the requirements for their admissibility. The parties agreed that the discovered documents may be used as real evidence and not documentary evidence. They merely agreed that the accident report, being a relevant document, is what it purports to be and there was no agreement with regard to the admissibility of the contents of the documents.

[20] If the respondent wanted to prove the contents of the accident report, it had to prove its relevance, originality and authenticity.⁶ That was not done. The lack of compliance with the admissibility requirements for documentary evidence meant that the contents of the document was hearsay evidence.

[22] In **Rautini v PRASA**⁷ the parties agreed that the discovered documents are what they purport to be, but the correctness of the contents was not admitted. The Court found that the contents of the discovered documents constituted inadmissible hearsay evidence unless it could be proved that they are admissible under one or other common law exception to the hearsay rule or in terms of s 3(1) of the Law of Evidence Amendment Act.⁸ No attempt was made, in this matter, to have the accident report admitted under any statutory or common law exception to the hearsay rule.

[23] I will accept, for present purposes, that the accident report is a public document because it was generated by a public officer during a public inquiry in the exercise of his duties. One of the common law exceptions to the rule against admitting hearsay evidence is that a public document may, by its mere

⁶ Bellengere et al: The Law of Evidence, Oxford University Press, 2019 p 99.

⁷ Rautini v Passenger Rail Agency of South Africa (Case no. 853/2020) [2021] ZASCA 158 (8 November 2021).

⁸ Act 45 of 1988.

production, be admitted in evidence.⁹ There was no application, by the respondent, to have the document admitted under the common law exception to the hearsay rule. In fact, the respondent abandoned any reliance on the document.

[23] Section 34 of the Civil Proceedings Evidence Act¹⁰ (Act) provides:

‘(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided-

(a) the person who made the statement either-

(i) had personal knowledge of the matters dealt with in the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and

(b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.

⁹ Hassim v Naik 1952 (3) SA 331 (A) at 338B.

¹⁰ Act 25 of 1965.

(2) The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in subsection (1) as evidence in those proceedings-

(a) notwithstanding that the person who made the statement is available but is not called as a witness;

(c) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof proved to be a true copy.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) A statement in a document shall not for the purposes of this section be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the provisions of this section, any reasonable inference may be drawn from the form or contents of the document in which the statement is contained or from any other circumstances, and a certificate of a registered medical practitioner may be acted upon in deciding whether or not a person is fit to attend as a witness.'

- [24] The respondent did not adduce any evidence to show that the accident report is admissible in terms of s 34. It did not show that it was not reasonably practicable to secure the witness's attendance or that all reasonable efforts to find him have been made without success. In fact, all that the defendant said was that the witness was no longer attached to the Reddersburg Police Station because 'he was shipped somewhere' and that it could not get hold of him. The Court was not apprised of any efforts that were made to get hold of him. No enquiry was held to determine whether there would be undue delay or expense caused if the document was not admitted.
- [25] It surely is not enough for a litigant to state that a witness, a police officer at that, had been shipped somewhere. There was no indication as to whether he is still a police officer. The defendant did not indicate what 'shipped somewhere' meant; was he transferred to another station or was he shipped out of the country. There must be an indication that reasonable efforts were made to get hold of the witness and, obviously, what those efforts were.
- [26] In my view there was no basis to allow the accident report as documentary evidence because none of the requirements for its possible admission were proved or present in this matter. The appellant therefore correctly objected against being cross-examined on its contents. The court *a quo* should not have relied on the contents of the accident report as part of the evidential material to determine this dispute. I now turn to consider the admission of the evidence relating to sunrise. On what basis did the court *a quo* take judicial notice of the rising of the sun?
- [27] It is trite that a court may take judicial notice of facts that are so notorious as not to be the subject of reasonable dispute or controversy or which are capable of accurate demonstration by resort to readily acceptable sources of indisputable accuracy. A party who requests the Court to take judicial notice of

a fact bears the onus of convincing the Court of the notoriety of the fact or that it is capable of accurate demonstration.¹¹

- [28] The court *a quo* did not investigate or indicate the reliability of the source the parties used to determine the time of sunrise in Bloemfontein on 14 January 2014. In **Sibuyi** it was said:

‘An almanac or diary or calendar may be considered and has been considered as indisputably accurate in regard to days and months, which is really the reason for their existence, but certainly cannot be regarded as indisputably accurate as regards the phases of the moon or the setting and rising of the sun or the state of the tides, let alone any other interesting information that one finds in these publications.’

- [29] Proof of the times of sunrise and sunset has been made easy by the legislature. Section 26 of the Act states that:

‘The Minister may from time to time by notice in the Gazette approve of tables prepared at any official observatory in the Republic of the times of sunrise and sunset on particular places in the Republic or any portion thereof and appearing in any publication specified in the notice, and thereupon, until the notice is withdrawn, such tables shall on their mere production in any civil proceedings by any party thereto be admissible of such times...’

- [30] Neither party in this matter made use of s 26. The statutory regulation of the times of sunset and sunrise is, in my view, indicative of the fact that a court may not of its own accord take judicial notice of such times. It must be proved. The parties may not grant a court permission to take judicial notice of a fact unless the fact fulfils the requirements set out above. It is proper for a court to inform the parties that it intends to take judicial notice of a fact and allow them

¹¹ Master Currency (Pty) Limited v The Commissioner for the South African Revenue Services (155/2012) [2013] ZASCA 17 (20 March 2013) para 8; S v Sibuyi and Others 1988 (4) SA 879 (T) AT 881H – I.

to address it on the aspect. However, asking them whether the court may take judicial notice of a fact such as civil twilight or the time of sunrise – which is not a notorious fact or capable of indisputably accurate demonstration – is impermissible.

- [31] The calculations with regards to the time the appellant left Aliwal North and the time he would have reached the incident scene is based on inaccurate information by the appellant, an inadmissible accident report and impermissible judicial notice. Wrong premises invariably lead to wrong conclusions.
- [32] The reasoning of the court *a quo* is anchored in the time of the incident and allied thereto the time the sun rose on that day. The court *a quo* utilised two equally unreliable sources to determine the time of the incident. These were the appellant and the accident report.
- [33] The court *a quo* correctly criticised the appellant's version that he was approximately 30 metres from the heavy vehicle when he saw it for the first time. His version is indeed improbable, regardless of whether it was dark or not, because the lights of the heavy vehicle and the other vehicle were on. His counsel correctly conceded this improbability and argued that a distance of approximately 100 metres is more realistic. The court *a quo* found that on the appellant's version he would not have had enough reaction time to avoid a head-on collision. It must, however, be emphasised that witnesses' estimates are mostly an unreliable factor from which to make definitive conclusions.
- [34] In **Van der Westhuizen and Another v S.A. Liberal Insurance Co. Ltd**¹² it was said that:

‘In my opinion, however, the strictly mathematical approach, though undoubtedly very useful as a check, can but rarely be applied as an absolute test in collision cases, since any mathematical calculation so

¹² Van der Westhuizen and Another v S.A. Liberal Insurance Co. Ltd 1949 (3) SA 160 (C).

vitality depends on exact positions and speeds; whereas in truth these latter are merely estimates almost invariably made under circumstances wholly unfavourable to accuracy.¹³

[35] The finding related to reaction time in order to avoid the accident is based on an unreliable estimate by the appellant. There was insufficient evidence for the court *a quo* to conclude that a head-on collision would have occurred, regardless of the appellant's testimony that he veered to the left and successfully avoided a collision with any of the two other vehicles.

[36] The court *a quo* also found it improbable that the drivers of the heavy vehicle and the other vehicle would drive away after witnessing the appellant's predicament. I do not think that the conduct of the drivers is improbable. It is probable that the drivers acted in the manner they did in order to avoid involvement or even being held liable.

[37] The court *a quo* further found that the appellant:

- (a) Adapted his testimony to fit the timeframe indicated in the accident report;
- (b) Had an ulterior motive when he testified that he did not see the police on the scene; and
- (c) Lied or misled the court.

[38] I have already indicated that the accident report was inadmissible and that it, in any event, contained improbable or inaccurate information. The appellant mentioned, as a fact, that he did not see any police officer on the scene. It is improbable that he would lie about this fact. He had nothing to benefit from the lie. His testimony is that he did not see a police officer and not that there was no police officer at the scene. There is no evidence as to whether the police

¹³ Ibid page 168.

officer was in uniform. The court *a quo*'s concern about where the police officer obtained the information contained in the accident report, is of no moment. It is not farfetched that he could have obtained the information from the paramedics or Pelonomi Hospital. Assuming, for a moment, that the accident report was admissible, the inaccuracies contained therein bolsters the proposition that the information was obtained much later.

- [39] An alternative hypothesis as to how the incident could have happened or indeed happened was not put to him. The fact that he would not have had enough time to avoid the incident was also not put to him. Furthermore, it was not put to him that he adjusted his testimony to fit in with the time on the accident report. The court *a quo* should have been slow to reject his evidence based on these aspects that were never put to him because:

‘...As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct.’¹⁴

- [40] I agree with the court *a quo* that the appellant’s version contains apparent improbabilities. He was certainly not a good witness. That said, can it be said that the improbabilities or possible lies are of such a nature that it is more likely that the incident occurred in a manner other than the version proffered by the appellant?

- [41] Most of the appellant’s testimony was beside the point. The court *a quo* unfortunately made much of the testimony that was off the subject and did not

¹⁴ President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC) para 61.

properly evaluate the impact of the improbabilities or lies on his testimony. It is well documented that witnesses regularly lie. On the one hand a witness may lie in an unwise attempt to fortify an already good case. On the other the witness may lie because the entire case is built on a lie.¹⁵ The implication of a total rejection of his version as improbable is that his entire case is based on a lie. The court *a quo* did not differentiate between the impact of the improbabilities in respect of particular points of his testimony as opposed to whether his evidence was a complete lie. The failure to make this important distinction is unfortunate and impacts negatively on the court *a quo*'s assessment of the appellant's evidence.

[42] A consideration of the entire basket of evidence does not indicate that the appellant's case as to how the incident occurred is a complete lie. There is no evidence to gainsay his testimony. There is no proof of deliberate lies. In my judgment, regardless of the shortcomings in his version, it cannot be said that the incident occurred in a manner other than the one recounted by the appellant.

[43] On his version the driver of the other vehicle was negligent by overtaking the truck in circumstances where there was an oncoming vehicle. The appellant did all that he could to avoid a head-on collision. The other driver was the sole cause of the incident.

[44] In my view the appeal ought to succeed.

[45] I make the following order:

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

“i. The defendant is liable for 100% of the plaintiff's damages.

¹⁵ S v Oosthuizen 1982 (3) SA 571 (T) at 576G-H.

- ii. The defendant is ordered to pay the plaintiff's costs.
- iii. The plaintiff is directed to set the matter down on the pre-trial roll within 30 days of this order."

C.J. MUSI, JP

I concur.

N.G. GUSHA, AJ

I concur.

A.P. BERRY, AJ

Appearances:

For the Appellant:

Adv. H. E. de la Rey
Instructed by State Attorney
Bloemfontein

For the Respondent:

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Instructed by Honey Attorneys
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