THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 138/2020

In the matter between:

PHILLIPUS ARNOLD VENTER DU PLESSIS **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *Venter Du Plessis v RAF* (138/2020) [2021] ZASCA 64 (26 May 2021)

Coram: NAVSA, DAMBUZA and MOCUMIE JJA and POTTERILL and EKSTEEN AJJA

Heard: 4 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The time and date for hand down are deemed to be at 09h45 on 26 May 2021**.**

Summary: Evidence–Onus of proof- whether the appellant failed to establish on a balance of probabilities that the insured driver negligently caused the collision – whether the trial court erred in not accepting the appellant's version concerning the

point of impact – whether credibility findings ought to have been made against the driver of the insured vehicle.

ORDER

On appeal from: Eastern Cape Division of the High Court, (Bloem J and Nhlangulela DJP, concurring & Jaji J dissenting, sitting as a full court.)

1 The appeal is upheld with costs.

2 The order of the full court is set aside and substituted with the following:

'(a) The appeal is upheld with costs;

(b) The order of the court below is set aside and substituted as follows:

"1. The plaintiff's claim succeeds;

1.1 The defendant is ordered to pay the plaintiff the sum of R 1 778 550;

1.2 The defendant is ordered to pay interest on the aforesaid amount at the prescribed legal rate of interest from fourteen days after the date of this order to date of payment.

1.3 The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17(4) (a) of the Road Accident Fund Act, No. 56 of 1996 as amended.

1.4 The defendant is ordered to pay the plaintiff's taxed party and party costs, including the costs of the photographs and the reasonable and necessary qualifying fees and expenses of the following expert witnesses if any:

1.4.1 Dr Olivier;

1.4.2 Ansie Van Zyl;

1.4.3 Dr Peter Whitehead; and

1.4.4 Actuary Willem Boshoff.

1.5 The defendant is ordered to pay interest on the plaintiff's taxed party and party costs at the prescribed legal rate of interest from the date of allocatur to the date of payment."'

JUDGMENT

Mocumie JA (Navsa, Dambuza JJA and Eksteen and Potterill AJJA concurring)

[1] At approximately 19h00 on 27 September 2014, a collision occurred close to the intersection between Buffelsfontein and Glendore road, Port Elizabeth, between a 650cc Suzuki motorcycle driven by the appellant, Mr Phillipus Arnoldus Venter Du Plessis, and a motor vehicle with registration number [….], driven by the insured driver, Mr Shad Sampson. The appellant's motor cycle was struck by the insured driver's vehicle, as a result of which he suffered severe bodily injuries, more particularly; a fracture of the left tibia and a fracture of the left lateral malleolus. In his claim against the Road Accident Fund (the RAF) the parties agreed on the quantum of his damages at R1 778 550. In addition, the RAF agreed to furnish him with an undertaking in terms of s 17 (4) (*a*) of the Road Accident Fund Act, in the event that he succeeded on the merits, subject to any applicable apportionment of liability. Accordingly, the only issue that the trial court had to decide was whether the collision was caused by negligence on the part of the insured driver, and if so whether there was contributory negligence on the part of the appellant. In the trial court, Goosen J, concluded that 'the collision was caused by the appellant's negligence inasmuch as he drove his motorcycle into the intersection; into the path of an oncoming vehicle when it was unsafe and inopportune to do so'. The appellant appealed, with the leave of the trial court, unsuccessfully to the full court (Bloem, J and Nhlangulela, DJP concurring, Jaji, J dissenting). This appeal is with special leave of this Court.

[2] The collision occurred at the intersection of Buffelsfontein and Glendore roads. It is a T-junction with Glendore road joining from the southern side of Buffelsfontein road. Buffelsfontein road is a straight main road with a single carriageway that runs in an east-west direction. Where the collision occurred, the two lanes in Buffelsfontein road are separated by a solid barrier line and the road runs through a built up area. At the intersection there is a stop sign for traffic from

Glendore road, turning either left or right into Buffelsfontein road. On the north of Buffelsfontein road, after one has turned right from Glendore road, there is large lawn separated from Buffelsfontein by a gravel filled verge. The lawn extends northwards to a road that runs parallel to Buffelsfontein road. Immediately north of that road is the housing complex where the appellant lived. Between the gravel verge and the grassed area there are short wooden poles preventing access onto the lawn by cars. A short distance from the intersection after one has turned right into Buffelsfontein road is a lamppost. Before one gets to the lamppost there is a no parking sign. The appellant usually steers his bike through the wooden posts to get to the housing complex, utilising a footpath.

[3] At the time of the collision it was already dark and visibility was not good, but, the street lights were on. As it had been raining, the road surface was wet. So, too, was the gravel part. The footpath was covered with water.

[4] As alluded to already, the appellant was returning home after meeting some friends and travelling on Glendore road towards the stop street to join Buffelsfontein road. His version, briefly, was as follows. He had enjoyed lunch with his friends until around 16h00 on the other side of the city and was on his way home on his motorcycle. At the intersection of Buffelsfontein and Glendore roads he stopped at the stop street, looked around, saw no oncoming motor vehicle and turned right into Buffelsfontein road. About 45 metres from the intersection, he pulled off to his left side on Buffelsfontein road and stopped on the gravel verge; with his foot on the ground. His intention was to take a short-cut across the gravel and grass between Buffelsfontein road and his home. But that day it had been raining and there was water on the footpath that he normally uses to reach his home a few meters away. Just as he put his foot down on the gravel to attempt to gently manoeuvre away from the puddles and through the wooden obstacles he was struck at the back of the motorcycle by the insured vehicle.

[5] After the collision, his motorcycle was lying in the vicinity of the wooden barricades alongside the road, to the north. In the trial court he used a sketch plan to depict the point of impact, on the gravel verge, north of Buffelsfontein road. He also

testified with reference to photographs of the scene. As a result of the collision, he lost consciousness and was taken to hospital where he recovered.

[6] The insured driver's version of the collision was different. The essential parts of his testimony are set out hereafter. He stated that he was driving along Buffelsfontein road and approached the intersection in an easterly direction. As he approached the intersection, he saw the lights of the motorcycle which 'just went over the stop street' and appeared in front of him. The motorcycle travelled across Buffelsfontein road into his path. He applied brakes, but it was too late and he collided with the left side of his motor vehicle against 'the back of the motorcycle, on the left'. He depicted the point of impact by making an asterisk on the photo placed before the court by the appellant to be on the tarred surface of Buffelsfontein road. The two drivers were the only witnesses who testified.

[7] The trial judge was conscious that there were mutually destructive versions. It is to be noted that the trial court made no credibility findings, save, as appears from the passage of the judgment referred to immediately hereafter, there is a suggestion, without substantiation, that the appellant's, and perhaps neither witness' evidence was impeached. He held as follows: 'Neither the plaintiff nor the insured driver impressed as outstanding witnesses. Their evidence is each subject to some criticism, inasmuch as it was vague in certain respects. The fact that neither witness stood out as a particularly impressive witness does not mean that either witness's version is to be rejected as not credible. Where a court is faced with a conflict in evidence by witnesses [whose] credibility cannot be impeached, it will have regard to the inherent probabilities and improbabilities in the versions in determining which version to accept'.

[8] The trial court went on to consider the probabilities. Its finding in this regard is set out in para 21 of the judgment, which is set out hereafter as follows:

'In my view, the plaintiff's description of the point of impact and, in particular, that the motorcycle was stationary and that his right foot was on the gravel at the point of impact is highly improbable. It would suggest that he had already driven along Buffelsfontein road for the distance of approximately 45m and that he had already driven his motorcycle off the tarmac surface onto the gravel and brought it to a halt, prior to the insured driver braking

heavily to avoid the collision. It would suggest that the braking had caused the vehicle to veer off the tar surface so that it could impact the motorcycle. Far more probable, in my view is the version presented by the insured driver. His evidence was that the motorcycle had approached the intersection at Glendore Road slowly but that it did not stop. Instead, it entered the intersection directly in front of him into his path of travel at an angle across Buffelsfontein. He applied brakes heavily but, due to the wet conditions, the vehicle skidded striking the motorcycle.'

[9] The trial judge disagreed with the contention on behalf of the appellant that 'the point of impact as described by the [appellant] accords with the objective evidence, namely that the motorcycle was struck from the rear and that it had fallen onto its right side, which was damaged and that the motor cycle had come to rest on the gravel verge'. Goosen J, in the trial court, held that the damage to the motor vehicle and the position it came to rest after the collision and the damage to the insured driver's motor vehicle do not, with any force of probability point to the mechanism of collision as described by the [appellant]'. He held furthermore, that 'for the collision to have occurred in that manner with the point of impact being on the gravel verge, it would necessarily mean that the insured driver had either driven off the tar surface or that the vehicle had skidded off the tar surface before impacting with the [motorcycle]'. On that basis, he concluded that 'the plaintiff's description of the point of impact, and in particular that the [motorcycle] was stationary and his right foot was on the gravel at the point of impact is highly improbable. . .'

[10] The trial court concluded that 'the collision was caused by the appellant's negligence inasmuch as he drove his motorcycle into the intersection; into the path of an oncoming vehicle when it was unsafe and inopportune to do so'. On appeal, the majority in the full court agreed with the trial judge.

[11] Before this Court, the main issue for determination is whether the trial court erred in dealing with the two irreconcilable versions in the manner that it did. A court of appeal is generally reluctant to disturb the factual findings of a trial court but will do so where such findings are based on false premises or where relevant facts have

been ignored or where the conclusions are plainly wrong.[1] Overemphasis of the advantages which a trial court enjoys is to be avoided lest an appellant's right of appeal 'becomes illusory'.[2] 'It is equally true that the findings of credibility cannot be judged in isolation but require to be considered in the light of the proven facts and the probabilities of the matter under consideration.'[3]

[12] Where, as in the present case, there are conflicting versions, this Court stated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*[4]

'[5] 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 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 extra curial 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.

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[1] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 was recently cited with approval in *Beukes v Smith* [2019] ZASCZ 48 para 22, and *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC; 2019 (9) BCLR 1049 (CC); 2019 (5) SA 598 (CC) (3 July 2019) para 135 and *ST v CT* (1224/16) [2018] ZASCA 73; [2013] 3 All SA 408 (SCA); 2018 (5) SA 479 (SCA) (30 May 2018) para 12.

[2] *Protea Assurance Co. Ltd. v Casey* 1970 (2) SA 643 (7) 648 D-E and *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) 623H – 624A.

[3] *Santam Bpk v Biddulph* [2004] ZASCA 11; [2004] 2 All SA 23 (SCA) (23 March 2004) para 5.

[4] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others* [2002] ZASCA 98 (6 September 2002) at 141 to 150E.

The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail. . .'

[13] As is clear from the judgment of the trial court, despite the conflicting evidence on the point of impact, the trial judge preferred the version of the insured driver but did not employ the *Stellenbosch Farmers' Winery* technique referred to above. To that extent, the trial court erred. This Court is therefore duty bound to consider the evidence afresh.[5]

[14] Applying the *Stellenbosch Farmers' Winery* principles, first, the question of credibility. In his evidence-in-chief the insured driver stated that he saw the appellant stop at the crossroad, who then suddenly went across the road in front of him causing him to apply brakes late, but he could not avoid the collision, which occurred on the tarmac with the left hand-side of his vehicle striking the motorcycle at the back. This is contrary to what was put to the appellant. It was put by counsel for the respondent to the appellant that he had entered the intersection at an angle, without stopping at the stop sign. This was also contrary to what the insured driver had said in his statement to the respondent when he reported the collision. The following is the relevant part of the statement:

'I noticed the [motorcyclist] *stop* at the intersection waiting for oncoming vehicles.
When I was right opposite the intersection, the motorcyclist pulled off and collided with my vehicle left front side. . . I did not know where the [appellant] was when [I applied] brakes.
I did not see the [appellant] but saw the brake lights, the back of the [motorcycle] . . . I was not sure where the collision took place but was sure that his vehicle did not swerve from the tarred road onto the gravel. . .'
(Emphasis added).

[15] These contradictions are material and clearly impact negatively on the insured driver's credibility and this ought to have redounded in favour of the appellant, as held by Jaji J in the dissenting judgment.

[16] Yet another contradiction was elicited under cross examination.

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[5] See fn 1 above.

'Your evidence was that he, [the appellant], was in the middle of the road… If you don't know where he was you can say so.
I don't know where he was…
In your own words when you braked it was too late.
It was too late, ja…
You saw his lights and you got a fright, is that correct
Ja. Yes…
And that braking, when you got a fright, that hard braking caused your vehicle to skid…
…Yes…'

This is not only a contradiction but it favours the appellant, in that it supports his version of events and leads one compellingly to the conclusion, on the insured driver's own version, that he was not keeping a proper lookout and explains how he suddenly came upon the motorcycle without there being any time at all to take evasive action.

[17] The motorcycle was found after the collision, approximately 50 metres away from the intersection, on the gravel. That is in line with the appellant's version of travelling some distance slowly into Buffelsfontein road, to identify the best route through the barricades. In line with this stated purpose, one would have expected a much reduced speed and that it would take a commensurate period of time travelling eastwards to get to that point providing every opportunity for an oncoming motorist to see him. It also militates against the version of the sudden driving across the intersection into the path, at an angle, of the insured driver's vehicle. Additionally, the photographs of the damage to the motorcycles presented at trial favours the appellant's version in that it appears that it was struck from behind rather than on the left-hand side. Thus, the objective evidence supports the appellant's version of events.

[18] On the probabilities, if one accepts the insured driver's version that his lights were on then it would have been suicidal for the appellant to suddenly swerve in front of him. That is not only improbable but at odds with the objective evidence set out above.

[19] Counsel for the respondent came into this case at the eleventh hour because of the administrative chaos that prevails at the respondent's offices. Nonetheless, he made a valiant attempt at persuading us to find that there was contributory negligence on the part of the appellant, on the basis that he had entered the intersection when it was unsafe to do so. For all the reasons set out above, the ineluctable conclusion is that the collision was occasioned by the sole negligence of the insured driver. The trial court and the full court holding otherwise, without considering the factors set out above, courts erred. The appeal must succeed.

[20] In conclusion, it is necessary to record the following. The original attorney for the respondent withdrew from the matter. A new firm of attorneys received instructions sometime in late April 2021. A notice of substitution of attorneys and an application for a postponement was filed on the morning of the hearing (4 May 2021). No heads of argument had been filed. Counsel for the respondent, Mr Erasmus, as could be expected of a senior officer of the court, rightly, on behalf of the respondent, apologised for the manner in which the appeal had been conducted. He indicated that he had briefed the night before (3 May 2021). Given that the record of proceedings in the trial court and before the full court comprised only 1 volume, of which approximately only approximately 70 pages constituted evidence counsel was willing to take some time before the hearing before us commenced to acquaint himself with the record and thereafter to present argument, which he did most ably, avoiding a punitive costs order and an injustice to the appellant.

[21] In the result, the following order is made.

Order

1. The appeal is upheld with costs.
2 The order of the full court is set aside and substituted with the following:

'(a) The appeal is upheld with costs;
(b) The order of the court below is set aside and substituted as follows:
"1 The plaintiff's claim succeeds;
1.5 The defendant is ordered to pay the plaintiff the sum of R 1 778 550;

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1.8 The defendant is ordered to pay the plaintiff's taxed party and party costs, including the costs of the photographs and the reasonable and necessary qualifying fees and expenses of the following expert witnesses if any:

1.4.1 Dr Olivier;

1.4.2 Ansie Van Zyl;

1.4.3 Dr Peter Whitehead; and

1.4.4 Actuary Willem Boshoff.

1.5 The defendant is ordered to pay interest on the plaintiff's taxed party and party costs at the prescribed legal rate of interest from the date of *allocatur* to the date of payment."'

_____

BC MOCUMIE

JUDGE OF APPEAL

Appearances

Counsel for Appellant	D Niekerk SC
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