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

CASE NO: 8729 /07

In the matter between:

MUZIWAKHE EMMANUEL SITHOLE **PLAINTIFF**

and

LION OF AFRICA INSURANCE COMPANY LTD **DEFENDANT**

JUDGMENT

Delivered on: 3 May 2012

MURUGASEN J

[1] The plaintiff, Muziwakhe Emmanuel Sithole, instituted an action against the defendant, Lion of Africa Insurance Company Limited, for payment in the sum of R122 000, interest thereon and costs arising from the repudiation by the defendant of an insurance claim lodged by the plaintiff.

[2] The plaintiff sued in his capacity as the owner of a motor vehicle, an ISUZU KB 300 bakkie (the vehicle), bearing the registration letters MUZZY-ZN (MUZYZN as per licence registration), alternatively as the legal possessor of the aforesaid vehicle under a credit agreement, in terms of which all risk in and to the vehicle vested in the plaintiff.

[3] The plaintiff relied on an agreement of insurance entered into on 1 October 2002 (the policy), in terms of which the defendant undertook to insure the plaintiff's vehicle, against the risks specified in the policy, *inter alia*, damage

to the vehicle.

[4] On or about 20 August 2006 the vehicle was damaged in a collision which occurred at Osborne Street in Eshowe. The damage to the vehicle was assessed at R122 000, being the difference between its pre-accident and post-accident value. The plaintiff lodged a claim for the damage to his vehicle with the defendant in terms of the policy, alleging that he was the driver of the vehicle at the time of the collision, which the defendant repudiated. The plaintiff instituted this action for payment of the aforesaid damages pursuant to such repudiation.

[5] In repudiating the claim, the defendant alleged that it indemnified the plaintiff on the terms and conditions contained in the policy. It was however not obliged to make payment to the plaintiff in terms of the policy because at the time of the collision the vehicle was driven by an unidentified third party who, with the general consent or knowledge of the plaintiff, was driving the motor vehicle whilst under the influence of intoxicating liquor or drugs.
The plaintiff had misrepresented to the defendant that he was the driver of the motor vehicle at the time of the collision. As it was a material term of the policy that if any claim under the policy was in any respect fraudulent, or if the plaintiff or anyone acting on his behalf or with his knowledge or consent, utilised any fraudulent means or device to obtain a benefit under the policy, the benefit under the policy would be forfeited, the cover under the policy was invalidated, alternatively the plaintiff had forfeited the right to claim the benefits afforded under the policy.

[6] At the commencement of the trial, the court ordered a separation of issues in terms of the provisions of Rule 33(4) of the Uniform Rules and the trial proceeded on the issue of liability only.

[7] Although only a portion of the policy was annexed to the summons, the parties agreed that the whole of the relevant portion of the agreement was before the court and there were no conflicting clauses or clauses requiring

consideration in the remainder of the policy document. Both counsel placed on record that the court could, in its determination of the issues, restrict its attention to the extract of the policy furnished. Each party furnished the court with a bundle of documents (Exhibits A and B respectively). A sketch plan (not to scale) drawn by the plaintiff was admitted as Exhibit C.

Common Cause

[8] The following was common cause or not in dispute :

1 The identity of the plaintiff.

2 The plaintiff was the legal possessor of the vehicle.

3 In terms of the insurance policy dated 1 October 2002, the defendant undertook to compensate the plaintiff for damages to his motor vehicle on the occurrence of certain events, subject to various terms and conditions *inter alia*,

3.1 the defendant would not compensate the plaintiff if the event occurred and the vehicle was damaged while the Plaintiff or any person, with his knowledge and consent, drove the vehicle while intoxicated or under the influence of alcohol or other substance;

3.2 if the plaintiff misrepresented the circumstances under which the event occurred or the vehicle was damaged, the plaintiff would forfeit the benefit due under and in terms of the insurance agreement.

4 The plaintiff's vehicle was damaged in a collision which occurred in the early hours of 20 August 2008 when it collided with a pole, electricity fuse box and a roller door on the pavement in Osborne Street, Eshowe.

5 The plaintiff lodged a claim dated 21 August 2008 with the defendant on 30 August 2006.

6 By way of a letter dated 13 October 2006 the defendant repudiated the plaintiff's claim relying on the grounds set out in Clause 8 of the General Conditions of the policy, viz that the claim was fraudulent in that the plaintiff was not the driver of the vehicle as he alleged and that the benefit due under the policy was consequently forfeited.

The Issue for Determination

[9] The issue for determination is whether the plaintiff has discharged the *onus* he bears to prove on a balance of probabilities that :

1 he was the driver of the Isuzu Twin Cab vehicle bearing registration plates Muzzy ZN on 20 August 2006 at approximately 1h45 when the said vehicle was involved in a collision in Osborne Street, Eshowe.

2 in terms of the insurance policy with the defendant, he is entitled to payment of the damages to his vehicle consequent to the collision.

The Plaintiff's Case

[10] The plaintiff testified and called one witness, Ntokozo Sifiso Cebekhulu, also known as Skwili.

The plaintiff testified at the time of the collision he was paying instalments in liquidation of the purchase price of the vehicle to ABSA bank, which had financed the purchase. After the collision and the repudiation of the claim, he paid several instalments and retained possession of the vehicle until he had it repaired in 2009 and thereafter sold it.

[11] The plaintiff testified that when the collision occurred he was driving the vehicle and was its sole occupant. He was sober and not under the influence of any intoxicating liquor or substance. The police had made notes at the scene of the collision before a breakdown vehicle from Eshowe had towed the vehicle away from the scene of the collision. He thereafter reported the accident at the Eshowe police station to a police officer Ngcobo and then submitted the claim to the defendant.

[12] Under cross examination the plaintiff testified that the vehicle had hit a light pole, an electricity fuse box and then capsized with its side against the roller door of a shop. The vehicle was damaged on the left front and side, the front grill and the bonnet. The damage to the left mirror was exacerbated when the vehicle was towed. There was no mechanical damage of damage to the

engine or to the bottom, right or rear of the vehicle, but he could not remember if there was any further damage to the top of the vehicle.

[13] Further damage in the form of body rust occurred to the vehicle after the collision, which was also repaired in 2009. He had paid the panel beater for the repairs not more than R60 000. The radiator and the air conditioner were also not functioning as a result of the accident and he had paid approximately R30 000 for those repairs. He thereafter 'sold' it to his own company by merely effecting a change of registration of owner.

[14] The plaintiff clarified that the reason he had recorded in the claim form that the vehicle was damaged beyond economical repair and had sued for the difference between the pre-collision and the post-collision value was that, although he had eventually effected repairs to the vehicle, he had taken the motor vehicle immediately after the collision to the panel beaters authorized by the defendant, who had advised him that the vehicle could not economically be repaired. He was insistent that he was entitled to enforce the claim because of the assessment and report by the defendant's panel beaters that the vehicle was damaged beyond repair.

[15] When he instituted the claim, he was still paying the instalments for the vehicle. He was therefore entitled to claim the difference between the pre-collision and post-collision value. It was only after the claim had been repudiated and the insurers failed to repair the motor vehicle that he had to accumulate the funds before he could attend to the repairs.

[16] The plaintiff testified that from about 18h00 on the evening of 20 August 2006, he had been at a social gathering at a carwash outside the town. He had left the carwash to drive to the BP Garage in Eshowe just after midnight to purchase the cool drink. The collision occurred between 01h00 and 02h00, although he inserted the time of the collision as 01h45 in the claim form as he was trying to be specific.

[17] He testified that his home was in the opposite direction from the direction he approached the garage and a distance from the car wash. When he reached the garage Cebekhulu approached him for a lift to Umlalazi which is in the direction of Melmoth and the plaintiff's home but is also far into the rural area. The plaintiff therefore did not give Cebekhulu a lift but left him at the garage. He left the garage shortly thereafter to return to the carwash.

[18] The plaintiff described Osborne Street as a dual road, as the traffic on it travelled in two directions. It is wide because there were two lanes on each side of the road and a parking lane. At the time of the collision there were no vehicles parked on the side of the road. He estimated that the collision occurred about 6 kilometres from the garage.

[19] Just after he left the garage he noticed two vehicles which appeared to be racing each other, travelling toward him. He first saw the vehicles when they were approximately 500 - 600 metres away from his vehicle. He was travelling at approximately 60 kilometres per hour on the slow lane or the left of the two lanes, when he observed the approaching vehicles in his rear view and side mirrors. The vehicles were travelling very fast and occupying both the fast and the slow lanes. He was unable to see whether they were travelling parallel to each other because the light affected his vision.

[20] He attempted to take evasive action by swerving left but lost control of the vehicle, and collided into the pole and the electricity fuse box on the pavement and then into the roller door which was on the window of a shop on the other end of the pavement. He did not brake but his foot remained on the accelerator. The speed of the approaching vehicles did not allow him to consider manoeuvring the motor vehicle into the parking lane or pulling his vehicle to the side. He was unable to estimate how long after the collision the vehicles passed his vehicle as he was concentrating on the evasive action he had taken.

[21] The plaintiff denied that he was not the driver of the vehicle or that he only

arrived at the scene of the collision after the collision occurred or that the occupants of the vehicle were two other male persons or that the driver of the vehicle had smelt of alcohol and appeared to be intoxicated.

[22] Cebekhulu testified that he knew the plaintiff as at 20 August 2006; he used to meet him when he was looking for employment in Eshowe. On 20 August 2006 at approximately 1h00, while hitching a lift at the BP Garage to his home in Umlalazi, Cebekulu saw the plaintiff alone in his Isuzu double cab bakkie with registration plates MUZZY-ZN in the parking area of the garage. He had asked the plaintiff for a lift but the plaintiff advised him that he was not going to Umlalazi and shortly thereafter, the plaintiff left the garage.

[23] Cebekhulu confirmed that when the plaintiff left he was still alone in his vehicle. Shortly after the plaintiff left the garage, Cebekhulu heard a crash. He then walked approximately ten minutes to the scene of the collision. The police were already there and the plaintiff had alighted from the vehicle.

[24] Under cross examination Cebekhulu testified that while standing outside the garage still hitching, he had observed the plaintiff exit the shop at the garage with some cool drinks and drive off. Shortly after the plaintiff left he heard a noise but as it sounded like a car crash, he walked at a normal pace about ten minutes from the garage to the scene of the accident.

[25] Cebekhulu testified that he could not estimate the distances, but when advised that the width of a soccer field is a 100 meters, he estimated the distance from the garage to the collision to be between 50 to 100 meters. Although the accident took place fairly close to where he was standing at the garage, he could not see the collision because of a slight bend in the road.

[26] He disputed the evidence of the plaintiff that the collision occurred 5 to 6 kilometres away from the garage, when it was put to him that if the collision had occurred 5 to 6 kilometres away, he could not have heard the sound of

the collision.

[27] Cebekhulu described Osborne Street as a long street which passes the garage in both directions. He confirmed that there are no intersections between the garage and the scene of the collision. Before the car crash, he only saw vehicles that were travelling in the opposite direction to the direction the plaintiff had driven. He denied seeing any vehicles travelling in the same direction as the plaintiff after the plaintiff left. He refused to furnish a reason why he had not noticed any vehicles passing him in the same direction as the plaintiff, alleging that he was not paying any attention to vehicles travelling in the opposite direction because he was looking for a lift.

[28] Cebekhulu testified that on 18 April 2007 he had volunteered to make a statement to the police although he had not observed the collision, because he met the plaintiff who told him the police had been looking for him and it was necessary that he made the statement. The police had been unable to locate him as he was no longer employed where he had been previously. In the statement Cebekhulu confirmed that he arrived at the scene of the collision after the accident.

The plaintiff then closed its case.

The Defendant's Case

[29] The defendant called two witnesses, Ivan Roestoff and Athanasils Galanopoulos.

[30] Roestoff testified that he was travelling with a friend Jean-Pierre Smith along Osborne Street in the early hours of 20 August 2006. After they passed the BP garage, they saw a collision that had occurred approximately 50 meters from the garage. As they passed the collision, Roestoff heard someone whistling as though to gain their attention. They turned back and stopped at the scene of the accident. He noticed that the vehicle was on its side but could not recall if anyone was in the vehicle. He had spoken to the owner of

a bakery in town at the scene. When he and Smith were about to leave, a young black man approached them and asked for a lift. They gave him a lift and dropped him off somewhere near Smith's home. Roestoff could not remember what the man looked like and could not comment on his state of sobriety or whether he smelt of alcohol.

[31] Roestoff confidently estimated that the distance from the garage to the accident was 50 metres and was certain that one would be able to hear the crash from the forecourt of the garage.

[32] Galanopoulos who owns a bakery which is situated in the same building as the BP garage, testified that about 1h00 on 20 August 2006 while working in the bakery, he received a report from his assistant that there had been an accident on Osborne Street. Galanopoulos proceeded to the scene of the collision. He estimated the distance from the forecourt of the garage to the scene of the collision to be between 100 - 130 meters. He also confirmed that if one had stood in front of the bowsers in the garage, the scene of the collision would have been visible.

[33] When he arrived at the scene there were people milling around. He noticed that there was one person seated inside the cab of the vehicle and another person was climbing out of the vehicle. The spectators in the area were reluctant to get close to the motor vehicle because of the electrical wires lying around as the fuse box had been destroyed during the collision.

[34] Galanopoulos testified that he knows the plaintiff well although at that time he did not know that he was the owner of the vehicle. He also did not notice the plaintiff when he arrived at the scene of the collision. However shortly thereafter he saw him standing near the vehicle, which was at the same time as when he observed the two people in the cab of the vehicle: the person inside the cab and the other person who was climbing out of the vehicle. He specifically saw the plaintiff standing near the vehicle while the one person was still inside the cab of the vehicle.

There was no cross examination of this witness. The defendant closed its case.

Argument

[35] In argument, Mr Mfungula submitted that much of the evidence was common cause: the contract of insurance, the fact that the plaintiff's motor vehicle was insured in terms of the contract, and that the vehicle was damaged as a result of the collision that took place on 20 August 2006. The issue in dispute was whether the plaintiff was the driver of the vehicle. Mr Mfungula submitted that the plaintiff's evidence was satisfactorily corroborated by his witness. The defendant's witnesses however did not support its version as they could not confirm how long after the collision they arrived. Although Galanopoulos 'created the impression that there was a person inside the vehicle who required assistance', it did not detract from the plaintiff's version that he was the driver of the vehicle. The accident report recorded by the police at the scene of the accident is consistent with the plaintiff's evidence. Further the defendant's witness places the plaintiff at the scene of the accident.

Mr Mfungula contended in conclusion that on a consideration of the conspectus of evidence, the plaintiff had satisfied the onus on him to prove on a balance of probabilities that he was the driver of the vehicle and had therefore proved the liability of the defendant.

[36] In response Mr Topping submitted that the contract of insurance demanded good faith, honesty and full disclosure on the part of the plaintiff. Although the defendant had originally relied on two clauses in the policy viz clause 1 (c) of the specific exceptions and clause 8 of the general conditions which related to claims tainted with fraud or dishonesty and the forfeiture of benefits, he conceded that the defendant had failed to place any evidence before the court that the driver was intoxicated or that the person who had taken a lift with Roestoff was in any way involved in the collision. The defendant therefore relied only on clause 8 which was extremely broad.

He submitted that the defendant's witnesses did not deny that they had not seen the plaintiff driving the vehicle, but it was clear from the undisputed evidence of Galanopoulos that there had been at least two people in the cab of the vehicle. There was therefore no truth in the claim of the plaintiff, which leads to the irresistible conclusion that the claim was fraudulent.

In contrast, the plaintiff and Cebekhulu were inconsistent and dishonest. The plaintiff's testimony that the collision had occurred 6 kilometres away from the garage was an indication that he was not at the scene of the collision when it occurred. His evidence that there were two vehicles racing down the road was not corroborated by Cebekhulu. Further Cebekhulu's statement was intended to corroborate the plaintiff's version only as it did not assist with the investigation as Cebekhulu was not present when the collision occurred.

Mr Topping submitted in conclusion that the court should grant absolution from the instance because of the plaintiff's attempts to mislead the defendant and his connivance to obtain a benefit in terms of the insurance.

[37] Both counsel agreed that if the court were to determine the issue of liability in favour of the plaintiff, the costs should be granted for the plaintiff but reserved for finalization together with quantum. But if the court were to find for the defendant, costs ought to be ordered on the High Court scale, as the plaintiff had chosen to litigate in the High Court.

Evaluation

[38] The court was faced with two contradictory and mutually destructive versions, which lay to be resolved in accordance with the technique set out in **Stellenbosch Farmers Winery Group Ltd & Another v Martell et Cie & Others 2003 (1) SA11 SCA** at Paragraph [5] at 14I - 15E :

> 'The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may be summarised as follows. To come to a conclusion on the disputed

> issues the 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 of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in 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 extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to *(b)*, a witness' reliability will depend, apart from the factors mentioned under *(a)* (ii), (iv) and (v), on (i) the opportunities he had to experience and 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.'

[39] The plaintiff displayed an impressively confident and artless demeanour when he testified clearly and coherently. Under crossexamination he was able to respond to questions leading up to the actual occurrence of the collision in a convincing and frank manner. He is clearly an intelligent and articulate person. However his convincing artlessness began to show cracks when he was cross examined on the collision and the cause thereof.

[40] The plaintiff testified that just before the collision, he was driving at 60km an hour down Osborne Street which was clear of vehicles and there were no vehicles parked on the side. According to the plaintiff, after he had travelled about 6 km from the garage, he saw 2 vehicles approximately 500-600

metres behind him, apparently travelling adjacent to each other, approaching at a great speed. He then took evasive action by swerving to the left; however he did not brake and his foot remained on the accelerator of the vehicle. He lost control of the vehicle which crashed into the pole, then the power box and finally came to rest with its side against the roller door on the far side of the pavement.

[41] Although the court could not fault the plaintiff's evidence that it was night and he could not estimate the distance of the vehicles accurately and that he was concentrating on the collision and was therefore unable to estimate how soon thereafter the two vehicles passed the scene of the collision, there were a number of improbabilities in his evidence and material discrepancies between his evidence and that of his witness Cebekhulu, whose testimony was intended to corroborate the plaintiff's version that he was the driver and sole occupant of the vehicle at the time of the collision.

[42] Although not an impressive witness and clearly lacking the sophistication of the plaintiff, Cebekhulu testified satisfactorily in his evidence in chief about his encounter with the plaintiff at about 1h00 on the night of 20 August 2006 at the BP Garage. He corroborated the evidence of the plaintiff that he did not give him a lift as he was not travelling in the direction that Cebekhulu needed to travel, and confirmed that the plaintiff was alone in his vehicle.

[43] However when under crossexamination, he was required to furnish details of the period between when the plaintiff drove off and his arrival at the scene of the collision, Cebekhulu was clearly uncomfortable; he hesitated before responding and was not convincing in the responses elicited from him. Even allowing for the intimidatory court environment and the lapse of time since the date of the collision, in my view, his hesitation and uncertainty arose from his inability to respond frankly and unhesitatingly as the events he testified to, were not within his own knowledge, but a fabrication intended to corroborate the plaintiff's version.

[44] This was apparent from his responses. He refused to commit himself about whether 2 cars passed him at great speed shortly after the plaintiff drove off from the garage, eventually admitting that he may have heard the sound if they did drive past him but he had not noticed or heard such vehicles as he was concentrating on hitching a lift. Given the undisputed evidence that there were no intersections between the BP Garage on Osborne Street and the scene of the collision, if the vehicles did approach the plaintiff's vehicle as he alleged, then they would have had to pass the garage, while Cebekhulu was still there. Although Cebekhulu denied seeing or hearing the 2 vehicles, he heard the noise of the collision which according to his version occurred 50 – 100 metres from where he was. He then walked approximately ten minutes to cover that distance, in a direction opposite to the one he was travelling in to observe the collision. This testimony not only contradicted his allegation that he was concentrating on getting home rather than paying attention to other events around him but also impacted adversely on his credibility.

[45] I turn to the improbabilities and material discrepancies in the evidence in support of the plaintiff's case.

[46] The first improbability arises from the inability of the plaintiff to move off the traffic lanes on Osborne Street and onto the parking lane without losing control of the vehicle and his failure to brake, if as alleged, he was only driving at a speed of 60 km per hour and in the lane next to the parking bays, while the approaching cars were still 500 – 600 metres away. Instead the number of points of contact with objects until the vehicle came to rest are indicative of a speed greater than the plaintiff alleges he was driving at. Further his evasive action is extreme if the approaching vehicles were at a distance of 500 – 600 metres.

[47] There is a material discrepancy in the evidence of the plaintiff and Cebekhulu about the distance from the garage to the scene of the accident. Cebekhulu testified that the plaintiff drove off leaving him in the forecourt of

the garage. Shortly thereafter he heard the sound or noise which caused him to walk ten minutes to the scene of the collision. The plaintiff testified that he drove 6 km from the garage before the collision occurred. If this was true, the sound certainly would not have carried to the garage where Cebekhulu was, no matter how acute his hearing. Even allowing for a marginal error and acknowledging that the plaintiff had estimated the distance, the discrepancy is far too great to dismiss as insignificant or a mere error. Both Cebekhulu and Roestoff testified that the collision occurred about 50 – 100 metres from the garage. Galanopoulos estimated the distance as between 100 – 130 metres. If the accident occurred 100 - 130 meters from the garage it would not have taken Cebekhulu ten minutes to get to the scene of the collision.

[48] The next material discrepancy arises from the evidence of the plaintiff that he first sighted the two vehicles approaching while they were 500 – 600 meters away and Cebekhulu's evidence that, although the collision took place only 50 – 100 meters away from the garage, he was unable to see the accident scene as there was a bend in the road. Their evidence is in direct contradiction. Cebekhulu was also coy in his responses when asked about the vehicles. This calls into question the existence of the two vehicles that allegedly caused the plaintiff to swerve, and renders his version as to how the collision occurred improbable and untrue. Galanopoulos's testimony that the scene of the collision would have been visible from the forecourt of the garage, in the area where Cebekhulu was hitching also renders Cebekhulu's evidence unreliable.

[49] The statement which Cebekhulu volunteered to the police was of no assistance to the police investigation as he was not present at the time of the collision. Its value lay in its corroboration of the plaintiff's version in respect of the dispute between the parties. In any event as pointed out by Mr Mfungula, the police had already taken a statement on the accident report which was consistent with the plaintiff's version. Cebekhulu's statement was therefore not necessary to the police. Given that the

statement was made after the repudiation and at the instance of the plaintiff's advices to Cebekhulu, the veracity and objective thereof is called into question. It is also notable that in his statement Cebekhulu states that he looked 'immediately I heard a noise of collision then when I looked because it was not too far from where I was, I then saw Mr Sithole vehicle capsize after collided with a transformer and a street light' . A reading of the statement seems inconsistent with his oral testimony as it appears that he was able to observe the collision from where he was standing.

[50] Therefore even without reliance on the evidence of the defendant's witnesses the plaintiff's case fell short, particularly as a result of the lack of credibility, reliability and consistency which permeates the evidence in support his claim.

[51] Although there was no need to disbelieve Roestoff, who had no interest in the matter, he did not assist the defendant's case in that he did not observe who was driving the vehicle at the time of the collision, and as conceded by Mr Topping, there was no value to be attached to his evidence about the person they had given a lift from the accident scene. He did however testify that the collision occurred in proximity to the garage.

[52] Similarly Galanopoulos had no interest in the case. He knew the plaintiff well and merely observed his presence at the scene. Although Galanopoulos's evidence on its own did not conclusively sustain the defendant's version that the plaintiff was not the driver of the vehicle when it crashed, his evidence that there was one person in the cab of the vehicle while the plaintiff was standing outside the vehicle, places in dispute the plaintiff's allegation that he was the sole occupant of the vehicle.

[53] This militates against the probability and credibility of the plaintiff's version. The irresistible inference to be drawn from the evidence that there must have been at least one person other than the plaintiff in the vehicle and therefore the plaintiff's allegation that he was the sole occupant of the

vehicle cannot be true. The further inference that follows logically is that the plaintiff has alleged that he was the sole occupant of the vehicle because he was not the driver when the collision occurred and that his false allegation was intended to sustain his insurance claim.

[54] From the aforegoing evaluation of the conspectus of evidence, in particular the material discrepancies and improbabilities as set out *supra* which weigh against the credibility of the plaintiff's case and the reliability of his witnesses, I am not persuaded that the plaintiff has discharged the onus on him to prove on a balance of probabilities that he is entitled to the relief he seeks.

Costs

[55] There is no reason why costs should not follow the result of the action. I am in agreement with the submission that the defendant ought to be indemnified by an order for costs on the high court scale as the plaintiff instituted the action within the jurisdiction of this Honourable court.

Order

[56] In the premises the following order do issue:

1 The defendant is granted absolution from the instance.

2 The plaintiff is ordered to pay the defendant's costs, taxed or agreed, on the High Court Scale.

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Murugasen J

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