

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

**CASE NO. AR
566/10**

In the matter between:

JACOB ERIC LAZARUS

APPELLANT

and

ROAD ACCIDENT FUND

RESPONDENT

APPEAL JUDGMENT Delivered on 23 March 2012

SWAIN J

[1] The appellant comes before this Court, with the leave of the Court *a quo*, (Harcourt A J) aggrieved that the respondent was absolved from the instance, in respect of a claim for damages, instituted by the appellant as plaintiff, against the respondent as defendant, arising out of motor vehicle accident which occurred on 13 March 2004.

[2] The central issue in the case was whether the collision between the appellant's vehicle (driven by the appellant) and a tree alongside the road, was caused by the negligent driving of an unidentified vehicle. The appellant's case was that the driver of the

unidentified vehicle, negligently turned across his path of travel into a side street, causing the appellant to take evasive action to avoid a collision, which resulted in the appellant's vehicle colliding with a tree.

[3] The appellant was seriously injured in the collision, and although the trial court was not concerned with the nature and extent of his injuries, the trial proceeding only on the issue of liability, it is common cause that as a consequence of the injuries the appellant sustained, he is confined to a wheelchair.

[4] The respondent in its plea denied the occurrence of the collision and at trial, the defence advanced by the respondent was primarily aimed at refuting the appellant's assertion that another vehicle was involved in the collision, between the appellant's vehicle and the tree. It is of course trite that in the absence of another vehicle, the respondent would be absolved from liability to compensate the appellant for the injuries he sustained as a consequence of the collision.

[5] There were no witnesses to the collision and the respondent was consequently unable to lead any direct evidence, to contradict the appellant's assertion as to how the collision occurred.

[6] It is therefore necessary to examine at the outset, what the

correct approach is to assessing the reliability of evidence led by a party upon whom the onus of proof lies, where there is no direct countervailing evidence.

[7] It is clear that

“It does not follow because evidence is uncontradicted, that therefore it is true. Otherwise the court, in cases where the defendant is in default, would be bound to accept any evidence the plaintiff might tender. The story told by the person on whom the onus rests may be so improbable as not to discharge it”.

Siffman v Kriel
1909 TS (1) 538 at 543

Phrased differently – can it be said that the appellant’s evidence

“.....was so improbable or vague and ineffectual that it could be rejected out of hand as being untrue, thereby relieving the respondent of any obligation to contradict it”.

Santam Bpk v Biddulph
2004 (5) SA 586 (SCA) at 593 F - G

[8] The test has also been described as follows. Whether on “a fair conspectus of the evidence, coupled with the fact that there is no testimony from the (respondent) to gainsay it, impels the inference, to the required degree of proof” that the party upon whom the *onus* lies has discharged it.

South British Insurance Co. Ltd. v Unicorn Shipping Lines Ltd.
1976 (1) SA 708 (A) at 713 G - H

[9] Consequently, where there is no countervailing evidence, in order to assess whether the evidence of a party upon whom the *onus* lies, is so improbable as not to be sufficient to discharge the *onus*, such evidence would have to be weighed against any objective facts as to the issue in question, as well as relevant surrounding circumstances. In the present case, surrounding circumstances extraneous to the manner in which the collision occurred, but relevant to an assessment of the credibility of the appellant, were relied upon by the respondent, which will be dealt with in due course.

[10] To be contrasted with this approach, is the approach where there is countervailing evidence on the issue on which a party bears the *onus* of proof. In such a case, in order to determine where the truth lies, the Court has “by balancing probabilities, select a conclusion which seems to be the more natural, or plausible conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one”.

Govan v Skidmore
1952 (1) SA 732 (N) at 734 D

[11] As regards an assessment on the evidence of the probabilities

as to how the accident occurred, Harcourt A J postulated the following scenario as a “plausible” cause of the collision

“On the other hand, what could well have happened was that the plaintiff was travelling much faster, crested the rise, saw a vehicle ahead, already committed to a non-negligent right turn into Aberfoyle Road. The plaintiff then swerves in evasion, mounts the grass verge and loses control because of a high speed and a change in the surface from tarmac to grass. That seems, to me, to be a more plausible explanation from the known facts, especially the statement that the collision between the two vehicles was totally avoided, and in evidence, the plaintiff said by 2 metres”.

In conclusion the trial Court weighed the appellant’s version of how the accident occurred, against this scenario, in the following words

“In other words, against the background I have described, I do not accept that the plaintiff’s version of events is more consistent with the probabilities than a version where the unidentified driver was not negligent”.

[12] The postulated explanation by the trial Court as to how the collision occurred, was never raised during the trial, nor put to the appellant, as a plausible explanation for how the accident happened. It is also apparent that the postulated explanation, necessarily involves an acceptance of the presence of the unidentified vehicle, turning across the path of travel as described by the appellant, but in a “non-negligent” manner.

[13] It is therefore clear that in granting absolution from the

instance, Harcourt A J concluded that the appellant had not discharged the onus of showing on a balance of probabilities, that the driver of the unidentified vehicle had acted negligently in executing the right hand turn that he did. This must be so, because he weighed the appellant's version, against a version postulated by him, which accepted the presence of the unidentified vehicle turning across the appellant's line of travel in a non-negligent manner, as "a more plausible explanation".

[14] In order to reach the conclusion that he did it was necessary for Harcourt A J not merely to find that the conclusion he had reached, as to the cause of the collision was "more plausible" than the appellant's version, but that the appellant's version was so improbable, as not to discharge the *onus* resting on the appellant. The version of the appellant would have to be rejected, as being so improbable, or vague and ineffectual that it could be rejected out of hand, as being untrue.

[15] More specifically, it would have to be concluded that the manner in which the appellant, described how the unidentified vehicle turned across his path of travel in a negligent manner, was so improbable or vague and ineffectual, that it could be rejected as being untrue.

[16] It must be noted that the trial Court made no adverse

credibility findings against the appellant, and in fact in his Judgment granting leave to appeal, expressly stated that he had made no adverse credibility findings against the appellant.

[17] In my view, Harcourt A J misdirected himself in applying the test he did, in assessing the appellant's evidence. The test he applied did not give sufficient weight to the absence of any countervailing evidence, to refute the appellant's version of how the collision occurred.

[18] This Court is accordingly at large to assess the appellant's evidence, in order to determine whether the appellant discharged the onus of proving on a balance of probabilities, that the accident occurred as he said it did.

[19] In respect of the evidence led by the appellant, Harcourt A J added the following after reaching the conclusion that he did

"That is, in particular, against the background that more evidence of the surrounding objective facts could have been, but was not, led".

His concern as to the adequacy of the evidence placed before him, found expression earlier in his Judgment, in the following words:

"What I am left with is scant evidence, speculation, reconstruction and evidence which suggests the plaintiff understated his speed".

[20] It is therefore necessary in deciding whether appellant discharged the *onus* resting upon him, to determine whether the misgivings of Harcourt A J were justified.

[21] As regards the issue of whether the appellant could have led evidence of the surrounding facts concerning the accident, the concerns expressed by Harcourt A J were as follows. No evidence was led of the damage to the vehicle, which may have assisted in the reconstruction of what had occurred. It is clear, as observed by the trial Court, that the vehicle was repaired and driven by the appellant's son after the accident, before being re-possessed. Whether evidence of the nature of the damage to the appellant's vehicle, would have been of assistance in determining how the accident happened, when there was no contact with any other vehicle is impossible to say. In any event, in the light of the appellant's evidence that he only established on 21 February 2006, that he had a claim against the defendant (the veracity of such an assertion I will deal with in due course) it is not unreasonable that evidence of the damage to the appellant's vehicle, was not preserved.

[22] The trial Court also expressed concern that Duran, the appellant's son, was not called to give evidence, which according to a statement Duran made to the police, "it seems as though he went to the scene of the collision immediately after the collision". An affidavit by Duran made to the police is part of the appeal record, but does not record any assertion by him, that he went to the scene on the day of

the accident. From the evidence of Captain Ximba, the investigating officer, Duran accompanied him to the scene of the accident on 03 July 2004. Mr. Pitman, who appeared for the defendant in the Court *a quo* and the respondent on appeal, when cross-examining the appellant, referred to a statement made by Duran to the police and in which he said that the appellant's vehicle "overturned several times". The statement which is part of the appeal record, does not contain such an assertion, and consequently it appears that the statement referred to, does not form part of the appeal record and there is no indication that it was handed in to the Court *a quo*. Be that as it may, even if he did visit the scene on the day of the collision, it is pure speculation that his visit would have revealed anything of significance, such that a failure to call him, to give evidence, should be seen in a suspicious light.

[23] Harcourt A J also expressed concern that the appellant when giving evidence was unable to say whether his vehicle had overturned, when what was contained in the statement of his son was put to him. He said he was not sure what happened after he had hit the tree, which is not surprising as the appellant was rendered unconscious in the collision and only regained consciousness the next day in the afternoon. I do not regard it as suspicious that he was unable to describe what happened to his vehicle after he collided with the tree.

[24] In my view the misgivings of Harcourt A J, were unjustified. In

the absence of any evidence to suggest that the nature of the damage to the vehicle, or any evidence which may have been found at the scene of the accident, could have played a significant role in determining how the accident happened, to positively find against the appellant, that the appellant has deliberately chosen not to lead such evidence, because to do so would weaken the appellant's case, was unjustified. That the trial Court viewed this aspect in this light is illustrated by his remarks that "the barest evidence was led by the plaintiff" and "I have the feeling that as little evidence as possible is being proved" and "other available evidence which could be relevant and the subject matter of cross examination has not been made to the Court" and further "what I am left with is scant evidence". That any such evidence could have played a significant role in determining how the collision occurred is pure speculation.

[25] Although Harcourt A J made no adverse credibility finding against the appellant, he referred in his Judgment to a number of aspects in the appellant's evidence, which although extraneous to how the accident happened, formed the basis in cross-examination for attacks upon the credibility of the appellant. Such evidence forms part of the surrounding circumstances which although extraneous to the manner in which the accident occurred, are relevant to an assessment of the appellant's credibility.

[26] The most significant of these was the delay by the appellant in lodging any claim against the respondent. The accident occurred on 13 March 2004 and the claim had to be lodged by 12 March

2006. The claim forms were drafted in the attorney's office on 21 February 2006, shortly before the expiry of the relevant period for lodging a claim. Related to this issue was the fact that the appellant had lodged a claim, dated 26 August 2002 with the respondent, arising from a previous incident on 03 March 2002, when an unidentified vehicle was driven over his foot. In addition the appellant had only made a statement to the police with regard to the present accident in June 2004.

[27] From these facts Mr. Pitman sought to argue that by virtue of the inordinate delay by the appellant in lodging a claim against the respondent, an inference should be drawn that the appellant was aware that he had no claim against the respondent because no other vehicle was involved in the present accident. Allied to this assertion was the fact that the appellant had not asked his family to investigate in the area to try and trace the vehicle involved and ascertain whether there were any witnesses. The appellant had also not asked his family to report the matter to the police.

[28] As regards the appellant's failure to lodge a claim, he said that the reason he did not approach the attorneys, was because he did not know he had a claim because he did not "smash into another car". He had heard this from friends. The attorney of the appellant was called and he said that the appellant had come to his office to discuss the previous accident and while he was in the office, the witness noticed the appellant was in a wheelchair, so he asked him what had happened. The appellant explained that he was in

another collision and the witness asked the appellant if he had lodged a claim. The appellant had said he had not because he wasn't sure that he had a claim against the respondent. The appellant said he felt he had no claim because there was no contact between the vehicle he avoided and his vehicle. The witness however realised the appellant did have a claim, and so he went ahead and lodged the claim with the respondent.

[29] When the appellant was interviewed by the police in hospital in July 2004, it is recorded in his statement that a red Toyota vehicle had swerved across in front of him, causing him to swerve off the road and collide with a tree.

[30] Consequently, the appellant's version from July 2004 until he visited his attorney on 21 February 2006 was that another vehicle was involved in the accident. The only plausible explanation for such a delay in lodging a claim against the respondent, would be the reason given by the appellant and his attorney, particularly so as in the appellant's previous claim, although the vehicle was unidentified, there was "contact" between this vehicle and appellant. In my view, it would accordingly be unfair to infer from the delay that no other vehicle was involved. If the appellant had made no mention of another vehicle in his statement to the police, that would obviously have placed a different complexion upon events.

[31] As regards the appellant's failure to ask his family to

investigate in the immediate area and report the matter to the police, when asked why he had not done this he said that “I wasn’t in the right frame of mind. I was injured, my spine, and I was not too good”. Whether the appellant’s mental state was such that his conduct in not asking for these investigations to be carried out and reports made to the police, was reasonable, is of course impossible to determine. Why his family did not do this themselves is unexplained, as the natural inclination would be to take all possible steps to apprehend the driver, who had caused the accident. Standing alone however it is obviously insufficient to refute the appellant’s contention that another vehicle was involved. It is however a factor to be considered in weighing up the probabilities.

[32] A further factor of relevance to an assessment of the appellant’s credibility, was a contradiction between how he described the other vehicle in his statement to the police and how he described it, when giving evidence. In his statement he is recorded as saying that it was a red Toyota, but in evidence he described it as a red Toyota Corolla. The appellant was adamant he had told Captain Ximba it was a red Toyota Corolla, whereas Captain Ximba was equally adamant he had recorded it correctly as a red Toyota. Again the possibility that the appellant failed to tell the police that the vehicle was not simply a red Toyota but a red Toyota Corolla, standing alone is insufficient to refute the appellant’s contention that another vehicle was involved. It is however a factor to be considered in weighing up the probabilities.

[33] Turning now to an assessment of the evidence and the

probabilities, which arise on the evidence, as to how the accident happened. At the outset, it should be remembered that the crucial issue is whether there was another vehicle involved, or not. The issue is whether the appellant's version that the accident was caused by the negligent driving of an unidentified vehicle, when assessed in the context of the objective facts as to the accident, may be regarded as so improbable as to find that the appellant has not discharged the *onus* resting upon him. The appellant's version would have to be rejected as untrue and in reaching such a conclusion the extraneous factors, dealt with above, which are relevant to the appellant's credibility, would have to be considered.

[34] It is so that the estimations by the appellant of the speed he was travelling at, as well as the distance between his vehicle and the other vehicle could not be accurate. It is not necessary and in my view, unfair, to subject such estimations to mathematical scrutiny and reject them on this basis. In assessing this evidence, allowance has to be made for the fact that the appellant was testifying to an accident which at the time of trial, had taken place six years ago, in which he was seriously injured. In this regard Harcourt A J was alive to the danger of reconstruction, reliance on speed tables and witness recollections of distances. Be that as it may, the fact remains that these estimations are inaccurate. Whether such inaccuracy is however sufficient to adjudge the appellant's version that another vehicle was involved, as so improbable that it may be rejected as untrue, depends upon an assessment of the appellant's version, in the context of the objective facts as to the accident in question. The objective facts are that the

appellant drove his vehicle off the right hand side of the road, whilst negotiating a right hand turn and collided with a tree.

[35] Considering firstly the version advanced by the respondent that no other vehicle was involved in the accident. On this version the accident could only have occurred as a consequence of the appellant losing control of his vehicle and driving off the right hand side of the road, where the road curves to the right. Although reference was made in the evidence to the camber of the road to the right hand side as a possible cause of such an event, the camber of the road does not appear to be particularly pronounced from the photographs. There is a wide grass verge between the tree that was struck and the edge of the road. If a loss of control is predicated on the basis of excessive speed, the more natural or plausible manner in which this would occur in a curve to the right, would be by losing control of the vehicle to the left hand side of the road, rather than towards the inside of the corner. That the appellant drove his vehicle to the right is more consistent with his version that he was taking evasive action to avoid the other unidentified vehicle. Be that as it may, I am satisfied that it cannot be concluded that the appellant's evidence of how the accident occurred is so improbable or vague and ineffectual, that it can be rejected as being untrue. In reaching this conclusion I do not overlook the reservations I have expressed in regard to the failure to take steps to try and trace the driver of the unidentified vehicle, nor the conflict as to whether the appellant simply told the police it was a red Toyota and did not add that it was a Corolla. I am satisfied that these issues which are relevant to the appellant's credibility are

insufficient to disturb the conclusion I have reached on the probabilities of the matter.

[36] The remaining issue to be considered, is whether the appellant was contributorily negligent. As I have said the appellant's estimations of speed and distance were inaccurate. The appellant must have been travelling at a speed well in excess of his estimation of fifty-five to sixty kilometres per hour, in order to travel across the opposite lane and the grass verge and collide with the tree with such disastrous consequences. In addition, if the appellant was travelling at the speed he estimated, he should in my view, have been able to retain control of his vehicle on the wide grass verge, without colliding with the tree. This is particularly so as it was dry and visibility was clear. Considering all of the above, I am satisfied that the appellant was fifty percent to blame for the accident.

The order I make is the following:

1. The appeal succeeds and the order of the Court *a quo*, granting absolution from the instance in favour of the defendant, is set aside and replaced with the following order:
 - (a) the defendant is liable to pay to the plaintiff fifty percent of any damages the plaintiff may prove to have suffered, as a result of the motor vehicle accident on 13

March 2004.

(b) The defendant is ordered to pay the plaintiff's costs.

2. The respondent is ordered to pay the appellant's costs of appeal.

K Swain J

I agree

Steyn J

I agree

Mbatha J

Appearances /

Appearances:

For the Appellant : Mr. A. K. Kissoon Singh S C with
Mr. P. N. Schumann

Instructed by : Justin Reichlin Ramsamy
C/o Cajee Setsubi Chetty Inc.
Pietermaritzburg

For the Respondent : Mr. M. Pitman

Instructed by : Askew Grindlay & Partners Inc.
C/o Tomlinson Mnguni James Inc
Pietermaritzburg

Date of Hearing : 09 March 2012

Date of Filing of Judgment: 23 March 2012

