

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)**

Case No. CA 446/12

Date Heard: 5/8/13

Date Delivered: 19/8/13

Not Reportable

In the matter between:

OLIVER DAVID HART

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Motor vehicle accident – claim for damages – mutually destructive versions given by plaintiff and insured driver – proper approach to factual findings – consideration of credibility of witnesses and probabilities.

JUDGMENT

PLASKET, J:

[1] It is common cause that, on 30 November 2007 at the corner of Bells and Dickerson Roads, Queenstown, a collision occurred between a motor cycle ridden by Mr Oliver Hart, the appellant, (Hart) and a Toyota bakkie driven by Mr Zolani Banzana, the insured driver (Banzana). Hart subsequently issued summons against the Road Accident Fund, alleging that the accident was caused by the negligence of Banzana and claiming damages in the amount of R1 289 822.63, interest thereon and costs.

[2] At the commencement of the trial before Bloem AJ, an order was made separating the merits from quantum. In his judgment on the merits, he found

that the probabilities in respect of the versions of Hart and his witnesses, on the one hand, and Banzana and his witness, on the other, were evenly balanced, that as a result Hart had not succeeded in discharging the onus that rested upon him and that consequently the action had to be dismissed with costs. This is an appeal against that order which comes before us with the leave of the trial judge.

Legal principles

[3] From what I have stated in the introductory paragraphs of this judgment, it will be apparent that this appeal is directed against the factual findings made by the court below. As a general rule, courts of appeal are reluctant to interfere with factual findings made by trial courts unless they are convinced that those findings are clearly wrong.¹ In *Santam Bpk v Biddulph*² Zulman JA explained the principle and its limits as follows:

'Whilst a Court of appeal is generally reluctant to disturb findings which depended on credibility it is trite that it will do so where such findings were plainly wrong . . . This is especially so where the reasons given for the finding are seriously flawed. Overemphasis of the advantages which a trial Court enjoys is to be avoided, lest an appellant's right of appeal "becomes illusory". . . It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration.'

[4] The proper approach to determining the facts in a civil trial was set out authoritatively in this court by Eksteen AJP in *National Employers' General Insurance Co Ltd v Jagers*:³

'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

¹ *R v Dlumayo & another* 1948 (2) SA 677 (A) at 705-706.

² *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5.

³ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-G. See too *Mabona & another v Minister of Law and Order & others* 1988 (2) SA 654 (SE) at 662C-F; *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA) para 5; *Dreyer & another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) para 30.

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.'

The versions of the parties

[5] The trial judge was confronted with two conflicting versions. He had to decide which of them was probably true. He concluded that he was unable to find that Hart's version was the more probable. That finding is attacked by Hart in this appeal.

[6] The evidence of Hart, supported by Johan Beukes, who was riding his motor cycle behind Hart, and Werner Olivier, who was riding his motor cycle in front of Hart, was this. As they rode along Bells Road on their way to work, Banzana's bakkie which was travelling in the opposite direction turned to its right to enter Dickerson Road. By this time, Olivier had passed Dickerson Road but Hart and Beukes had not.

[7] Banzana crossed the centre of the road to begin to effect the turn. Hart's motor cycle, travelling on its correct side of the road, collided with Banzana's bakkie. Hart fell off the motor cycle and slid along the road. The motor cycle ridden by Beukes then struck Hart's motor cycle, resulting in Beukes also falling off.

[8] Olivier, in the meantime, heard the collision and saw in his rear view mirror that Hart and Beukes had fallen. He turned around and returned to the scene of the accident, parking his motor cycle on the side of the road pointing in the direction from which he, Hart and Beukes had come. He claimed that as he ran past Banzana (who was still in his bakkie) to render assistance to his friends, he told Banzana not to move the vehicle. He noticed later, however, that Banzana had moved the bakkie by reversing across Bells Road and parking it near his motor cycle. All three were certain that the bakkie had crossed the centre of the road and that the point of impact was on Hart's side of the road.

[9] Banzana's version changed through the trial. In essence, however, it was that while his bakkie was stationary on the correct side of the road and waiting to turn right into Dickerson Road, the motor cycles of Hart, Olivier and Beukes collided with each other and Hart's motor cycle collided with his bakkie. A witness, warrant officer Siphon Ntingashe, was called in support of Banzana's evidence. I shall refer to his evidence as and when it is relevant in my analysis that follows.

Analysis

[10] In the judgment of the court below, while the evidence of each witness is summarised, there is insufficient analysis of the evidence and little consideration of the credibility of the witnesses and of the probabilities inherent in their versions. While it is true that the trial judge stated that Banzana was, in his view, an honest witness, it is clear from what follows this finding that he must, in fact, have been referring to Ntingashe as he is the person who drafted the sketch plan referred to in relation to this finding.⁴

[11] I do not lose sight of the fact that the trial judge made certain findings and observations. He found that Banzana had indicated that he intended to

⁴ Para 15.

turn right, a fact that Hart was not able to deny, but which takes the matter no further, one way or the other.

[12] He also found that it was improbable that Olivier had accelerated shortly before the accident thus creating a bigger gap between him and Hart, describing this as being 'too much of a co-incidence'. I am not sure that this is relevant at all to Hart's case. It is contained in a statement made by Hart that was put to him in cross-examination. Counsel read from the statement that, as Banzana's bakkie approached, 'the motor cycle in front of me accelerated creating a gap between [my] motor cycle and his' and asked whether this was correct. Hart's response was: 'Ja die gap was daar of hy accelerate ek is nie heeltemaal seker nie.' Hart disavowed this statement on the basis that the person taking it must have misunderstood him. It was, consequently, not his version and in any event takes the matter no further. That said, however, I can see nothing inherently improbable in Olivier having accelerated. (Olivier's evidence was that if he had accelerated it was when he changed gears and it would not have been by much.) The trial judge appeared to accept, however, that Olivier's motor cycle was not damaged in the accident.

[13] As to where the impact occurred, the trial judge recorded that the relevant witnesses were *ad idem* that it was near the middle of the road but there was no certainty concerning the side of the imaginary middle line on which it occurred. It would be more accurate to say that, according to Hart and his witnesses, the collision occurred on their side of the middle of the road while Banzana stated that his bakkie was facing directly up Bells Road on the correct side of the middle of the road when the collision occurred. This is the crux of the case and which party's version is accepted will depend on questions of credibility and the probabilities.

[14] Insufficient consideration was, however, given to the credibility of Hart, Beukes and Olivier in relation to the probabilities inherent in their version. And no proper consideration was given to the credibility of Banzana and Ntingashe in relation to the probabilities inherent in Banzana's version. A general resort to the inherent probabilities is no use in a case such as this because, viewed

in a vacuum, it is as probable (or improbable) that a motor cyclist riding with other motor cyclists may collide with one of them and then collide into a vehicle waiting to turn, as it is that a motorist may collide with a motor cyclist when turning across his line of travel, as a result of miscalculation or not having seen the motor cycle. In order to decide whether Hart has discharged the onus it is necessary to consider both versions within the context of the credibility of the witnesses and the probabilities that flow from their versions.

[15] In the judgment of the court below there is no criticism of Hart and his witnesses. In my view, there is nothing in the record that indicates that any of them could be criticised in any significant respect. All gave evidence which was consistent and straight forward. They struck me as honest witnesses. All three of them testified that Olivier's motor cycle was unscathed, as he had passed Dickerson Road when the accident occurred, and that Hart's motor cycle collided with that of Beukes only after the collision with Banzana's bakkie. They also all testified that when the collision occurred, Banzana's bakkie had crossed the middle of the road onto their side of it and that it was at an angle of 45 degrees to a line drawn parallel to the middle of the road. On the probabilities, it was this last fact that made it possible for Hart's motor cycle to slide into the path of Beukes' motor cycle.

[16] It must, in my view, be accepted that Olivier's motor cycle was indeed unscathed and that he did not collide with either Hart or Beukes. Apart from the credible evidence of Hart, Beukes and Olivier to this effect, the evidence of Banzana does not account credibly for it as one of the damaged motor cycles and Ntingashe only saw two damages motor cycles on the scene. The acceptance that Olivier's motor cycle was not damaged is an important factor in favour of Hart's version probably being true and Banzana's probably being false.

[17] The version put up by Hart is not improbable: Banzana's conduct on this version, of turning into the path of Hart's motor cycle is explicable on two possible bases: he either did not see the motor cycle for some reason; or he

thought that there was sufficient time and space to turn across Bells Road, and miscalculated in this respect.

[18] In my view, Banzana could not justifiably be said to have been a good witness for two overriding reasons: his version of how the collision occurred was, as I shall demonstrate, something of a moving target and, in any of its manifestations, was improbable.

[19] In his plea, there is no mention of all three motor cycles colliding with each other before Hart's motor cycle collided with Banzana's bakkie. Instead, it is pleaded that Hart's motor cycle collided 'with another motorbike'.

[20] The version that was put to Hart, Beukes and Olivier varied. It was put to Hart that the three motor cycles 'het met mekaar gebots' and that Hart's motor cycle slid into the front of Banzana's bakkie before sliding to Hart's left to the side of the road where 'al drie daar op 'n bondel beland het'.

[21] When the version was put to Beukes, however, it had changed, presumably on Banzana's instructions. It was put to Beukes that a collision had occurred between the motor cycles of Olivier (in front) and Hart (in the middle) which resulted in Hart's motor cycle colliding with Banzana's bakkie before 'die derde fietsryer [Beukes] die spul raakgery [het]'.

[22] Yet another version was put to Olivier, again one presumes on the instructions of Banzana. It was that Hart collided with him, whereupon he and Hart fell, Beukes collided with both of them and Hart's motor cycle 'came spinning out to damage the Toyota where it stood stationary facing the town'.

[23] When Banzana testified in chief the version changed again. His evidence was that Hart's motor cycle collided with Olivier's before sliding head-on into the front of his bakkie, rebounded into the line of travel of Olivier's motor cycle, apparently first overtaking it, before Olivier's motor cycle collided with it and rode over it. When he was asked about Beukes' motor

cycle, he said that it 'also went over the other one, over the other two, all three of them'.

[24] When he was cross-examined, Banzana stated that in the collision between the motor cycles of Hart and Olivier that occurred after the collision with his bakkie, Olivier's motor cycle did not go over Hart's but it was 'the driver of the first bike who went over the second bike, not the bike itself'. He was then asked what had happened to the third motor cycle – that of Beukes. He said that it was 'against the pavement', that it was not close to the other motor cycles and that he did not notice it collide with the other motor cycles. He was asked whether he saw it collide with the pavement but he said that he did not know what had happened to it and he saw it 'lying next to the pavement'. He was pertinently asked whether his evidence had been that the third motor cycle had collided with or come into contact with any of the others and his answer was: 'I did not notice that.'

[25] These differing versions of how the collision was said to have occurred are material and impact negatively on the credibility of Banzana. As indicated above, his version also suffers from a number of improbabilities.

[26] First, it cannot account for the credible and consistent evidence of Hart, Beukes and Olivier that Olivier's motor cycle was unscathed. This, as I shall show, is evidence which is also supported by the evidence of Ntingashe.

[27] Secondly, his explanation of how Hart's motor cycle slid back onto its correct side of the road after colliding with his bakkie is improbable in the light of his evidence that his bakkie was facing directly up Bells Road and was struck head-on by the motor cycle: if anything, the momentum of Hart's motor cycle, if it was not arrested completely by the head-on collision, as one would have expected, would have taken it towards the right hand side of the road because it commenced its slide on the left hand side of the road and struck the bakkie on the right hand side of the imaginary middle line of the road.

[28] Thirdly, as a matter of physics (and geometry for that matter) it strikes me as highly improbable that having of necessity decelerated as a result of the impact with Banzana's bakkie, Hart's motor cycle could have overtaken Olivier's motor cycle, so that Olivier would collide with it.

[29] The evidence of Ntingashe does not support Banzana in important respects. He only mentioned two motor cycles as having been involved in his accident report – those of Hart and Beukes. The plan he drafted only depicts two motor cycles as having been involved in the accident. He stated that he only saw two damaged motor cycles on the scene. As for the third motor cycle, he said that it was not on the scene and he did not know where it was. These aspects of Ntingashe's evidence support the version of Hart and his witnesses.

[30] In addition, once it is accepted – as it must be – that Olivier's motor cycle was not involved in any collision and had passed Dickerson Road before Hart's motor cycle collided with Banzana's bakkie, that is destructive of Banzana's version. As I have pointed out, however, the probabilities are, in any event, heavily stacked against Banzana's version.

[31] In these circumstances, I am of the view that the trial judge erred in his assessment of the evidence and in concluding that the probabilities were evenly balanced. He ought to have found that the probabilities favoured Hart's version being true and Banzana's being false. Once that is accepted, it follows that Hart established that the collision occurred on his side of the road and that Banzana, in attempting to turn into Dickerson Road but colliding with Hart instead, was negligent in that he failed to keep a proper look-out; attempted to make a right hand turn at a time when it was dangerous or inopportune to do so; and failed to avoid colliding with Hart when, by exercising reasonable care and skill, he could and should have done so.

Conclusion

[32] In the result, Hart discharged the onus resting upon him to establish his case on a balance of probabilities. That being so, his appeal must succeed.

[33] The following order is made:

(a) The appeal succeeds with costs.

(b) The order of the court below is set aside and is replaced with the following order:

‘(i) It is declared that the defendant is liable for the damages that the plaintiff proves in due course arising from the motor vehicle accident that occurred on 30 November 2007 at the corner of Bells and Dickerson Roads, Queenstown

(ii) The defendant is directed to pay the plaintiff’s costs.’

C Plasket

Judge of the High Court

I agree.

M Lowe

Judge of the High Court

I agree.

B Majiki

Judge of the High Court

APPEARANCES:

Appellant: A G Dugmore, instructed by Neville Borman and Botha,
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Respondent: S H Cole, instructed by N N Dullabh & Co, Grahamstown