



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

Reportable:	YES/NO
Official Report to be made	YES/NO
Official Report to be made	YES/NO

Case No.: A51/2016

In the matter between:-

MEC FOR POLICE, ROADS AND TRANSPORT

Appellant/Defendant

and

BORNMAN, CHRISTIAAN HIERONYMUS

Respondent/Plaintiff

CORAM: MUSI, AJP *et* DAFFUE, J *et* HEFER, AJ

HEARD ON: 19 JUNE 2017

DELIVERED ON: 17 AUGUST 2017

- [1] This is an appeal against the judgment of a single judge of this division. The appeal is with the leave of the court *a quo*.
- [2] On 4 June 2010 at approximately 17h30, Mr Bornman (respondent) was driving his motor vehicle on the R59 road between Vredefort and Viljoenskroon. A collision occurred as a result of which he sustained serious injuries and his car damaged beyond repair. The court *a quo* found that the collision occurred because he drove over a pothole, lost control over his vehicle which veered off the road, overturned and came to a stop in bushes adjacent to the road. It also found that the Member of the Executive Council for Police, Roads and Transport in the Free State Province (MEC) (appellant)

was negligent by not properly maintaining the road. It further found that the MEC is liable for 60% of the respondent's damages.

- [3] Mr. Bornman, who worked at Krugersdorp and stayed at Vredefort, testified that on 4 June 2010 he was on his way home from work on 4 June 2010 at approximately 17h30. He knows the R59 well because he travels on it to work every Sunday and back home every Friday. He was driving at approximately 100km/h when he approached potholes in the road. He normally avoided the potholes by driving in the lane of oncoming traffic. On this particular day he could not do so because there was an oncoming car that was about hundred meters away from him. He reduced speed to 80 km/h and drove over the potholes, bumped his head against an object in the car and cannot recall what happened thereafter. The potholes were spread over a distance of approximately hundred meters. They were approximately 5cm deep and 50cm wide.
- [4] Mrs. Elizabeth Margaretha Bornman testified that she is the respondent's wife. On 4 June 2010 at approximately 18h00 she was at home when she received a phone call from an unknown person. The person informed her that her husband was involved in a collision. She rushed to the scene where she saw her husband. She tried to communicate with him but he was disorientated and only said: 'the pothole, the pothole'. He also asked her about the children because he thought they were with him in the car. She informed him that the children were not with him at the time of the collision. She noticed that he had an open wound above his right eye which was bleeding profusely. She took him to Potchefstroom Medi-Clinic, where she was asked general questions relating to, *inter alia*, what he ate and what previous medical procedures he had undergone. He was treated and thereafter transferred to Netcare Krugersdorp hospital. She could not communicate properly with him because he was disorientated.
- [5] She knows the R59 well because she travels daily on that road. There were potholes on the road. Some of them were approximately 20 to 30 cm deep and approximately half a meter wide or in circumference. Approximately five

or six months after the incident, she took photographs of potholes which were already repaired on that road.

- [6] The medical records of Medi-Clinic Potchefstroom and Netcare Krugersdorp were 'discovered'¹ by the respondent. The following notes were made at Medi-Clinic Potchefstroom by the nurse:

"Pasiënt was 'n passasier, betrokke in m.v.a. kan nie onthou of hy sitplekgordel gedra het nie. (R) oogbank het 'n lasersie, kla van nekstyfheid en lae rugpyn."²

And

"19:50 Manlike pasiënt loop afdeling in alleen, hy is verwelkom en gemaklik gemaak, pasiënt bekend aan omgewing en pasientregte. Vitale data soos aangedui. Pasiënt gee bogenoemde geskiedenis, hy kom ook gedisorienteerd voor. Laserasie (R) oogbank. Dr K. v. Zyl in afdeling, sy sien pasiënt:

- Medikasie voorgeskryf
- vir X-trale.

20:10 Pasiënt na radiografie afdeling op 'n bed, toestand bevredigend. Nekstut in posisie.

21:00 Pasiënt terug vanaf radiografie, wond geheg met vicryl rapide en nylon 4/0

21:20 Pasiënt terug na x-trale vir 'n scan.

22:30 Pasiënt terug vanaf x-trale, toestand bevredigend."³

¹ The documents were not discovered in terms of Rule 35 of the Uniform Rules.

² "Patient was a passenger, involved in motor vehicle accident, cannot remember whether he wore his safety belt. (R) Eyebrow had a laceration, complaining of stiffness in the neck and pain in the lower back."

(My Translation)

³ "19:50 Male patient walks in alone, he is welcomed and made comfortable, patient familiar with environment and patient rights. Vital data as indicated. Patient gives the above-mentioned history, he also appears disoriented. Laceration (R) eyebrow. Dr. K. v. Zyl in section, she sees patient:

- Medication prescribed
- for X-rays.

20:10 Patient send to radiography department on a bed, condition satisfactory. Neck brace in position.

21:00 Patient back from radiography, wound attached with vicryl rapide and nylon 4/0.

21:20 Patient returns to x-rays for a scan.

22:30 Patient back from x-rays, condition satisfactory."

(My translation)

- [7] According to the medical records the respondent was admitted at Netcare Krugersdorp on 5 June 2010. The following note was made on the medical record:

"Pasiënt kan nie gebeurde 100% verduidelik nie, a.g.v nekbeseering + harsingskudding. Aankomende motor hom klaarblyklik verblind met hoofligte en aan die verkeerde kant v.d. pad gery. Pasiënt het van die pad gery, daar was 'n wal, die bakkie moes "deur die lug getrek het" – boom getref, rol,... Ongelukstoneel was baie bebos en moeilik sigbaar a.g.v. "donkerte" – 17:50nm."⁴

- [8] On 5 June 2010 he was seen by Dr. Fourie, a neurosurgeon, who recorded that there is no history of loss of consciousness and further that he was neurologically intact.
- [9] An accident report was also 'discovered'. In terms of the accident report, which was ostensibly made on 5 June 2010, although the date stamp reads 4 June 2010, the respondent drove over a pothole, lost control of the vehicle as a result of which the vehicle overturned.
- [10] Mr. Matthews Manyike testified that between 1 June 2010 and 3 June 2010 he repaired the potholes on the R59, between Vredefort and Viljoenskroon. There were no potholes on that road on 4 June 2010.
- [11] Mr. Cornelius Dykman testified that he is an insurance broker. The respondent's son called him in order to process the claim for the motor vehicle which the respondent drove. Mr. Bornman Jr. informed him that the collision occurred as a result of the head lights of an oncoming vehicle which blinded the driver of the insured vehicle as a result of which it veered off the road and the vehicle overturned. He confirmed that the insurance company accepted the claim and paid the respondent for his loss as a result of what his son told Dykman and by extension the insurance company.

⁴ "Patient cannot explain events 100%, due to neck injury + concussion. Oncoming vehicle apparently blinded with headlamp and on the wrong side of the road. Patient veering off the road, there was a culvert, the bakkie had to 'travel through the air' - hit the tree, roll, ... Accident scene had thick bushes and visibility was poor due to 'Darkness' - 17: 50nm."

(My translation)

- [12] Mr Motlalentoa Jacob Motshoane testified that he is the Hospital Manager of Krugersdorp Netcare Hospital. He confirmed that although he is not the author of the notes referred to above, they were indeed taken from the respondent's hospital file.
- [13] It is trite that a court of appeal should defer to the factual findings of the trial court. As a result of this, an appellate court is always slow or reluctant to upset the factual findings of the trial court. Where there has been no misdirection on fact it is presumed that the factual findings of the trial court are correct, unless the appellate court is convinced that the factual findings of the trial court are wrong.⁵
- [14] Mr Moerane, on behalf of the appellant, contended that the trial court misdirected itself on various aspects. He submitted that the trial court did not give proper consideration to the totality of the facts. He further submitted that the respondent and his wife were unsatisfactory witnesses and that the respondent's version was wrongly accepted as credible.
- [15] Mr Botha, on behalf of the respondent, contended that the trial court was correct in its findings, judgment and order. He submitted that the respondent and his wife were credible witnesses and that their version was probable. He further submitted that the hospital records or notes were inadmissible hearsay evidence, which should not have been admitted by the trial court.
- [16] It is not clear, from the record and the judgment of the court *a quo*, on what basis the hospital records were admitted as evidence. Initially the court *a quo* intimated that it would accept it provisionally subject to the authors thereof testifying. Regardless of Mr Botha's countless objections that it is inadmissible hearsay evidence and Mr Moerane's insistence that it is admissible because it was discovered by the respondent, the trial court failed to make a finding with regard to the admissibility of the evidence. The trial court went directly to the weight to be attached to the evidence without first

⁵ R v Dhlumayo and Another 1948 (2) SA 677 (A.D.) at 706

considering whether that evidence is admissible. This in my view was a misdirection. One can only attach weight to admissible evidence. Inadmissible evidence, by its very nature, carries no weight.

- [17] The trial court found that the potholes in question were in the area where the collision occurred. It was common cause that the potholes were situated approximately 900 metres from where the respondent's car left the road. Although the word 'area' is wide enough to include a place in a radius of 900 metres to a kilometre, on the facts of this case it can hardly be said that 900 metres is in the vicinity or area of the accident.

- [18] The trial court found that 'the fact that the respondent only left the road some 900 metres away from the area of the potholes, after hitting a pothole seems to indicate that his speed was excessive at the time'. Speed can never scientifically or logically be calculated or determined devoid of time and distance. In order to say a motor vehicle was driven with excessive speed one needs time and distance. In this case the trial court only knew the distance that the motor vehicle travelled without any evidence relating to the other crucial ingredient: the time it took the car to travel that distance.

- [19] The trial court failed to properly assess the probability of a motor vehicle hitting a pothole and only veering off the road 900 metres from the place where it drove over the pothole. It failed to properly consider the failure by the respondent to call important witnesses. It failed to properly assess and evaluate the improbabilities in the respondent's version.

- [20] The appellant denied that his negligence caused the collision. In the alternative it pleaded that the respondent was contributory negligent *inter alia*, because he failed to avoid the potholes in the road when he could and should have done so. The trial court found that the appellant's alternative plea 'indicates that it was aware of the condition of the road in question and of the presence of potholes thereon'. Although the appellant did not preface the alternative plea to the effect that it is only if his plea is rejected that the alternative should be considered; it is standard practice that the alternative plea is only considered after the plea has been rejected. The trial court

misdirected itself by finding that the alternative plea is indicative of knowledge of the presence of potholes.

- [21] The court *a quo* misdirected itself by giving unsatisfactory or insufficient reasons for its conclusions and it overlooked or misinterpreted important facts and probabilities. This court is therefore at large to disregard most of the factual findings of the court *a quo*.
- [22] I propose to deal with the hospital records first because they have a bearing on the testimony of the respondent and his wife. Although the hospital records were not discovered in terms of the uniform rules, they were delivered in terms of Rule 36(4) of the Uniform Rules by the respondent to the appellant. They were therefore discovered in the wider sense of the word. There was no agreement between the parties as to the admissibility of the hospital records. The contents of the documents were also in dispute. The respondent objected to the documents being used during cross-examination, without the authors thereof testifying. As stated above the trial judge did not make any finding with regard to the admissibility of the documents. It is however implicit in the trial judge's judgment that the documents were found to be admissible but scant weight was given thereto.
- [23] At some stage the trial judge, correctly, intimated that cross-examination on the documents would be allowed subject to the authors thereof testifying. The authors of those documents did not testify. The trial judge did not make any express finding about the admissibility of the evidence after the failure by the appellant to call those witnesses.
- [24] Discovery is a pre-trial mechanism to facilitate a fair hearing. It prevents trial-by-ambush. It ensures that before trial both parties are aware of all the relevant documents. The issues to be taken to the trial are thereby delineated and disputes narrowed so that only the controversial aspects of the trial need

to be adjudicated upon. In Air Canada⁶ the purpose of discovery was described as follows:

"Discovery is one of the few exceptions to the adversarial character of our legal process. It assists parties and the court to discover the truth. By so doing, it not only helps towards a just determination; it also saves costs. A party who discovers timeously a document fatal to his case is assisted as effectively, although less to his liking, as one who discovers the winning card; for he can save himself and others the heavy costs of litigation."

- [25] A discovered document is not *ipso facto* admissible. Even if a party admits the authenticity of a document it does not automatically become admissible. There is a difference between the admissibility of a document and the authenticity thereof. It is not enough to aver that a document has been discovered by the opposition and that therefore the correctness of its contents need not be proved. The legal position was explained thus in Knouwds⁷:

"Hofreël 35 (10) skep 'n uitsondering tot die algemene reël dat 'n dokument nie sondermeer van die Balie af ingehandig kan word nie. Die algemene reël is dat 'n dokument alleenlik ingehandig kan word deur 'n persoon soos, byvoorbeeld, die outeur daarvan of 'n persoon wat die outeur se handskrif kan identifiseer. Wanneer 'n dokument deur 'n gedingvoerder se teenstander blootgelê word en hy versoek om dit by die verhoor voor te lê, hoef die dokument nie deur getuienis geïdentifiseer of as eg bewys te word nie. (Sien Schmidt *Die Bewysreg* te 234.) 'n Dokument is egter nie normaalweg getuienis van die inhoud daarvan nie. Dit is alleenlik bewys van die feit dat die brief deur die outeur geskryf is. Die inlewering van 'n dokument deur 'n getuie wat in staat is om dit te identifiseer, bewys nie dat wat die outeur daarin geskryf het waar is nie. (Sien *Weintraub v Oxford Brickworks (Pty) Ltd* 1948 (1) SA 1090 (T) te 1093 en *Da Mata v Otto* NO 1971 (1) SA 763 (T) te 769.) Wat die betrokke dokument bevat is hoorsê getuienis en daarom ontoelaatbaar tensy dit onder een of ander uitsondering op die hoorsê reël ingebring kan word. (Vgl *Smith and Others v Strydom and Others* 1953 (2) SA 799 (T) te 805 - 6.) Die reël dat die inhoud van 'n dokument hoorsê getuienis is, geld ook met betrekking tot 'n dokument wat ingevolge Hofreël 35 (10) ingehandig word. Die inhoud van so 'n dokument is derhalwe ontoelaatbaar as getuienis van wat in

⁶ Air Canada v Secretary of State for Trade [1983] 2 AC 394, as quoted in Santam v Segal 2010 (2) SA 160 (NPD) at para 6.

⁷ Knouwds v Administrateur, Kaap 1981 (1) SA 544 (KPA).

die brief staan tensy dit onder een of ander van die uitsonderings op die hoorsê reël val.”⁸

[26] The authors of the hospital records did not testify. The contents of the hospital records irrespective of whether they were discovered by the respondent remain hearsay evidence. They are inadmissible unless they can be admitted under one or other common law exception to the hearsay rule or the Law of Evidence Amendment Act⁹ or the Civil Proceedings Evidence Act.¹⁰

[27] They do not fall under any common law exception to the inadmissibility of hearsay evidence. The applicability of the two other bases for the admissibility of hearsay evidence must therefore be explored. Section 3(1) of the Law of Evidence Amendment Act reads as follows:

“Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.”

⁸ At 551G to 552 A.

⁹ Act 45 of 1988.

¹⁰ Act 25 of 1965.

[28] Sections 3(1)(a) and (b) are not applicable. It has correctly been stated that the factors mentioned in section 3(1)(c) are inter-related and should be considered cumulatively¹¹. I turn to consider those factors in light of the circumstances of this case.

(i) *The nature of the proceedings:*

These are civil proceedings wherein the admissibility of discovered documents is in dispute.

(ii) *The nature of the evidence:*

It is documentary evidence relating to what the hospital personnel, at the two hospitals, were told and by whom they were told what they recorded. The party who has discovered the documents contended that they are inadmissible hearsay because the authors thereof did not testify. The other party contended that the documents are admissible because they were discovered.

(iii) *The purpose of the evidence:*

The appellant wants to prove that the source of the contents of the documents is the respondent.

(iv) *The probative value of the evidence:*

The relevant considerations here are relevance and reliability.¹² The evidence is indeed relevant because it speaks to the credibility of the respondent. Insofar as its reliability is concerned the respondent demonstrated that the information on the hospital records is not consistent and therefore unreliable. There are many issues which are not properly explained in the medical records. In the medical records of Medi-Clinic it is stated that the history was given by the respondent but it is also stated that he appeared to be disorientated. At the Netcare Krugersdorp Hospital it was recorded that the respondent could not explain the events hundred percent because of the neck injury and concussion. In the absence of an explanation by the medical staff at both

¹¹ Maize Board v Hart 2005 (5) SA 480 (O) at p487.

¹² Maize Board *supra* at 488.

hospitals it would be risky to selectively choose the correct state of affairs. The trial court had the same difficulty.

(v) *Why evidence is not given by the authors or creators of the documents:*

There is no evidence whatsoever on record as to why the authors of those documents were not called as witnesses. The respondent indicated from the beginning that the evidence is hearsay evidence and that he would cherish the opportunity to cross-examine those witnesses. The appellant therefore knew from the beginning that there was vociferous objection against the admission of the hearsay evidence. The trial court at some stage provisionally allowed, as it may, cross-examination based on those documents subject to the witnesses being called to testify. The condition was not fulfilled. The non-fulfilment of the condition meant that the evidence became inadmissible.

(vi) *Prejudice:*

Every party has the right to cross-examine any witness called to testify on behalf of another party. Hearsay documentary evidence curtails that right. The respondent was put at a disadvantage because he was unable to point out the incongruity in the statements and to solicit a response from its authors. It would be extremely prejudicial to the respondent to find that what is alleged to have been said by him in the hospital records was indeed said by him, without him being able to cross-examine the authors.

(vii) *Other factors:*

There are no other factors relevant to the facts in this case which require consideration.

[29] In my view, after considering all the relevant factors mentioned above, the hearsay evidence contained in the hospital records cannot be admitted on the basis of the factors set out in section 3(1)(c). This is so, specifically, in light of the prejudice to the respondent and the absence of a reason why the witnesses were not called.

[30] The other statutory basis on which the hearsay evidence could be admitted is in terms of the Civil Proceedings Evidence Act. Section 34 of the Civil Proceedings Evidence Act reads as follows:

"(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.

(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;
- (b) 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."

[31] It is clear that the medical records could not be admitted on this basis too. First, because the authors of the statement were not called as witnesses, there was also no indication that it was not reasonably practicable to secure their attendance at court neither was there evidence that any, let alone, all reasonable efforts to find them were made without success. Second, because there was no inquiry whatsoever by the trial judge as to whether undue delay or expense would be caused if the statements were not admitted.

[32] The hospital records were not generated by people employed by the state but people employed by private hospitals. Those documents are therefore private documents because they are not public documents. The accident report on the other hand was *ex facie* generated by a police officer, who is a public officer. Is the accident report a public document which is on mere production admissible?¹³ A public document is a document made by a public officer in the execution of a public duty, which is intended for public use and to which the public has a right of access.¹⁴

[33] It cannot be gainsaid that a police officer is a public official. Did the police officer in this matter make the accident report in the execution of a public duty? The public official is required to make the report in the performance of a duty to ascertain the truth and to record it accurately.¹⁵ In Doe dem. France v Andrews¹⁶ it was stated that:

"The principle upon which entries in a register are admitted is not that the person who makes the entry does it contemporaneously or of his own knowledge... It depends upon the public duty of the person who keeps the register to make such entries in it, after satisfying himself of their truth. If he does so satisfied himself, and makes the entry, it is not open to the contesting party to exclude the evidence by showing that he might have obtained the information on which he acted in a more businesslike manner."

[34] It is clear that a police officer who completes an accident report or notes the particulars thereof in an occurrence book has a duty to ascertain the truth as to how the accident occurred and to record it accurately. The accident report form *inter alia* states that a police officer or traffic officer must make an attempt to obtain witnesses to an accident. It states that attempts must be made to find a person or persons who can give valuable information about the circumstances relating to the accident and/or who can assist with the

¹³ See section 18 of the Civil Proceedings Evidence Act which reads:

"(1) Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from proper custody, any copy thereof or extract therefrom proved to be an examined copy or extract or purporting to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, shall be admissible in evidence.

(2) Such officer shall furnish such certified copy or extract to any person applying therefor, upon payment of an amount in accordance with the tariff of fees prescribed by or under any law or, if no such tariff has been so prescribed, an amount in accordance with such tariff of fees as the Minister in consultation with the Minister of Finance may from time to time determine."

¹⁴ Northern Mounted Rifles v O'Callaghan 1909 TS 174 at 176-177. Matthyssen Busvervoer (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Kimberley 1987 (4) SA 490 (NC) at 503.

¹⁵ Rex v De Villiers 1944 (AD) 493 at 500 - 502.

¹⁶ 15 Q.B. at p. 758, as quoted in De Villiers fn 10

identification of deceased or seriously injured persons involved in the accident. It further states that in the event of a reliable witness residing or working in another city or town an affidavit must as soon as possible be taken from that person either at the scene or at the police station or traffic department, where a police docket is opened.

- [35] It is therefore clear that there is a duty on a police officer to satisfy himself or herself of the truth of the information contained in the accident report. In this case it cannot be said that the police officer concerned attempted to satisfy himself about the truth of the report. The information in the report was given by the respondent's son-in-law or his daughter. Neither of them was at the scene when the collision occurred. Neither of them was the driver of the vehicle concerned. The information contained in the report was given by a person who had no personal knowledge of how the collision occurred. The report is based on hearsay and is unreliable. It does not meet the requirement that the document must be made in the execution of a public duty.
- [36] It also does not meet the requirements for the admissibility of a private document because it contains hearsay evidence and the person who made the statement was not called. It must suffer the same fate as the medical records.
- [37] The statement made by the respondent's son to the insurance broker, Mr Dykman, is on a different footing. It is admissible because the probative value of that evidence depends on the credibility of Mr Dykman. It is therefore not hearsay evidence. It is admissible. I now turn to consider the merits and demerits of all the admissible evidence.
- [38] The parties correctly agreed that the onus to prove that the appellant was negligent rests on the respondent. The appellant on the other hand was saddled with the onus to prove that the respondent was contributory negligent, in the event that the trial court found that the appellant was negligent.

[39] The respondent is the only witness who testified about how the collision occurred. He is for all intents and purposes a single witness. In terms of section 16 of the Civil Proceedings Evidence Act, judgment may be given in any civil proceedings on the evidence of any single competent and credible witness. In Daniels v General Accident Insurance Co Ltd¹⁷ it was said:

"...although there is apparently no 'cautionary rule' in civil cases as in criminal matters where proof beyond reasonable doubt is required, the single witness, more particularly where he is one of the parties, must be credible to the extent that his uncorroborated evidence must satisfy the Court that on the probabilities it is the truth."¹⁸

[40] The respondent alleged that there were potholes in that road on 4 June 2010, while the appellant alleged that there were no potholes on that road in the vicinity where the collision occurred. The proper approach to follow when faced with two mutually destructive versions was succinctly set out in National Employers General Insurance Co Ltd v Jagers¹⁹ where it was stated that:

"It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. 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 and, 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's, 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.

¹⁷ 1992 (1) SA 757 (C).

¹⁸ At 760A-B.

¹⁹ 1984 (4) SA 437 (ECD). See also SFW Group & Another v Martell et Cie & Others 2003 (1) SA 11 (SCA) at 141 – 15D.

This view seems to me to be in general accordance with the views expressed by COETZEE J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens (supra)* and *African Eagle Assurance Co Ltd v Cainer (supra)*. I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the *onus* which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.”²⁰

- [41] The respondent's testimony was that after he hit the pothole he bumped his head against something as a result of which he lost consciousness or had memory loss. However when he was asked by his attorney, during an inspection *in loco* which was held by the parties, to explain exactly what happened on the day of the accident, he did not mention that he bumped his head against something. When this inconsistency was pointed out to him, during cross-examination, he initially said that he was never asked, at the inspection *in loco*, to explain what happened on the day of the accident. He was constrained to admit that he was indeed asked after the video of the inspection was shown to him.
- [42] He confirmed that he deposed to an affidavit on 14 February 2011 and that he did not mention bumping his head against something in the vehicle. When he was asked why he did not mention it he said that he did not think that it was important to explain how the accident happened. This is a senseless answer. The reason for making the affidavit was indeed to explain the accident damage to his vehicle and the injuries sustained by him. He conceded that the fulcrum of his version was that he hit a pothole as a result of which he bumped his head and could not keep his motor vehicle under control. It was also pointed out to him that in his affidavit he categorically stated that ‘the vehicle collided with trees along the road which caused injuries to myself’.

²⁰ At 440 – 441.

When this incongruity was pointed out to him his response was that the injuries that he sustained were caused more by the trees than by him bumping his head in the car.

[43] According to the respondent the potholes were spread over a 100 metre area. His vehicle veered off the road approximately 900 metres from the last pothole therefore a kilometre from the first pothole. He could not explain how the vehicle travelled this distance. His explanation was that he was unconscious after hitting the pothole or he cannot remember what happened after he hit the pothole. If he was conscious it stretches credulity to accept that he could drive the vehicle for a distance of 900 metres after having driven over the pothole and still blame the pothole for veering off the road. On the other hand, if he was unconscious after driving over the pothole it is highly improbable that an unconscious person would be able to 'drive' a motor vehicle for 900 metres. If his motor vehicle drove over the first pothole it means that he was unconscious behind the steering wheel for an entire kilometre before the vehicle veered off the road. This is highly improbable.

[44] The respondent could also not explain why he could not stop his vehicle before the potholes, wait for the oncoming vehicle to pass and then execute the manoeuvre that he is used to executing in order to avoid driving over the potholes.

[45] The respondent failed to call his son as a witness. An unexplained failure to call a witness may lead to a negative inference. In Elgin Fireclays Limited v Webb²¹ it was said that:

"...With regard to this request, it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. See *Wigmore* (secs. 285 and 286).) But the inference is only a proper one if the evidence is available and if it would elucidate the facts."²²

²¹ 1947 (4) SA 744 (A).

²² At 749 – 750.

- [46] Whether such inference should be made is case specific and grounded in common sense. A negative inference should not be made in order to fill gaps in the evidence or to convert speculation into inference. The court should be careful not to create evidence from non-evidence by attaching undue significance to a failure to call a witness. The uncalled witness must be able to shed light on an important factual controversy. An adverse inference should not be drawn if a case may have been sufficiently presented without the witness. The relationship between the absent witness and the party who did not call him or her is also important. The closer the relationship, the stronger the inference that the witness was not called out of fear that he or she will contradict the party's case.²³
- [47] The respondent's son who instituted the insurance claim on his behalf told the insurance broker that the collision occurred because the respondent was blinded by the lights of an oncoming vehicle and he veered off the road. He did not mention anything about a pothole. The claim was paid out by the insurance company based on this version. There is no explanation whatsoever as to where or from whom his son got this version. His son is the only person who could explain from whom he got that version. The respondent elected not to call his son in order to clarify this important aspect of his case. There was no indication from the respondent that his son was unavailable to testify. No reason was given for the failure to call his son. The ineluctable inference is that he feared that his son would give testimony that is destructive to his case. This failure surely calls for a negative inference to be made against the respondent. The respondent's version that he informed Mr Dykman of the correct reason for the accident was not put to Mr Dykman during cross-examination.
- [48] Mr Botha requested us to make a negative inference against the appellant for his failure to call Mr Manyike's supervisor. The facts of this case do not justify such inference. The supervisor's testimony would not have elucidated any factual dispute; it would have served to corroborate or contradict a case that

²³ Galante v Dickinson 1950 (2) SA 460 (A) at 465; ABSA Bank Ltd v Natasha Investment Company Pty Ltd [1996] ZASCA 59 (29 May 1996) para 15; S v Ramokolo [2011] ZASCA 77 (26 May 2011) para 19.

was already sufficiently presented. Doing so would amount to creating evidence from non-evidence.

[49] The respondent testified that he was unconscious or that he cannot recall what happened immediately after the collision. He however had the presence of mind to give his wife's cellular phone number to the stranger who was the first person at the scene. This selective unconsciousness or memory loss was also not properly explained.

[50] The respondent's wife testified that when she got to the scene her husband was disorientated and said: 'the pothole, the pothole'. He also asked her where the children were whereas the children were not present in the vehicle. I find it improbable that his wife would not have told her son that the respondent mentioned a pothole as the cause of the accident. She testified that after the accident she saw the unrepaired potholes. Strangely though, she does not take a photograph of the potholes. She took photographs of a repaired pothole months after the collision.

[51] The trial court found that Mr Manyike's testimony was improbable because he remembered the exact dates, 1 – 3 June 2010, when he repaired the potholes in that road but could not remember the dates of the other occasions on which he worked on that road. The trial court did not factor in Mr Manyike's testimony that records were kept of the repairs done on that road and that he checked the records before testifying. Although the records were not discovered by the appellant, Mr Manyike's evidence on this score stood uncontroverted. Although he testified that the repairs were of a temporary nature, his testimony that such repairs last for approximately 5 to 6 months was unchallenged. Therefore on his version there could not have been potholes the day after he repaired the potholes in that road.

[52] I am satisfied that the respondent's version was neither credible nor probable. Considering the incidence of the onus I am not satisfied that the respondent succeeded in proving on a balance of probabilities that the appellant's negligence was the cause of the collision.

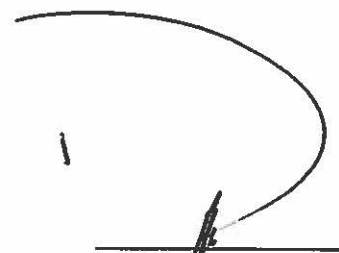
[53] There is no reason why the costs in the court *a quo* and in this court should not be paid by the respondent.

[54] I accordingly make the following order:

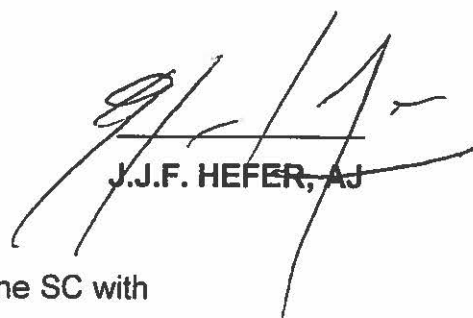
- (i) The appeal succeeds with costs.
- (ii) The order of the court *a quo* is set aside and replaced with the following:
The claim is dismissed with costs.


 C.J. MUSI, AJP

I concur.


 J.P. DAFFUE, J

I concur.


 J.J.F. HEFER, AJ

On behalf of Appellant:

Adv M.T.K. Moerane SC with
 Adv T.L. Manye
 Instructed by
 State Attorney
 BLOEMFONTEIN

On behalf of Respondent:

Adv J.N.W. Botha
 Instructed by
 Van Der Merwe & Sorour
 BLOEMFONTEIN