



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE No: A279/10

In the matter between:

PIET HOORNIET

Appellant

And

THE ROAD ACCIDENT FUND

Respondent

JUDGMENT DELIVERED ON 10 DECEMBER 2010

HENNEY, AJ:

INTRODUCTION

[1] The appellant sued the respondent in the Kuils River Magistrate's Court for compensation in damages for injuries allegedly sustained by him in a motor vehicle accident. This is an appeal against the determination by the court below that the respondent was not liable for any damages which the appellant might have

suffered.

[2] The appellant had alleged that his claim arose out of a collision that occurred on 20 January 2006 on the R300 near Brackenfell, between an unidentified Golf Hatchback vehicle of which neither the driver nor the owner could be identified and a bakkie motor vehicle with registration number CV11828, driven by Mr A Rooi in which he was a passenger. The evidence that was adduced did not support the occurrence of a collision as alleged, but the witnesses who testified on behalf of the plaintiff did say that the driver of the bakkie had lost control because of the manner in which a green VW Golf had swerved recklessly between the traffic so as to drive onto the Old Paarl Road off-ramp in an apparent attempt to avoid a police road block that was ahead on the R300.

[3] The appellant had alleged that the collision was solely due to the negligence of the driver of the unidentified Golf motor vehicle. The respondent would in fact be liable to compensate the appellant if the unidentified driver allegedly to blame for the incident was in any degree causally at fault.

[4] It was agreed between the parties prior to the commencement of the proceedings that the issue of liability should be decided separately from and before the issue of quantum. The hearing in the court below proceeded in accordance with that agreement.

[5] After evidence was led in the court *a quo*, the magistrate dismissed the claim on the merits with costs. The appellant now appeals that decision. The

main attack against the judgment of the court *a quo* is based on the overall findings of the court on the merits of the case of the appellant.

[6] In particular, counsel for the appellant contends that the magistrate had erred in making adverse credibility findings about the evidence of the two witnesses, Leon Adams and Belinda Cassiem, due to differences in their evidence.

[7] It was further argued that the magistrate erred by accepting the evidence of a policeman at the scene, Barend Swanepoel, and by rejecting the version of Adams and Cassiem that the driver of the green VW Golf drove in a negligent manner which caused the white bakkie wherein the Applicant was a passenger to lose control and cause an accident.

[8] During the course of the trial, the appellant did not testify but two witnesses, Leon Adams and Belinda Cassiem testified.

For the respondent, Barend Swanepoel testified.

[9] **EVIDENCE FOR THE APPELLANT**

Briefly stated, Leon Adams testified as follows:

On the night of 20 January 2006, accompanied by his family, he travelled in his

vehicle in a northerly direction on the R300 freeway in the right hand lane. At the Old Paarl Road off-ramp, he observed that a number of vehicles in front of him had backed up for a police roadblock. As a result of this, he also stopped his vehicle in the right hand lane. He observed a police officer that was standing on the left hand side of the road with his back towards the oncoming traffic having a discussion with some persons in a white Venture vehicle (this person later emerged to be Swanepoel). In his rear view mirror, he observed a green Golf approaching in his direction, driving in the same lane wherein his vehicle had been standing.

This green Golf swerved in front of a white bakkie at the Old Paarl Road off-ramp. The white bakkie thereafter veered into the right lane, and then swerved immediately to the right, passing the front of his vehicle on the right hand side of the road onto the sand and grass island, dividing traffic travelling in the different directions on the R300. It landed on a steel rope fence on the grass island and overturned. According to the witness, the accident would not have occurred, had it not been for the green Golf that swerved in front of the white bakkie. According to this witness, the bakkie had swerved out of control as a consequence of the manoeuvres by the driver of the green Golf.

[10] Belinda Cassiem's evidence, briefly summarised, was as follows:

She was a passenger in the vehicle driven by Adams. She confirmed the evidence of the previous witness except that she said that the incident happened next to and in front of their vehicle. She also stated that the green Golf was behind them and

then in front of their vehicle. Thereafter the vehicle swerved to the right in front of the bakkie. She further testified that they were moving the whole time when the incident happened.

[11] **THE RESPONDENT'S WITNESS**

Barend Swanepoel testified that he was an inspector in the South African Police Services, and had 20 years of service. On 20 January 2006, he was on duty on the R300. He was standing next to his parked police vehicle, about 2 kilometres from the roadblock. His vehicle was parked on a yellow parked island at the Old Paarl Road off-ramp. He stood with his back to the oncoming traffic and was busy talking to another person. He then heard the screeching of tyres, turned around and saw the white bakkie moving in his direction and witnessed it roll onto the sand and grass dividing island. He did not see any green Golf. He went with a colleague to the accident scene. His colleague spoke to the driver who had told his colleague that he had braked and lost control over the vehicle. The driver did not mention anything about a green Golf. He filled in an accident report from information given to him by the driver. He would have written in the accident report if mention was made of a green Golf.

[12] **EVALUATION**

The appellant's main ground of appeal was that the magistrate erred in his finding of facts against the appellant.

In particular, where the magistrate erred in finding that Adams and Cassiem were

not credible and reliable witnesses. Also where the magistrate found that there was not a green VW Golf vehicle that drove in a negligent manner by swerving in front of the bakkie which caused the driver to take evasive action, whereby it lost control of the vehicle causing the accident.

[13] It is trite that a court of appeal generally will not interfere in the factual findings of a trial court unless, there are compelling reasons to do so; especially, where the findings are based on credibility. See **R v Dhlumayo and Another 1948 (2) SA 677 (A) at 700**.

In **Santam Bpk v Biddulph 2004 (5) SA 586 (SCA) at page 589 para 5**, it was held that:

"Whilst a court of appeal is generally reluctant to dismiss the findings which depend on credibility, it is trite that it will do so where such findings are plainly wrong".

The court says further:

"This is especially so where the reasons given for the findings are seriously flawed".

[14] The magistrate in his assessment of the evidence was not impressed with the evidence of Adams and Cassiem. His criticism of their evidence was largely based on the discrepancies and differences in their evidence.

[15] One of the major points of criticism levelled against the evidence of these

two witnesses was the differences in their respective descriptions as to how and where precisely the green Golf had swerved in front of the white bakkie wherein the appellant was a passenger.

Adams said it happened behind them; whilst Cassiem said it happened next to and in front of them. Adams said in his evidence that this green Golf was at all times behind them.

[16] Other points of criticism against their evidence were whether their vehicle was stationary or moving when the incident occurred.

[17] Another point of criticism, in my view of lesser importance, was that the witnesses gave different versions with regards to what destination they were travelling to. There were other discrepancies of lesser importance, but the magistrate was of the view that the cumulative effect thereof together with the main points of criticism mentioned made the evidence of these two witnesses untrustworthy.

[18] Whilst being critical of Adams and Cassiem, the magistrate was impressed by the evidence of Swanepoel. He weighed the evidence of Swanepoel up against the evidence of these two witnesses and further stated as regards the main issue, that is whether there was a green VW Golf involved or not, that Swanepoel would have seen it if there had been. He further stated that the driver of the vehicle did not mention any green VW Golf when he spoke to Swanepoel after the incident. In the light of this, he concluded that was highly unlikely that there was a green

Golf.

[19] In my view, in his assessment and evaluation of the evidence, the magistrate took a very simplistic view. He was more concerned with the number of contradictions in the evidence of the witnesses than the importance thereof. He lost sight of the fact that the adjudication of evidence in a factual dispute is not dependant on the number of times a witness contradicts him or herself or is contradicted by another witness. An assessment of the context of the evidence is also required, as well as a consideration of the probabilities inherent in such context.

[20] The magistrate was unfair in his criticism of Adams and Cassiem, where he failed to take cognizance of the fact that when the incident occurred, it was not a static scene, but a sudden event that was rapidly unfolding. He failed to have regard to the fact that under such circumstances, it is to be expected that, after almost 3 years, the eyewitnesses would not have a perfect recollection of the events. It is not uncommon in cases like these that there would be differences between the witnesses. Indeed it would be unusual in the circumstances if the witnesses' impressions of a rapidly moving event were identical.

[21] These two witnesses were independent civic minded people who at the scene, presented themselves to assist with the injured and made themselves available as witnesses. They stopped and made a statement about the VW Golf to one of the other policemen attending at the scene. They had no interest in the appellant's claim and had no reason to fabricate or make up a version to benefit

any party. The magistrate does not appear to have considered this.

[22] The fact that there are differences in the detail of their evidence should, if anything, rather have counted in their favour because it would tend to confirm that there was no conspiracy between them to fabricate their evidence.

[23] In my view, by accepting the evidence of Swanepoel who says that there was no green Golf on the scene that would have caused the driver of the bakkie to have lost control of his vehicle, the magistrate was clearly wrong. With his back turned to the R300 Swanepoel would not have seen the green Golf and at the stage when it was driving on the off-ramp he would have no reason to appreciate the significance of how it came there or indeed to take any notice of it whatsoever.

The thing that caused Swanepoel to turn around and look at what was happening on the R300 was the sound of brakes screeching just before the bakkie in which the appellant was a passenger overturned. Swanepoel's attention would in the circumstances naturally have been focused on the bakkie. It would not have been on a vehicle travelling down the off-ramp to the Old Paarl Road. His evidence therefore could not have been used to disprove the eye-witness evidence of Adams and Cassiem about the presence of the green Golf.

[24] On a conspectus of evidence, what stands out in the evidence of Adams and Cassiem is the presence of the green Golf and their common impression that it was being driven in a way that endangered other traffic on the R300.

[25] It is also improbable in the absence of any other explanation that the driver

of the white bakkie would have manoeuvred his vehicle in this way had it not been for some intervening action, that had been explained by the witnesses. In my view therefore there is an overwhelming probability in favour of the acceptance of the evidence of the two witnesses for the appellant that the actions of the driver of the green VW golf caused the driver of the bakkie in which the appellant was being conveyed to lose control. It does not matter that the driver of the bakkie might also have been contributorily at fault.

[26] **FINDING**

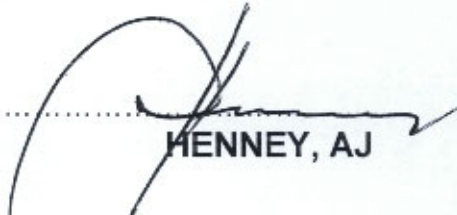
I am therefore of the view, that the magistrate erred in holding in favour of the respondent. He should have on the evidence of Adams and Cassiem found that there was a green Golf that was driven by an unknown driver in a negligent manner. He should also on the evidence of Adams and Cassiem have found that as a result of this green Golf that was driven negligently, it caused the driver of the bakkie wherein the appellant was a passenger to lose control, resulting in the appellant sustaining injuries and suffering damages. It follows that the appeal should succeed.

[27] The appellant has yet to prove that he suffered damages. The costs of the hearing in respect of the issue reserved for separate determination should therefore be costs in the cause.

[27] **THE ORDER**

In the result, I propose that the following order should be made:

- (a) The appeal succeeds with costs;
- (b) The order of the trial court is set aside and replaced by the following:
'The issue of liability reserved for separate determination is decided in favour of the Plaintiff. The costs of the action incurred thus far, shall be costs in the cause.'



HENNEY, AJ

I agree, and it is so ordered.



BINNS-WARD, J