

**IN THE HIGH COURT OF SOUTH AFRICA  
(EAST LONDON CIRCUIT LOCAL DIVISION)**

**CASE NO. EL 257/2016  
CASE NO. ECD757/2016**

In the matter between:

**LUCIAN BOTHA**

Plaintiff

and

**KIRK ATTORNEYS**

Defendant

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**JUDGMENT**

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**MBENENGE JP:**

*Introduction*

[1] The plaintiff, who was at all times relevant hereto a building contractor, was involved in an accident whilst driving a motor vehicle with registration letters and number [...] outside of Cradock on 5 April 2013. The motor vehicle veered off the road and overturned. As a result of the accident, the plaintiff was severely injured.<sup>1</sup>

[2] The defendant, from whom the plaintiff seeks to recover damages,<sup>2</sup> is a firm of attorneys conducting business in East London.

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<sup>1</sup> It is alleged that the plaintiff suffered a cervical 1 fracture (anterior and posterior arches); multiple avulsion fractures of the transverse processes of the C3-C7 vertebrae; displaced flake fracture of the C6 vertebra; vertebral artery injury, fracture of the first rib on the right; fracture of the left acetabulum; fracture of the right acetabulum and dislocation of the posterior hip with sciatic nerve injury causing drop foot.

<sup>2</sup> Past hospital expenses; past medical expenses; estimated future medical expenses; past loss of earnings; estimated future loss of earnings and general damages in respect of shock, pain and suffering, disability, disfigurement and the loss of amenities of life (the total amount of the claim being R4 030 000.00).

[3] The claim is predicated on the allegation that the plaintiff had a viable and sustainable claim against the Road Accident Fund (the Fund) for the recovery of all damages suffered, resulting from the injuries he sustained. It is further alleged that the defendant had held a mandate on behalf of the plaintiff to institute an action against the Fund, which the defendant negligently allowed to prescribe, hence the claim, at this stage, is against the defendant, and not the Fund.

[4] Because the accident is said to have occurred on 05 April 2013, the claim against the Fund would prescribe on 04 April 2015.<sup>3</sup>

[5] The plaintiff claims that the accident resulted solely from the negligence of the driver of the unidentified vehicle who was negligent by, *inter alia*, allowing the vehicle to encroach onto the plaintiff's correct side of the road at a time when it was dangerous and/or inappropriate to have done so or driving in such a way that the plaintiff was compelled to take emergency evasive action to avoid a head-on collision on the plaintiff's correct side of the road.

[6] The defendant disputes being liable to the plaintiff. More particularly, involvement of any unidentified motor vehicle in the accident and thus the existence of a viable or sustainable cause of action against the Fund are denied.

#### *Issue for determination*

[7] The issue which the parties have isolated from all others and which this court has been called upon to determine is whether, on the facts of this case and, but for<sup>4</sup> alleged professional negligence, the plaintiff would have successfully pursued a claim against the Fund.

[8] For the plaintiff to be successful, he must prove, on a balance of probabilities, that he was injured in a motor vehicle accident that arose as a result of negligent

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<sup>3</sup> See regulation 2(1)(b) of the Road Accident Fund Regulations, 2008 (promulgated under section 26 of the Road Accident Fund Act 56 of 1996 (the Act) and published in Government Notice No. R770 dated 21 July 2008, as amended by Government Notice No. R347 dated 15 May 2013), which provides:

"A right to claim compensation from the Fund under section 17(1)(b) of the Act in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of neither the owner nor the driver thereof has been established, shall become prescribed upon the expiry of a period of two years from the date upon which the cause of action arose, unless a claim has been lodged in terms of paragraph (a)."

<sup>4</sup> This is the test applied in determining whether a party has been negligent or not.

driving of the driver of the unidentified motor vehicle; conversely, if there was no other motor vehicle and/or there was no negligence on the part of the driver of the other vehicle *a fortiori*, there would be no claim against the Fund.

### *Plaintiff's Case*

[9] The first of the plaintiff's witnesses who testified was Dr Des Stigant,<sup>5</sup> a clinical psychologist. He is suitably qualified to express opinions on the *sequelae* of brain injuries, treatment and prognosis. He was, in the course of his professional work, asked to examine the plaintiff. Based on the information gleaned from Doctor Olivier's medico-legal report and the consultations held with the plaintiff shortly before the hearing, on 10 October 2018, he generated a neuropsychological report. In his report he has recorded that the plaintiff had suffered a small cerebral infarct and cerebral haemorrhaging. He has also commented on the deficits that occur subsequent to a traumatic brain injury, these being cognitive and personality dysfunctions. Loss of memory is one of the dysfunctionality areas. The plaintiff had told him, during consultations, that after his discharge from hospital he was confused, saw things in a hallucinatory manner and became aggressive. These symptoms, said Dr Stigant, are consistent with one who has been involved in an accident and suffered brain injury. Patients suffering from these symptoms will usually heal over a period of 18 months to two years.

[10] Dr Stigant did not access the plaintiff's hospital records. He only took the plaintiff at his word regarding his mental state after the accident. He could also not comment on the reliability of the plaintiff's version in comparison to any other version.

[11] Mr Christiaan Kriel, a pharmacist, was also called to testify. He is familiar with medicines such as Tramaset, Lirica and Dormonot. These drugs are supplied with package inserts which indicate that the user may become dizzy, lose consciousness, become confused and suffer from mental impairment, hence patients are advised to exercise caution when taking these drugs. He also mentioned certain

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<sup>5</sup> The transcript inadvertently refers to him as "*Stekend*", whereas it is clear from his curriculum vitae that his correct surname is "Stigant".

side effects associated with use of Tramaset, namely, psychiatric disorders, euphoria, anxiety, insomnia and nervousness. He has no personal knowledge of whether any of these side effects were displayed by the plaintiff.

[12] The plaintiff also testified in pursuit of his claim. He does recall having been involved in a motor vehicle accident on Friday, 05 April 2013. Having been a building contractor at the time in question, he worked on various building projects around Cradock. He stayed on the farm Spekboomberg, located approximately 23 kilometres from Cradock. After knocking off on the Friday in question at about 5pm he went home, took a shower and thereafter drove to Cradock for dinner and to watch a televised rugby match. After he had dined he drove back to the farm and, along the way, was involved in the accident that is the subject of this action.

[13] The plaintiff's narration of how the accident occurred is this:

“I was travelling and cars were coming towards me and I saw, in the far distance, there was a bright light and then I thought well that guy will dim maybe when he is closer and then I kept in my lane and then it became closer **and I thought well this guy is not going to dim and he is moving over towards my side. He is coming more over to my lane** and I got very on my nerves and I thought what is this guy now doing. Is he asleep or what is his plan? When is he going to now go back to his lane and then it happened quickly. He must have, I don't know, he must have travelled fast, I don't know, but then I tried to avoid, **I thought to myself this guy is coming now towards me** and the distance is closing terribly fast. I have to try and avoid him and I thought well I'm going to try and go left and see maybe if I can miss him that way, but **then in a split second I just saw here is an embankment down here and I thought okay well let me try and go right and then I went right and then I just saw that my vehicle spun out of control and I lost control and then I couldn't remember anything.**”<sup>6</sup> (Emphasis is mine.)

[14] Whilst still in hospital the plaintiff would hear voices and for the most part not conscious of where he was. He heard that road construction workers found him next to the road in a ditch, and that is how he ended up being in hospital.

[15] He explained that he had seen “*the big truck*” approaching all of a sudden and in the short space of time was unable to take evasive action. The approaching truck was so fast that he had no time to slam on brakes and stop. He did not think that hooting would have helped. After the accident his next recollection was being told

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<sup>6</sup> Sic.

that he was in hospital. He was also told that an ambulance had taken him to hospital. He never had any discussion with his wife after the accident. His hip was operated on. After the operation he was in a coma. His wife was told that he had suffered a stroke. All this took place after he had been transferred to Greenacres hospital, Port Elizabeth. He was eventually transferred to the East London Hospital so as to be closer to his family.

[16] After the plaintiff had been discharged from the East London Hospital, he could still not walk properly and was in a wheel chair. He walked with the aid of a stick around his home. Due to pain he was on medication, with all the attendant side effects. He recalled that Tramaset, Lirica and Dormonot were prescribed for him.<sup>7</sup>

[17] It came to pass during July 2013 after he had been in need of legal advice that he was approached by an attorney, Mr van Breda. During consultations that ensued certain disclosures were made and notes taken in his quest for legal advice. The plaintiff said Mr van Breda never reverted to him despite numerous efforts he made to contact him.

[18] On a subsequent occasion after his health had improved, the plaintiff visited some relatives in Cradock and thereupon took his wife to the scene of the accident. At that point he could clearly remember how the accident had occurred. He says he was clear “[t]hat a truck ... went down the road ... and this is where [he] went off and [he could] clearly remember it.”

[19] The plaintiff was subjected to lengthy cross-examination by Mr *Jooste*, counsel for the defendant. He was asked about what facts came to mind when he, together with his wife, had visited the scene, and answered:

“The fact that a bright lights vehicle came on towards me and I was in a position that I was just this thing was going to hit me head-on if I don’t apply to go off the road somehow to avoid him.” (Sic.)

[20] The hospital records point to the vehicle the plaintiff had been driving as having merely overturned resulting in the plaintiff sustaining the injuries he did. There is also record of the plaintiff having successfully lodged a claim with Alexander

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<sup>7</sup> This has not been disputed by any of the other parties.

Forbes for repairs to his vehicle and in relation to which his wife stated that the plaintiff had “*lost control over his vehicle as it seemed he burst (sic) a tyre and ... rolled.*” He said he never furnished his wife with that version as he was still in a coma. At a later stage he did not query his wife about it because he was “*glad that they were paying [his] bakkie*”.

[21] The plaintiff was confronted with what he had stated to Dr Stigant namely, that he took evasive action and “*swerved to the left*”, and he responded:

“I don’t know why he used the word swerved. I didn’t write the report. I said I tried to go to the left and I did go a little bit to the left. I didn’t use the word, I didn’t know why he said in the report ‘*swerve*’.”

[22] In a letter dated 20 March 2015 which a Mr Nick Mijster of the defendant penned to the Department of Roads and Transport it was stated that the plaintiff had been driving “*when a truck travelling from the opposite direction, came into his lane of travel. After swerving to avoid hitting the truck, he ended up in a ditch.*”

[23] He was taxed further in relation to what manoeuvres he had made to avoid the alleged danger. The following excerpt from the transcribed evidence captures the essence of that engagement:

Mr Jooste: What I am asking you is did you lose control which caused you to go to the right or was it a deliberate decision to go to the right?

L Botha: Well I deliberate[ly] went to the right.

[24] He was asked:

“And there is a material difference between the version you gave Mr Stigant and the version you gave in court this morning. On your version to Dr Stigant, when your left wheels touched the gravel you lost control, which is different from when I cross examined you this morning where you said I then deliberately decided to take avoiding action to the right because there was a ditch and a donga ... on the left hand side”.

He responded:

“You are hundred percent correct ... I did feel the gravel and then I tried to go to the right and I did go to the right ...”

[25] It further emerged during the cross-examination that in his reply to a request for further particulars for trial purposes dated 20 July 2017 the plaintiff had described the accident as having been attributable to him “[losing] *control of his vehicle on an (sic) account of being blinded by an oncoming vehicle with very bright lights*”. He

also stated, in response to a related question,<sup>8</sup> that “*he was totally blinded by the bright spotlights emanating from the oncoming vehicle, [that] he was not able to identify any specific feature of the oncoming vehicle that would have enabled him to make further investigations.*” Against all this, his version was that he was avoiding a vehicle which had been encroaching onto his path of travel. When called upon to explain this discrepancy his response was “... *I don’t know I can’t answer that.*” (Sic.)

[26] The plaintiff explained that with the passage of time, he regained a more vivid picture of how the accident had occurred, in this fashion:

“Well in the hospital Your Honour if I can explain, when I was waking up now and then in hospital I could remember this bright lights blinding me, and I was brain damaged, as you heard yesterday so my brain started to heal as I exercised and tried to go off the meds and then I remembered, so I am telling you ... what happened, a truck came over to my side, or the big vehicle, if you want to call it a vehicle, and the lights blinded me and I had to take evasive action otherwise I would have been head on and dead.” (Sic.)

[27] Reference was also made to hospital records pointing to the plaintiff as having been fully conscious and stable when being admitted to and during his stay in hospital. In response thereto, the plaintiff simply stated that he had suffered a stroke and had been, for the better part, unconscious:

“Mr Jooste: But there doesn’t appear to be any recordal of a confusion or a coma that you suffered from in any hospital record, and you had the opportunity Mr Botha going through with your counsel and your attorney to find corroboration out of these records for your evidence that you suffered from these conditions that you are complaining of, you agree with me?

L Botha: Well I suffered a massive stroke.”

### *Defendant’s Case*

[28] Mr Henry van Breda of Changfoot van Breda Attorneys was the only witness called to testify for and on behalf of the defendant. He has been an attorney in private practice since 1998. He met the plaintiff at the latter’s house on 25 July 2013. He had

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<sup>8</sup> The said question was put as follows:

“What investigations or steps were taken by or on behalf of the plaintiff designed to identify the “unidentified vehicle” or the driver thereof...?”

received a telephone call from the plaintiff expressing a desire to see him. During the discussions that ensued Mr van Breda informed the plaintiff that he did not have a viable claim against the Fund and that they should rather investigate the possibility of pursuing a claim against Toyota. He said, because the plaintiff had given him conflicting statements<sup>9</sup> in relation to the accident, he was bound to withdraw from the case for ethical reasons, and informed the plaintiff as much. In the course of time he released the plaintiff's file to the defendant. When parting with the plaintiff he had cautioned him of looming prescription, were he to pursue a claim based on the second statement against the Fund. According to Mr van Breda at no stage did the plaintiff ever raise with him a complaint about his mental condition and his inability to narrate the facts of how the accident had taken place.

### *Legal Position*

[29] The circumstances of this case bring to focus the provisions of section 17(1) of the Act. The section reads:

“The Fund or an Agent shall:

- (a) ....
- (b) Subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person for any loss for damage which the third party has suffered as a result of any bodily injury to himself ... caused by or arising from the driving of the motor vehicle ... if the injury is due to the negligence ... of the driver of the other vehicle ...”

[30] It is trite law that a party who asserts has a duty to discharge the onus of proof. In deciding this matter the court must have regard to the probabilities and the credibility of the various witnesses and any documents relevant in determining the outcome.<sup>10</sup>

[31] In *Stellenbosch Farmers' Winery Group & Another v Martell ET CIE & Others*<sup>11</sup> the court laid down the guidelines applicable to the resolution of factual

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<sup>9</sup> One in July 2013 and a different one in March 2015.

<sup>10</sup> *National Employers' General insurance v Jagers* 1984 (4) SA 437 (E) 440D-G.

<sup>11</sup> 2003 (1) SA 11 (SCA).



disputes and the ascertainment of where the truth lies between conflicting factual assertions in the following terms:

“[5] To come to a conclusion on the disputed issues a 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 about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the 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, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events ...” (My emphasis.)

[32] The inherent contradictions in the plaintiff’s testimony *viz-a-viz* written statements made to other functionaries, including the police and hospital staff as well as against the objective facts must also be considered by the court in deciding the onus of proof.<sup>12</sup>

[33] In civil cases the evidence of a single witness, who is one of the parties, must be credible to the extent that his uncorroborated evidence must satisfy the court that on the probabilities it is the truth.<sup>13</sup>

### *Analysis*

[34] It is indeed so that only the plaintiff testified in relation to the events which gave rise to the accident, he having been the only person who witnessed the same, hence the court has been invited to choose between accepting the plaintiff’s version or rejecting it as being a fabrication in its entirety.

[35] Mr *Cole*, counsel for the plaintiff, premised his argument on the contention that the defendant bears the onus of “*proving*” that there was no other vehicle involved in the accident and that the plaintiff’s entire version is fabricated. He argued that the defendant can meet “*the onus*” by putting up a valid alternative version through the testimony of credible witnesses which must be accepted on a balance of probabilities. I disagree. In the first place, the defendant bears no onus of proof, but an evidentiary

<sup>12</sup> *City of Johannesburg Metropolitan Council v Ngobeni* (314/11) [2012] ZASCA 55 (30 March 2012).

<sup>13</sup> *Daniels v General Accident Insurance Co. Ltd* 1992 (1) SA 757 (C).

burden. The onus of proving the claim remains with the plaintiff. In discharging that onus the plaintiff must, subject to the principles adumbrated above, tender credible evidence.

[36] What if the version of the plaintiff, even before any testimony on behalf of the defendant is given, is, under cross-examination, shown to bear inherent contradictions? Can it be said that in such an instance the defendant bears a duty of “*proving*”, as contended, by putting up a valid alternative version? I think not. That is not my understanding of the legal position. As pointed out above, to come to a conclusion on the disputed issues a court must make findings on the credibility of the witnesses. Those findings in turn depend on subsidiary factors such as, *inter alia*, internal contradictions in a witness’s evidence and external contradictions with what has been pleaded.<sup>14</sup> To contend otherwise would be to suggest that in all instances, such as the present one, where there is only one version of the events which gave rise to the accident with no other eye witness testifying as to the collision and putting up the opposite version, the plaintiff’s mere say-so should be accepted without further ado.

[37] The defendant has sought to rely on records compiled by ambulance and hospital personnel regarding objective facts which the court must consider, and argues that these records set at naught the plaintiff’s version. However, there is no evidence of the reasons for the conclusions contained in those reports, nor is there any source of the information on the strength of which the documents were tendered.<sup>15</sup>

[38] In my view, here is where the plaintiff’s case crumbles. The plaintiff would have the court believe that he was avoiding an oncoming vehicle that had traversed his path of travel. This version flies in the face of the contrary version given when further particulars for trial were being furnished namely, that he veered off the road after the unidentified vehicle brightened its lights towards him. He could not explain this incongruity under cross-examination. One should not underestimate the furnishing of further particulars for trial purposes, the object of which is to prevent surprise, to

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<sup>14</sup> *Farmer’s Winery Group supra* at para [55].

<sup>15</sup> Compare with *Jacobs v Road Accident Fund* (3335/2009) [2012] ZAECPHC 40 delivered on 19 June 2012 at para [24].

ensure that a party is told with great precision what the other party is going to prove in order to prepare his case.<sup>16</sup> The plaintiff was further hard-put to explain whether his swerving manoeuvre had been deliberate or resulted from him losing control after his vehicle had partially touched the gravel on the left side of the road. It is also worth mentioning that after the plaintiff had benefited from the version allegedly made by his wife to the insurance company he took no steps, subsequent to regaining composure, to inform the insurance company of the true version that resulted in the accident. All this should be understood in the context that the plaintiff, on his own showing, furnished Mr van Breda with two different versions as to the occurrence of the accident, having not ever informed Mr van Breda that at some stage he had been unconscious.

### *Conclusion*

[39] Has the plaintiff established with the requisite degree of proof that there was another vehicle involved in the accident? Assuming that this has been established, did the driver of the unidentified vehicle drive in such a way that the plaintiff was compelled to take emergency evasive action to avoid a head-on collision on the plaintiff's correct side of the road or did the vehicle encroach onto the plaintiff's trafficable side when it was dangerous or inappropriate to do so?

[40] In light of the incongruities pointed to above, more particularly the internal contradictions in the plaintiff's evidence and external contradictions with the response given in the particulars for trial purposes as to what caused the accident, I find myself being not able to find in favour of the plaintiff. If the accident was caused by the alleged other vehicle approaching from the other side with exceptionally bright lights, the plaintiff could and should have simply taken his foot off the accelerator, slowed down and stopped his vehicle, which is what a driver blinded by the lights is required to do.<sup>17</sup> The matter of how the plaintiff ended up on the opposite side of the road is shrouded in mystery. It is not clear what made him lose control of his vehicle. Little wonder that the plaintiff was hard put to explain how the accident occurred.

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<sup>16</sup> *Engelbrecht N.O. and Others v Moheidien* (2717/2015) [2016] ZAWCHC 39 (31 March 2016) at para [21].

<sup>17</sup> See *Flanders v Trans Zambezi Express (Pty) Ltd* 2009 (4) SA 192 paras [14] – [16] and the authorities cited therein.

[41] In all these circumstances, the plaintiff's version falls to be rejected. He has not established negligence by another driver in order to establish a claim against the Fund.

*Order*

[42] The **plaintiff's claim is accordingly dismissed with costs.**

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**S M MBENENGE**

**JUDGE PRESIDENT OF THE HIGH COURT**

Counsel for the applicant : Mr *S H Cole*  
 Instructed by : Stirk Yazbek Attorneys  
 East London

Counsel for the defendant : Mr *P E Jooste*  
 Instructed by : Joubert Galpin Searle  
 Port Elizabeth  
 C/o Kirk Attorneys  
 East London

Date heard : 05, 06 and 07 November 2018

Date judgment delivered : 22 January 2019