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

Case No: AR 219/2013

In the matter between:

UMZIMKULU PLANTERS **Appellant**
(Registration Number 1966/000001/24) (Defendant in the Court *a quo*)

and

A SCROOBY **Respondent**
(Plaintiff in the Court *a quo*)

JUDGMENT

Vahed J:

[1] In *Wright & anor v AIB Finance & Leasing & anor* [2013] IESC 55 the Supreme Court of Ireland (Clarke J with McKechnie and MacMenamin JJ concurring) commenced a judgment with the following paragraph:

'Accidents can and do happen in unusual circumstances and in unusual ways. The evidence which a court may have to assess in attempting to work out how, as a matter of probability, a particular accident occurred can range from eyewitness accounts to scientific or forensic evidence which may cast some light on the circumstances surrounding the accident in question. Even when the court has become satisfied as to how an accident did in fact occur, there may well remain legal questions as to how the possible liability of any relevant parties

for such an accident is to be assessed. This case involves an accident which, I think it is fair to say, occurred in somewhat unusual circumstances and where the trial court was faced with a difficult task not just in attempting to ascertain how the accident occurred but also in considering the legal consequences of any such findings. This appeal is concerned with an assertion that the trial Judge was in error, both in the way in which she assessed the facts and in the way in which the law was applied to those facts.'

[2] That opening paragraph could just as well serve as an introduction to this judgment.

[3] The present appeal, with the leave of the court *a quo*, is an appeal against a judgment delivered by Balton J concerning a collision where no eyewitness testimony was available and where all she had before her consisted of the evidence of two opposing accident reconstruction experts. She accepted the evidence of one, rejected the evidence of the other, and found that the appellant's driver was wholly to blame for the collision which was the subject matter of the dispute before her. But first, the facts.

[4] The appellant was the defendant in the court *a quo*, the respondent the plaintiff, and I shall refer to the parties as they were referred to in the court below.

[5] During the early hours of 20 December 2006 a collision occurred on the N2 National Road in the vicinity of Ezinqoleni, Harding, between the plaintiff's vehicle and the defendant's vehicle. The plaintiff's vehicle was a FAW truck which was referred to in the evidence as "the white truck" and the defendant's vehicle was a Mercedes Benz combination truck-tractor, it being an articulated vehicle with a truck

pulling two trailers. The defendant's vehicle was referred to in the evidence as "the red truck".

[6] At the time the road surface was wet with the white truck travelling in a southerly direction towards Port Shepstone and the red truck travelling in a northerly direction towards Harding. The drivers of both vehicles, who unfortunately died at the time of or shortly after the collision, were acting within the course and scope of their respective employments with the plaintiff and the defendant. Both vehicles sustained extensive and severe damage and were beyond economical repair. Both plaintiff and defendant pointed the finger of blame at the opposite party alleging, in their respective claims and counter-claims, various aspects of negligence on the part of each of the drivers.

[7] As I said earlier there was no eyewitness account as to what transpired and the parties each relied on the expert testimony of their respective accident reconstruction specialists. For the plaintiff that consisted of the evidence of a Miss Badenhorst and for the defendant it was the evidence of a Mr. Gibb. Both experts referred to various plans, photographs and diagrams and from their evidence it is not in dispute that the essential point of initial contact between the two vehicles was the right front corner of the white truck and the right and mid-front of the red truck. Although that was, as I indicated, the point of initial contact between the two vehicles, the natural forces that came into play after that initial contact caused extensive damage to other portions of both vehicles.

[8] Many photographs of the scene of the collision and of the damaged vehicles were put up and referred to at the trial. Of the scene these were taken during the daylight hours of the 20th of December 2006 and of those a composite panorama of

6 photographs became Exhibit “C” in the trial. Consistent with the adage that a picture paints a thousand words, this panoramic view showed the approaches to the scene of the collision from both directions as well as certain tyre and other road markings and, bolstered by the observations made by both experts when they visited the scene reveals the following:-

1. For the red truck approaching the scene of the collision the gradient was uphill and for the white truck the gradient was downhill.

2. Prior to approaching the scene of the collision the red truck would have had to have negotiated an S-bend before the path of travel for the red truck entered a straighter portion of the road.

3. Tyre marks caused by the red truck were visible on the tarred road surface and are still visible on the panorama.

4. It is common cause that those tyre marks were caused by the two front wheels of the red truck after its brakes had locked.

5. Except for when the red truck approached the immediate vicinity of the point of impact those tyre mark demonstrate that the red truck was wholly within its correct lane.

6. The tyre marks are visible from the point of initial impact and going back in the direction from which the red truck approached for at least nineteen meters.

7. At the point of initial impact the front of the red truck had marginally crossed over onto the opposite lane of travel with that point of initial impact being approximately one metre into that opposite lane.

[9] The essence of Miss Badenhorst’s opinion was that in the absence of any indicator as to why the defendant’s driver braked, the fact that the red truck encroached onto the opposite lane of travel into path of travel of the white truck

suggested that that is what caused the collision. Her conclusion was then that the driver of the red truck was to blame. She supported that conclusion with assessments of the post initial impact forces that came into play and inferences she drew from the damage sustained by both vehicles.

[10] In her judgment, the learned Judge *a quo*, after finding that it was common cause that the tyre marks were on the red truck's side of the road, went on to find, correctly, that they "veer slightly to the centre of the road". In my view, the learned Judge *a quo* then correctly observed: "[t]he question arises as to why would the [red] truck have braked and moved to the centre of the lane".

[11] The learned Judge a quo then went on to make the following observation in paragraph 20 of her judgment:-

'In Badenhorst's opinion the [red] truck was in the incorrect lane of travel. The rotation caused the [red] truck to rotate clock-wise from the area of impact, further into its incorrect lane of travel. The [white] truck moved out of the road because of the rotation and impact. She agreed that the [red] truck driver would have braked hard and thus locked his wheels and in those circumstances the driver had lost control.'

[12] In my respectful opinion, that paragraph contains the seeds of the learned Judge *a quo's* misdirection. She went on to say in paragraph 21:-

'In Gibb's opinion the [red] truck was on its right path of travel because of the skid marks. The skid marks start on the correct side of the road and veers slightly to the centre lane between the markings, close to where the collision occurred'

[13] With those observations the learned Judge *a quo* went on to indicate that she was unable to accept Gibb's view that the [red] truck must have braked because the [white] truck was in its path of travel. In my view she correctly observed that there "are endless possibilities as to what could have caused the [red truck] to brake. And then concluded that "[t]he marks clearly indicate that the [red] truck moved towards the centre line. By the time of first impact the vehicles were in the [white] truck's path of travel as explained by Badenhorst".

[14] With that observation the learned Judge *a quo* found for the plaintiff.

[15] In my view, having found that there were endless possibilities as to what caused the driver of the red truck to have applied his brakes at a time when he was still travelling wholly on his correct side of the road, it was incumbent upon the court *a quo* to examine whether any of those possibilities produced a reasonable probability.

[16] Clearly both Badenhorst and Gibb provided mutually destructive and irreconcilable versions on their respective reconstructions. The question that arises is whether those reconstructions are reliable and probable.

[17] The proper approach to wrongfulness and the determination of blame and the manner in which expert testimony is to be approached have been dealt with in a number of cases. A few bear repetition here.

[18] In *Roux v Hattingh* 2012 (6) SA 428 (SCA) the following observation was made at paragraph 25:-

‘Not every act or omission resulting in harm is actionable. This point was made by Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) when he said:

> “the first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that skade rus waar dit val. Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss.” ‘

[19] In *Wright* (*supra*) the Irish Supreme Court said the following:-

‘5.3 For example, evidence is often tendered from qualified engineers who seek to re-construct a motor accident in the light of some eye witness accounts coupled with forensic findings such as the location of vehicles post accident, debris, marks on the road and the like which may, for example, be recorded by members of [the police] investigating the accident in question. A court in attempting to reach a conclusion as to how such an accident occurred must, of course, take into account all of the evidence including accounts given by participants and independent eye witnesses but also any such expert or forensic evidence tendered. However, it needs to be noted that such evidence is not necessary to establish the facts. Eye witness accounts themselves can, if the court is satisfied as to their reliability, be sufficient to enable the court to reach a conclusion as to what actually happened. Such expert evidence can, of course, be led for the purposes of attempting to persuade the court that one or other account of the accident as given by the eye witnesses on either side should not be relied on because of what might be said to be an inexplicable inconsistency with the forensic record. Where one party has no direct evidence of its own but needs to challenge the account given by its opponent such expert evidence is also often important. Obviously, where such a case is made then the court needs to engage with all of the evidence and explain its findings of fact by reference to all of that evidence.

5.4 In some cases, of course, expert engineering evidence may be tendered with a view to assisting the court on the question of negligence or other wrongdoing. Such evidence may be material to the question of the standards which ought have been applied by, for example, an employer or even a motorist by reference to, for example, an appropriate distance to

keep from a car travelling in front in the same direction having regard to the speed of the cars concerned and the road conditions prevailing. However, it is important to keep in mind the distinction between those two types of expert evidence. One is relevant to the question of what actually happened and, in that regard, needs to be seen in light of all evidence touching on that question including eye witness accounts. Evidence of the second type is not relevant to what actually happened but is relevant to whether, on the facts as found by the trial judge, wrongdoing may be established.'

[20] In *Biddlecombe v Road Accident Fund* [2011] ZASCA 225 (30 November 2011) the following was said: -

'[8] The trial judge appreciated that there were mutually destructive versions given by the eyewitnesses on the state of the traffic lights at the time of the collision. That raised the question of the proper approach to such evidence in the light of the expert evidence. Basing himself upon the decision in *Abdo NO v Senator Insurance Company Limited* [1983 (4) SA 721 (E)] he said that he would provisionally assess whether Mr Biddlecombe had discharged the onus of proving on a balance of probabilities that Mr Motaung had been negligent on the basis of the eyewitness evidence, and then consider and take into account the expert evidence. In *Abdo* Kannemeyer J said that it was "convenient at the outset to consider the approach to be adopted if one is faced with both expert evidence and the testimony of eye witnesses in a case such as this". He then went on as follows:

"In *Putzier v Union and South West Africa Insurance Co. Limited* 1973 ECD (unreported) ADDLESON J was faced with such a problem. The decision in *Putzier's* case was reversed on appeal on the facts. The judgment of the Appellate Division is also not reported but the approach adopted by ADDLESON J in the following terms is not questioned therein:

'Counsel did not refer me to any authority dealing directly with the correct approach to a dispute between the experts and the eyewitnesses. It seems to me however that unless the opinion of the experts is either uncontroverted or incontrovertible, one should look first at the evidence of the eyewitnesses, if any. If such eyewitnesses are unacceptable then naturally the Court is bound to decide, if possible, which of the opinions of the various experts is preferable and to found its judgment on such opinion. On the other hand, where a choice can be made on a balance of probabilities and on accepted principles between two sets of eyewitnesses, the Court should first make a provisional assessment of which of the versions of the eyewitnesses is acceptable. Having provisionally accepted one or other version, the Court should then consider the expert evidence and decide whether that evidence displaces the provisional findings made on the evidence of the eyewitnesses. In this regard, where the *onus* is on the plaintiff and where there is a dispute between the experts, it is my view that, if the eyewitnesses favour the plaintiff, the evidence of the defendant must be shown to displace that of the plaintiff's eyewitnesses; but, if the eyewitnesses favour the defendant, the plaintiff must show that the evidence of

his experts must be accepted in preference to the experts and the eyewitnesses for the defendant. If, at best, the court is left in doubt as to whether the experts for the plaintiff have advanced opinions preferable to those of the defendant, then it seems to me that the plaintiff has failed to displace the findings made in respect of the eyewitnesses and has consequently failed to discharge the *onus* on him.' "

Kannemeyer J adopted that approach subject to a qualification that "in the final result, a decision must be reached on the evidence as a whole and the above approach must be no more than a convenient method of analysis of that evidence".

[9] However helpful that approach might have been in *Putzier* and *Abdo*, a matter on which I express no opinion, I share the view expressed in *Stacey v Kent* [1992 (4) SA 495 (C)], that "[i]t may be that the statements are too general and that one should treat each case on its own merits". In every case it is necessary for the trial judge to identify an appropriate point at which to commence the analysis of the evidence. In some cases that may be the eyewitness evidence, but in others it may be more appropriate to commence with the expert evidence. For example there may be physical evidence, such as skid marks, collision damage to the vehicles, the position of the vehicles after the collision or the location of debris that, when viewed in the light of established scientific data, such as the distance that a motor vehicle will travel at a particular speed, provides a definitive factual background against which to weigh the merits of the eyewitness accounts of what occurred. The evidence of the experts may be of great assistance in understanding and giving appropriate weight to this evidence. In such a case, to start with the eyewitness evidence and reach a provisional conclusion that the expert evidence must then 'displace' burdens the expert testimony with an onus that is not warranted and separates into two discrete enquiries what is a single enquiry.

[10] This is not to say that the caution with which our courts have always approached expert evidence on the mechanism by which motor accidents occur and their expressed preference for eyewitness testimony is not on occasions justified. As Eksteen J said in *Motor Vehicle Assurance Fund v Kenny* [1984 (4) SA 432 (E)]:

"Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training. Strange things often happen in a collision and, where two vehicles approaching each other from opposite directions collide, it is practically impossible for anyone involved in the collision to give a minute and detailed description of the combined speed of the vehicles at the moment of impact, the angle of contact or of the subsequent lateral or forward movements of the vehicles."

The expert tasked with reconstructing what occurred is often dependent for the reconstruction not simply on the application of scientific principle to accurate data but on calculations based on imperfect human observation. The fact that the reconstruction rests on a potentially imperfect factual foundation is the reason for caution in determining its evidential value. However, whether that is so in any particular case will depend upon an assessment of the degree to which it rests upon ascertainable and measurable facts and the application of scientific principles to those facts. It is undesirable for a court to adopt an *a priori* approach to its task of weighing eyewitness and expert testimony where the two conflict.'

[21] *Biddlecombe* was approved of in *Banglar Mookh, MV: Owners of MV Banglar Mookh v Transnet Ltd* 2012 (4) SA 300 (SCA).

[22] Applying those observations to the facts of the present case the crucial question remains this: can Mr Gibb's hypothesis be rejected out of hand?

[23] It is convenient to return to *Wright* (*supra*). The Irish Supreme Court said there:

'7.1 In the course of argument it was suggested that the difficult situation in which the trial judge found herself resembled that famously commented on by Sherlock Holmes in, amongst other works, The Adventure of the Beryl Coronet, where he said "*It is an old maxim of mine that when you have excluded the impossible, whatever remains, however improbable, must be the truth."*

7.2 This approach has been the subject of judicial comment in particular in the speech of Lord Brandon of Oakbrook in "*The Popi M" Rhesa Shipping Co SA v Edmunds* (1985) 1 W.L.R. 948 where, at p. 955, the following is stated:

> *"My Lords, the late Sir Arthur Conan Doyle in his book The Sign of Four, describes his hero, Mr. Sherlock Holmes, as saying to the latter's friend, Dr. Watson: "How often have I said you that, when you have eliminated the*

impossible, whatever remains, however improbable, must be the truth?" It is, no doubt, on the basis of this well-known but unjudicial dictum that Bingham J. decided to accept the shipowners' submarine theory, even though he regarded it, for seven cogent reasons, as extremely improbable.

In my view there are three reasons why it is inappropriate to apply the dictum of Mr. Sherlock Holmes, to which I have just referred, to the process of fact-finding which a judge of first instance has to perform at the conclusion of a case of the kind here concerned.

The first reason is one which I have already sought to emphasise as being of great importance, namely, that the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

The second reason is that the dictum can only apply when all relevant facts are known, so that all possible explanations, except a single extremely improbable one, can properly be eliminated. That state of affairs does not exist in the present case: to take but one example, the ship sank in such deep water a diver's examination of the nature of the aperture, which might well have thrown light on its cause, could not be carried out.

The third reason is that the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have concurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden".

7.3 However, some more recent United Kingdom authorities also bear consideration. In *Datec Electronics Holding Limited v United Parcel Service Limited* (2007) R.T.R. 40, Lord Mance did note that:-

> *"Inevitably, any systematic consideration of the possibilities is subject to a risk that it may become a process of elimination leading to no more than a conclusion regarding the least unlikely cause of loss".*

7.4 Having reviewed all the authorities, the Court of Appeal of England and Wales in *Ide v ATB Sales Limited* [2009] R.T.R. 8, concluded, per Thomas L.J. (at para. 6), the following:-

> *"As a matter of common sense it will usually be safe for a judge to conclude, where there are two competing theories before him neither of which is improbable, that having rejected one that it is logical to accept the other as being the cause on the balance of probabilities. It was accepted in the course of argument on behalf of the appellant that, as a matter of principle, if there were only three possible causes of an event, then it was permissible for a judge to approach the matter by analysing each of those causes. If he ranked those ranks in terms of probability and concluded that one was more probable than the others, then, provided those were the only three possible causes, he was entitled to conclude that the one he considered most probable, was the probable cause of the event provided it was not improbable".*

7.5 Sir Arthur Conan Doyle was not, of course, commenting on legal proof. The maxim which he put in the mouth of Sherlock Holmes was not intended as a formal means of legal analysis. There may well be, as Lord Brandon pointed out in the *Popi M*, circumstances where the level of evidence concerning how some event occurred or what caused it maybe insufficient to allow any legally sustainable conclusion to be reached so that the case will, in those circumstances, turn on the question as to which party bore the burden of proof.

7.6 However, it is also necessary to note the second point made by Lord Brandon. There may be circumstances where the dictum of Sherlock Holmes is applicable. As pointed out in the subsequent cases cited, an analysis of the relevant circumstances may reveal that there are, as a matter of logic, only a small number of possibilities. An analysis of those possibilities may demonstrate that an explanation which might, in advance, have appeared to be intrinsically improbable has, in fact, become probable or even very probable. It is important in that context to distinguish between how one might have viewed a situation in advance and how one views the same event after the event in the light of the available evidence concerning what might have occurred.

7.7 Thus, a proper analysis of the overall situation may lead the Court to conclude that there are, for example, only two possible explanations as to the manner in which an event occurred. Neither of the possibilities might, before the event, have seemed likely to provide an explanation for a possible future event which, itself, might seem unlikely to occur. However, if the event did, in fact, occur then one or other explanation, however unlikely same might have appeared in advance, must be true. In that context one of the possible explanations may appear, on the evidence, to be more probable than the other. Such an approach seems to me to accord with a proper evidence based approach coupled with logic and may lead a court to properly conclude that an event which might, in advance, have seemed unlikely to occur in a particular manner, has, as a matter of probability, actually occurred in that manner. Counsel for [the appellant] made the point, correctly so far as it goes, that the trial judge came to the view that she was satisfied to a high degree that the facts were as she found them. This, it was argued, was inconsistent with a "least improbable" approach. However, for the reasons I have sought to analyse, there is no reason in principle why, given that a potentially improbable event did in fact occur, an explanation which, in advance might have been seemed unlikely, becomes, in fact, probable or even highly probable.'

[24] As I have indicated it is clear, and common cause, that prior to the collision the red truck was wholly within its lane of travel when its brakes were applied in circumstances which caused its front wheels to leave tyre mark imprints of at least nineteen meters in length. The suggestion was that those tyre marks could only have been caused when the front wheels of the red truck locked. That much was accepted by everyone in the court *a quo* and, if that is accepted, it must be fairly assumed that the brakes were applied at some point prior to when the marks first appeared. The conclusion is inescapable that the red truck was clearly and consistently within its path of travel when its brakes were initially engaged. It was also accepted in the court *a quo* that when the brakes locked it was no longer possible to maintain any control over the direction of travel of the red truck and that is what caused it to proceed on its path more or less within its lane of travel until it veered slightly to its right. To my mind it is eminently probable that something, equally probable the white

truck, was in its path of travel causing the driver of the red truck to engage his brakes.

[25] The result is this. The court *a quo*, in my view, was faced with two equally probable versions and the impossible task of having to choose between the two. There was nothing, in my respectful view, to tip the scales in favour of one over the other. The court ought, in my view, to have returned a finding of absolution from the instance.

[26] I make the following order:

a) The appeal succeeds with costs.
b) The order of the court *a quo* is set aside and replaced with the following:-

"On both the plaintiff's claim in convention and the defendant's claim in reconvention there will be absolution from the instance with costs."

_____
Vahed J

I agree

_____
Van Zÿl J

I agree

_____
Nzimande AJ

Appearances:

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Date of Hearing	:	05 February 2014
Date of Judgment	:	18 March 2014