IN THE NORTH WEST HIGH COURT
MAHIKENG

CASE NO.: 33/15

In the matter between:

MADIMABE M D **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

CIVIL MATTER

DATE OF HEARING : 14 DECEMBER 2016

DATE OF JUDGMENT : 24 FEBRUARY 2017

FOR THE PLAINTIFF : Adv. E B Mafoko

FOR THE DEFENDANT : Adv. G I Mothibi

JUDGMENT

KGOELE J:

[1] On the 7th September 2013 at approximately 20h00 along Boshoek / Lindleyspoort road, North West Province, an accident occurred between a motor vehicle with the registration numbers FYR 708 NW driven by the plaintiff, and another one with registration numbers DMW 386 NW (the insured motor-vehicle) driven by Mr Dixon Adam Mogale (the insured driver).

[2] As a result of this accident plaintiff allegedly suffered damages in an amount of R3 000 000-00 (3 million rands) which he now claim from the Road Accident Fund (**RAF**). The basis for his claim is that the insured driver was solely responsible for the cause of the incident. The matter served before this Court on merits only.

[3] The time, date and place of accident were common cause between parties. The only issue that this Court was called upon to decide is the liability and the degree thereof between the two drivers as from the evidence that was given it is quite clear that their version as to how the incident took place is mutually distractive.

[4] According to the plaintiff, who was alone in the car at the time of the accident and the only witness who testified for the plaintiff's case, the accident occurred when he was driving from Tlokweng to Ledig direction. It was dark already. The road was tarred and he was driving at a speed of 80km per hour at the time of the accident. However, before the accident there was a car in front of him which kept on applying brakes and signalling with hazards.

He understood it to mean that the driver thereof was trying to warn him about potholes on the road. He reduced his speed to 40km per hour as a result. The potholes were only visible at that initial stage along where he was driving, but they cleared as they drove along so he proceeded driving at 80km per hour. At the time of the incident this car had already gone far away and there was no car in front of him. The only car was the oncoming vehicle driven by the insured driver on the opposite direction. According to him the insured driver's car came travelling at a high speed with its bright lights switched on. Although these bright lights dazzled on him, he managed to still control the vehicle and kept on driving in his correct lane. Suddenly he was hit by this car on his right front side after it had swerved or encroached onto his lane. The collision according to him occurred on his left side of the road where he was travelling. There was nothing he could do at the time as the swerving occurred so quickly and unexpectedly. He lost control of his vehicle as a result and it came to a standstill outside the road next to a fence. He was trapped in the car and could not walk as he sustained injuries on both his legs.

[5] On the other hand the insured driver Mr Mogale testified on behalf of the defendant that as he was driving in the opposite direction, he realised that the car driven by the plaintiff was driving too much on his left side of the road where he was driving (its incorrect lane). He alerted the three cousins he was with in the car about this but at that time the plaintiff's car was already nearby. He tried to swerve to the left hand side of the road avoiding the collision but it was too late. He heard a loud bang as the plaintiff's car hit his on the arear of the head lamp on the right side of his car. His vehicle

turned and faced the direction where they were coming from as a result of the collision. He further testified that the collision occurred on his side of the road where he was travelling, meaning, on his left hand side but on the incorrect lane of the oncoming vehicle of the plaintiff. Further that his bright lights were not on as they were not functional if his memory serves him well.

[6] Patrick Thabo Senamolela was a passenger seating at the back seat on the left hand side of the insured driver. Although he testified on behalf of the defendant he could not share more light as to what happened except to say that he also saw that there was an oncoming vehicle's lights only but could not see the said car. What he only heard was when the insured driver was remarking how this approaching car was travelling. He peeped through the two front seats to see what the driver was referring to and could not see anything, and immediately after retreating back to his seat he heard a loud bang of the cars colliding. He was also adamant that they were travelling on their correct side of the road because of the reason that he could still see the gravel next to his side where he was seated. He is also of the view that the plaintiff's car crossed the centre-line into their lane.

[7] The plaintiff was a single witness. There is no reason to doubt his evidence as it had no contradictions and his credibility was not an issue even after cross-examination.

[8] There was only one contradiction in the evidence of the defendant. The insured driver said the road had marked lines whereas his passenger said the road did not have any. In my view, this

contradiction is not material as the plaintiff's Counsel submitted, reasons being that, the plaintiff himself said there were marked lines on the road. The insured driver also testified about them and his version can be believed because firstly as a driver, he had a better opportunity to observe that rather than a passenger who was sitting at the back. Secondly, this is not an issue between the parties as both drivers agree on this fact.

[9] The only criticism that can be levelled against the insured driver is the fact that he appeared not to have been sure whether his bright lights were on or not as he could not speak with certainty on this issue. Nevertheless, this issue cannot assist this Court in any manner, because the plaintiff's version is not that the defendant was negligent in the sense that he drove with its bright lights, which affected his vision and caused the accident. On the contrary, plaintiff claims that despite the insured driver driving with his bright lights on, it did not affect his driving as he kept on driving on his correct lane and managed to control his car. Therefore, the bright lights, even if we can accept the fact that they were there, were not causally linked to the collision.

[10] Mr Senamela alluded to the fact that he did not see how the accident happened, which leaves the only version of the insured driver and the plaintiff to stand against each other. Both Counsel accepted the fact that the versions of the plaintiff and the defendant are mutually destructive in that both parties' case suggest that the accident happened in their correct lane of travel.

[11] The following phrases in **paragraph 5** of the case of **Stellenbosch farmers' Winery Group Ltd and Another v Martell et cie and Others 2003 (1) SA 11 (SCA)** summed up the principles applicable in as far as when two versions are mutually destructive in a matter:-

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. 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. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's

> credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.

[12] In **Arthur v Bezuidenhout & Mieny 1962 (2) SA 566 (A)** the Appellate Division affirmed the decision in **Naude v Transvaal Boot & Shoes Manufacturing Co 1938 AD 379 at 392, 396** that it was decisive on the point that no onus rests on the defendant to establish the correctness of his explanation on a balance of probabilities. Further that, the maxim and finding of *res ipsa loquiter* does not alter the incidence of the onus of proof: it merely casts an evidential burden of rebuttal on the defendant. The onus of proving negligence in our matter remains on the plaintiff and after hearing all the evidence, the inquiry is whether the plaintiff has discharged the onus of proving on a balance of probabilities that the defendant (driver) was negligent.

[13] In the matter of **Watt v Van Der Walt 1947 (2) SA 1216 (W)** at **1221**, the view that when both parties have completed their evidence there is no room for an argument based on res *ipsa loquitur* was challenged. Commenting on it **Millin J** said:

> "….. I cannot understand why, at that final stage, there should be no room for an argument based on *res ipsa loquitur*. True, the inquiry is as the learned judge says, but the plaintiff's case remains. It still consists of the body of circumstantial evidence which, at the close of his case enabled him to say that, *Ex hypothesi* he never had any other case and his argument must at the end be that the defendant has not displaced the inference of negligence which originally arose, either by successfully contradicting the evidence of the existence of facts from

which the inference was drawn, or proving other facts which, taken with the former facts are consistent with the exercise of due care. If the defendant's explanation of the occurrence takes the form of direct evidence that he did exercise due care by taking all necessary precautions against damage to others, that evidence must be tested by the probabilities of the case; and if the defendant's evidence cannot be rejected as clearly false, the plaintiff fails to discharge his burden of proof on the pleadings unless there is such a preponderance of probability against the evidence as to leave the original facts still speaking for themselves and proclaiming negligence'

[14] Plaintiff's Counsel submitted that the version of the plaintiff is more probable and that it should weigh heavily against that of the defendant. His reasoning is that defendant should have foreseen that his impending conduct of keeping the lights bright could have had the consequence of incapacitating the plaintiff to discharge his duties as a driver and could lead to a dire consequence which is the accident. I have already dealt partly with this issue and the submission thereof above that it appears from the plaintiff's version that the bright lights did not cause the accident. But what is mostly disturbing in this case is that the plaintiff is now clutching at straws by also attempting to rely on the evidence of the insured driver that his bright lights were not working as negligence on the part of the defendant. Clearly this amounts to abating and aprobating which the plaintiff cannot be allowed to do. But the plaintiff has an insurmountable mountain to climb in that:-

- The plaintiff's pleadings do not contain any of these two facts (bright lights or no bright lights) as a form of negligence pleaded on its behalf;

- The plaintiff need to discharge his burden of proof on the pleadings and/or his allegation of the negligence against the defendant unless there is such a preponderance of probabilities against the evidence as to leave the original facts still speaking for themselves and proclaiming negligence.

[15] In my view, poking holes at the version of the defendant as the plaintiff's Counsel is doing clearly demonstrate that the plaintiff is not even sure of what his case is and goes to an extent of relying on a new cause of action in their submissions. Their submission that defendant could have seen that driving without bright lights would have made him not to be able to see properly cannot be belatedly accepted.

[16] The next question is whether the explanation by the defendant is sufficient to negate the probability of negligence arising from the occurrence. If the explanation is sufficient to negate the probability of negligence the plaintiff cannot succeed. See: **Rankisson & Son v Springfield Omnibus Services 1964 (1) SA 609 (N) at 616 D.**

[17] An analysis of the defendant's version is to the effect that it cannot be rejected as clearly false. It is common cause that the police were called and they attended the scene of accident. The sketch plan that was drawn by them does not assist the Court. Instead it worsened the difficulties this Court is faced with as it depicts the point of impact or collision right in the middle of the road, to be specific, on the centre line. What exacerbate this fact is that no

photos as to the damages on the two cars were made available to the Court as it sometimes assists. The police officer who attended the scene was not called to testify. Of significance is that this Court does not have the evidence of whether the two drivers contributed in the drawing of the sketch plan or not. No expert witnesses were called by the two parties in this matter. The availability of all these type of evidential material sometimes assists in weighing probabilities in cases of this nature. Unfortunately this third version by the police does not support either party as to where the collision took place.

[18] In addition, whilst the version of the defendant might still be improbable in the eyes of the plaintiff's Counsel, plaintiff's Counsel loses sight of the fact that if the defendant succeed in establishing his explanation on the balance of probabilities, then there exists a balance of probabilities against the plaintiff, who in such an event, obviously fails in establishing his/her onus of proof.

[19] Having said that, I am of the view that the defendant's explanation is sufficiently cogent to disturb the probability of his negligence arising from the collision. This Court is therefore not satisfied that in considering the evidence as a whole, the plaintiff has proved, on a balance of probabilities, his allegation of negligence against the defendant.

[20] Consequently the following order is made:-

20.1 The plaintiff's claim/action is dismissed with costs.

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A M KGOELE
JUDGE OF THE HIGH COURT

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