/SG

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 25/5/2005
CASE NO: A1667/2004

UNREPORTABLE

In the matter between:

ROAD ACCIDENT FUND	APPELLANT (Defendant *a quo*)
And	
NALIN KANT SHARMA	RESPONDENT (Plaintiff *a quo*)
CASE NUMBER IN COURT *A QUO*:	26398/02
ROAD ACCIDENT FUND	APPELLANT (Plaintiff *a quo*)
And	
E E MCALISTER	RESPONDENT (Plaintiff *a quo*)
And	
NALIN KANT SHARMA	RESPONDENT (3rd Party *a quo*)

JUDGMENT

VAN DER MERWE, J

In case number 3921/2002 N K Sharma as plaintiff instituted action against the Road Accident Fund for the recovery of damages he

suffered in a motor vehicle collision to which I will later refer. In case number 26398/2002 E E McAlister instituted action against the same defendant for the recovery of damages she suffered in the same motor vehicle collision. N K Sharma was joined as a third party in McAlister's matter. At the trial the two cases were consolidated. It was furthermore agreed between the parties that there would be a separation in terms of rule 33(4) of the Uniform Rules of Court of the merits from the *quantum*.

Both actions are based on a collision which took place on 27 October 1997 between two motor vehicles on the road between Swartruggens and Groot Marico. The one motor vehicle, a Nissan Centra, was driven by Sharma, in which McAlister was a passenger. The other motor vehicle (the insured vehicle), a BMW, was driven by a certain Pule.

His wife was a passenger in that vehicle.

In this judgment I will refer to the two plaintiffs and the insured driver by name.

On 27 February 2004 the court *a quo* granted judgment in favour of Sharma against the defendant on such amount as the parties may agree

on 80% / 20% apportionment in favour of Sharma. The court *a quo* furthermore granted judgment in favour of McAlister against the defendant for payment of a sum still to be determined or agreed upon by the parties. Sharma was declared to be a joint wrongdoer in McAlister's claim and declared to be liable to make a contribution towards any amount payable to McAlister by the defendant, taking into account the degree of negligence apportioned and ordered in the judgment. The defendant was ordered to pay the cost of the action.

Leave to appeal was granted on 4 May 2004 on the grounds as set out in the notice of appeal. I will not deal with the grounds of appeal individually as they will be dealt with in general in what is to follow.

Sharma's and McAlister's case is that the collision was caused by the sole negligence of Pule who, according to them, drove his motor vehicle on his incorrect side of the road. This is denied by the defendant who alleges that the collision was caused by the sole negligence of Sharma who drove his motor vehicle on his incorrect side of the road. The court *a quo* therefore found that "the real issue is whether the collision occurred on the side of Sharma or Pule and whether the plaintiffs (ie Sharma and McAlister) discharged the *onus* resting on them and alternatively as argued by counsel for the defendant whether any

contributory negligence can be attributed to both Sharma and Pule and the extent of such contributory negligence, if any." The court *a quo* analysed the evidence and concluded that it was faced with two mutually destructive versions. In the course of its judgment the court *a quo* correctly referred to *Stellenbosch Farmer's Winery Group Ltd and Another v Martell et CIE and Others* 2003 1 SA 11 (SCA); *Selamole v Makhado* 1988 2 SA 372 (V); *Mabona and Another v Minister of Law and Order and Others* 1988 2 SA 654 (SE); and *Kamakuhusha v Commander, Venda National Force* 1989 2 SA 813 (V) indicating how a trial court should deal with such versions. The trial court also considered how to deal with contradictions in a witness's evidence.

On the question of a court's approach where it is faced with two mutually destructive versions, reference can also be made to the judgment of EKSTEEN AJP (as he then was) in *National Employers General Insurance Co Ltd v Jagers* 1984 4 SA 437 (ECD). At page 440d to 441 the following is stated:

> "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 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.

This view seems to me to be in general accordance with the views expressed by COETZEE J in *Koster Ko-operatiewe*

> *Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* (*supra*) and *African Eagle Assurance Co Ltd v Cainer* (*supra*). I would merely stress, however, that when in such circumstances one talks about a plaintiff having discharged the *onus* which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

As far as the credibility of the witnesses, in particular the witness Wilken to which I will later refer, is concerned, and the effect of contradictions in the evidence of witnesses and of a witness' own testimony is concerned, general note can be taken of the contents of the

1984 Oliver Schreiner *Memorial Lecture* delivered by H C NICHOLAS J, (as he then was), "Credibility of witnesses", published in 102 (1985) SALJ at 32. Under the heading "Veracity", the learned author says:

> "A witness is proved to be in error where his statements are contradicted by the proved facts or where he is guilty of self-contradiction. Where he has made contradictory statements, since both cannot be correct, in one at least he must have spoken erroneously. Yet error does not in itself establish a lie. It merely shows that, in common with the rest of mankind, the witness is liable to make mistakes. A lie requires proof of conscious falsehood, proof that the witness has deliberately misstated something contrary to his own knowledge or believe."

At page 35 NICHOLAS J deals with contradictions in particular and states the following:

> "The argument is often advanced in court that, because witnesses' accounts disagree, they lack veracity, and considerable time is spent in establishing, and basing

> argument on, contradictions and discrepancies. Such argument is fallacious."

The trial court analysed the evidence and concluded that the evidence presented on behalf of Sharma and McAlister was more probable than that of the defendant and therefore found that Sharma and McAlister discharged the *onus* that the collision occurred on Sharma's correct side of the road.

I do not intend analysing all the evidence again. It is only necessary to consider whether the evidence supports the trial court's findings.

There was a big difference between the parties as to where on the road between Swartruggens and Groot Marico the collision took place. Sharma testified that the collision took place approximately 25 kilometres outside of Swartruggens. He was supported in this respect by Wilkens and Smit, both independent witnesses. Reference was in each instance made to bluegum trees in the vicinity of a slight curve to the left as Sharma was travelling.

Pule indicated a place where the collision occurred which, according to the evidence of the independent witness Smit, is approximately 1 kilometre away from the Groot Marico Police Station. Pule's evidence cannot be correct. Had the collision occurred where Pule stated, the investigating officer would not have come from the Swartruggens Police Station but from the Groot Marico Police Station. Furthermore the Swartruggens Police Station would not have called a tow truck driver from Swartruggens had the collision occurred outside of their area.

The witness Mann who testified on behalf of the defendant stated that Wilken had great difficulty in pointing out the area where the collision occurred. That was denied by Wilken. The expert Grobbelaar who testified on behalf of Sharma and McAlister in turm testified that Wilken was able to immediately pinpoint the place where the collision occurred.

There was also a dispute as to the end positions of the vehicles after the collision. According to Pule the two cars ended up on the same side of the road, ie on Sharma's correct side of the road. On all the evidence placed before the trial court Pule's evidence in this respect is not correct.

The expert witness, Grobbelaar, who testified on behalf of Sharma and McAlister conceded that there are essentially two versions in this matter, namely that of Sharma who claims that Pule was on his side of the road and that of Pule who says that Sharma was on his side of the road. Grobbelaar also stated that without any physical evidence such as gouge marks on the road as to where on the road the collision actually took place, it is not possible for an expert witness to give an opinion about where the point of impact was.

The evidence of Wilken therefore becomes of the utmost importance. Wilken's evidence was to the effect that shortly after the collision he visited the scene in his official capacity as a member of the South African Police Service. According to him the collision occurred on Pule's wrong side of the road where he noticed gouge marks on the road surface.

Wilken's evidence was seriously attacked and criticised in the court *a quo* and during the appeal before us. In particular his evidence was criticised regarding his memory as to the point of impact.

It is common cause that there were at least two plans, one without a point of impact and an indication where on the cars the damage was. The other with a point of impact and an indication where the cars were damaged. It is also common cause that none of the police plans indicated that the collision occurred in a bend. Wilken was not responsible for the drawing of the plan and key thereto. That was done by Benadie who had passed away. Wilken could not say when the amendments to the plan were made and could merely say that he told Benadie that the plan was wrong and that he had to rectify it.

It was further submitted on behalf of the defendant that Wilken was not able, when he visited the scene of the collision, to see where the collision occurred because it was dark, that he was not interested in a point of impact and that he did not see any marks on the road. In support of this submission reference was made to the evidence of Mann who testified that Wilken did not mention any gouge marks on the tar surface.

Grobbelaar testified that when he went with Wilken to the scene of the collision, not only was Wilken able to immediately say where the collision occurred, but on questioning him about the point of impact, Wilken mentioned the gouge marks on the tar surface.

The joint minute of the experts on behalf of Sharma, McAlister and the defendant states that the experts are in agreement that gouge marks would be expected in a collision of the nature in the instant case. That lends strong support for Wilken's evidence.

Sharma testified that the collision occurred on a straight road close to a curve to his left. It was therefore argued on behalf of the defendant that Sharma, instead of negotiating the bend, continued straight on and therefore collided on Pule's correct side of the road with him. That was denied by Sharma and is also contrary to the evidence of Wilken. Even Mann conceded that on the information available to him it appeared as if the collision occurred on Sharma's correct side of the road.

The trial court concluded that Wilken was an honest and reliable witness in spite of criticism that might be levelled against his evidence. The trial court was in a position to see and hear Wilken and the other witnesses.

In my judgment the trial court correctly concluded that the probabilities favour Sharma and McAlister in that the collision occurred on Sharma's correct side of the road.

On the finding of the trial court there was, in my judgment, no room for an apportionment of damages. That has, however, become irrelevant because no cross appeal was lodged.

In my judgment there is no merit in the appeal. The appeal is dismissed with costs.

W J VAN DER MERWE
JUDGE OF THE HIGH COURT

I agree

J B SHONGWE
JUDGE OF THE HIGH COURT

I agree

J N M POSWA
JUDGE OF THE HIGH COURT

A1667/2004

HEARD ON:
FOR THE APPLICANT/PLAINTIFF: ADV
INSTRUCTED BY: MESSRS
FOR THE RESPONDENT/DEFENDANT: ADV
INSTRUCTED BY: MESSRS
DATE OF JUDGMENT: