

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

APPEAL CASE NO: A5004/2009
COURT A *QUO* CASE NO: 20496/2005

In the matter between:

YORK INTERNATIONAL SA INCORPORATED

Appellant
(Plaintiff in court *a quo*)

and

N P DU PREEZ

First Respondent
(First Defendant in court *a quo*)

I VAN ZYL

Second Respondent
(Second Defendant in court *a quo*)

J U D G M E N T

LAMONT, J:

[1] This is an appeal by the appellant against an order made by Bashall J, leave to appeal having been granted by the Supreme Court of Appeal.

[2] The appellant was the plaintiff in the court *a quo* and the respondents were the defendants. For the sake of convenience I refer to the parties as they were cited in the court *a quo*.

[3] On or about 30 June 2005 and at approximately 19h50 on the extension to Broadway Avenue in Bruma a collision occurred between a vehicle in respect of which the plaintiff bore the risk of loss and/or damage ("the Land Rover") and another vehicle. In consequence of the collision the Land Rover was damaged. At the hearing the issue of liability and quantum were separated.

[4] The plaintiff gave evidence that the right rear of the Land Rover was struck by another vehicle in consequence of which the Land Rover veered first to the right, then to the left and eventually went over a divider onto an access road at which point it turned onto its side. The plaintiff could identify neither the other vehicle nor its driver. After the collision the plaintiff was given a registration number, the make of the vehicle and a name by one Mr. Chetty ("Chetty"). This data was the data given to enable the plaintiff to identify the vehicle which had struck the Land Rover. Chetty gave evidence that on the day in question he was driving behind the Land Rover. Another vehicle, a Volvo, bumped into it. After it had bumped into the Land Rover the Volvo pulled to the right and carried on travelling straight on the freeway. Chetty was driving immediately behind the Volvo and followed it because it had bumped into the Land Rover and the driver was "*running away*". The other vehicle

was a grey Volvo station wagon. Chetty's wife wrote down the number which he called out to her. He drove behind the Volvo for some five to ten minutes. The Volvo drove past the Linksfield off-ramp. Chetty drove off the highway at the Linksfield off-ramp and returned to the scene of the collision. He gave the plaintiff the registration number of the Volvo, some additional data and his telephone number. It is apparent from the evidence of Chetty that the driver of the Volvo drove negligently. Chetty confirmed that he was good with registration numbers and had recollected the number independently.

[5] It was put to Chetty that he had said that the Volvo was silver coloured in a statement which he had made. He explained that the collision had happened at night and that would explain the discrepancy between his evidence (grey) and what he had stated in the statement. Chetty stated that his wife had written down the registration number which he had called out for her. He had at the scene written down additional details on the slip of paper which was given to the plaintiff. He was adamant that the Volvo had struck the Land Rover, that he had seen it continuously and that there was no room for error in his observation; there was no other vehicle and he had followed the Volvo with a view to recording its identity.

[5] The first defendant gave evidence. He was the owner of a Volvo station wagon bearing the registration number matching that which the witness Chetty had seen. His evidence was that on the day in question he was the driver of that vehicle. He went to the Mandibel Sports Club in Bezuibenhout Park to attend a wheelchair rugby practice. On his way to the club and on Jan

Smuts Avenue just before Empire Road, at approximately 17h00, an unidentified taxi drove in front of him and a collision occurred in consequence of which the left front of the Volvo was damaged. The taxi did not stop and he was unable to give its registration number. After the collision he went to the rugby practice. The second defendant drove the vehicle after the rugby practice. She drove in Tenth Street to Broadway and drove in Broadway in the direction of the highway. He denied that there was a collision between the Volvo and the Land Rover. Subsequent to the collision he described, and on 31 June 2005, he reported the collision which he claimed had taken place in Jan Smuts avenue to the Linden Police. He also submitted a claim to an insurance company providing it with the same description of how the damage to the Volvo had occurred. The Volvo station wagon he drove on the day is greyish in colour: it is gunmetal grey. Prior to the collision on 30 June his vehicle was undamaged.

[6] The first defendant's wife, the second defendant, testified that she had driven the vehicle after the rugby practice. If the Volvo had collided with the Land Rover is she who would at the time have driven the Volvo. She stated that there had been no collision at the place where the plaintiff claimed the collision had occurred and that there had earlier that day been a collision on Jan Smuts Avenue. She did not see it happen but she felt the bump.

[7] A Mr Levenson was called by the defendants who stated that on an evening at about 17h30 or 17h45 he noticed slight damage to the Volvo. He was told that a taxi had hit the Volvo on the way to the practice.

[8] The judge *a quo* found all the witnesses to be good witnesses. He did not find probabilities in favour of either version and as the versions were mutually destructive granted absolution from the instance with costs.

[9] In my view the judge *a quo* had little regard to the probabilities of the matter. Oral evidence can only be properly evaluated by testing it against the inherent probabilities. See *Cohen and Another v Lench and Another* 2007 (6) SA 132 (SCA) para [9]. By reason of the misdirection it is open to this Court to re-assess the evidence.

[10] *“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 others witnesses testifying about the same incident or events. As to (b), a witness’ 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 finding 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."

Per Nienaber JA in *S F W Group Ltd and Another v Martell et cie and Others* 2003 (1) SA 11 at para [14].

[11] The court *a quo* found all the witnesses to be good witnesses by which I understand the finding to be that the witnesses were credible. This Court is however not precluded from dealing with findings of fact which do not in essence depend upon personal impressions made by a witness giving evidence but which are rather based on the facts, inferences to be drawn from the facts and upon the probabilities. See *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* (2) 2002 (4) SA 408 (SCA) para [24]. See also *Louwrens v Oldwage* 2006 (2) SA 161 at 168 and the authorities therein cited; *Santam Beperk v Biddulph* 2004 (5) SA 586 (SCA) at 590 paras [5], [6] and [10].

[12] There are three primary methods used to determine probabilities. Probability theory is a branch of mathematics concerned with determining the likelihood a particular event will occur. The three primary methods are: Subjective probability, classical or theoretical probability, empirical probability.

[13] Subjective probability is determined by an individual's best available knowledge and his personal judgment of how events are likely to incur. This probability is not based on formal calculations but comprises the globular

knowledge of the person who makes the judgment and so reflects his opinions and past experiences.

[14] Classical or theoretical probability is a probability which can be determined in advance of any experiment. There are two sides to a coin and when spun, the chance (assuming the coin to be regular) of either of the surfaces facing up is equal. There is empirical probability, a probability calculated pursuant to experiments. Empirical probability is the most accurate or scientific guess based on the results of experiments. Naturally the more experiments conducted the more likely the guess is to be accurate.

[15] It is not necessary for a judge to wander into the realm of precise calculation and scientific correlation of events. A judge is required to determine a probability only. A judge's answer to a particular question is it is probably so based on the totality of the evidence. A scientist's approach to a particular problem is different. A scientist attempts to assess likelihood in terms of scientific certainty. This is not the correct approach of a judicial officer. See *Michael and Another v Linksfield Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at para [40].

[16] A judge when determining the probabilities will consider the totality of the evidence and draw an appropriate inference from those facts he finds proven. A judge may not read between the lines to speculate. See *Nedbank*

Ltd v Pestana 2009 (2) SA 189 (SCA) para [10]; *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) at para [34 and [35].

[17] In the present matter there are a variety of facts relevant to the probabilities.

[18] In my view the following facts are relevant to the probabilities:

- Chetty saw a vehicle, a grey Volvo bearing a registration number which was written down on the slip and which he in any event remembers.
- The vehicle bearing the registration number is in fact grey, is a Volvo and is a station wagon.
- The vehicle involved in the collision described by the plaintiff and Chetty, suffered damage to its front left-hand side on the day in question. The Volvo in fact sustained damage on the day to the front left side.
- No vehicle other than the Volvo, the Land Rover and the vehicle being driven by Chetty were on the scene or relevant to the collision as none is mentioned. The enquiries by counsel during

the cross examination relating to the witness Chetty having transposed the vehicle involved in the collision elicited strong responses establishing the certainty of Chetty that the Volvo was the vehicle which struck the Land Rover.

- The vehicle driven by the second defendant, the Volvo was in fact in the vicinity of the collision at the time the collision occurred.
- The vehicle took the N3 to Pretoria. The N3 is followed from the place where the collision occurred toward Pretoria, the N3 bypasses the Linksfield off-ramp. The vehicle seen by Chetty followed that route.

[19] In considering the evidence the questions raised below must be asked.

What are the chances of Chetty seeing a grey Volvo station wagon bearing a particular registration number and the car which in fact bears that registration number being a grey Volvo station wagon?

What are the chances of the Volvo being involved in another collision on the same day with resultant damage similar to that which one would expect to find on the Volvo which struck the Land Rover?

What are the chances the witness seeing the grey Volvo at the place where the collision occurred and the grey Volvo in fact having been in that area at or about that time?

What are the chances of the witness Chetty seeing the grey Volvo follow a particular route and the grey Volvo in fact having following that route?

What are the chances of all the events referred to above occurring as one extended event?

[20] The answers to these questions are the same; virtually nil. In my view it is wholly improbable that what was seen and described would have been proven accurate on investigation unless the facts described as have been seen were accurately described.

[21] The evidence off Levenson concerning the damage which he saw to the side of the first defendant's car takes the matter no further. Levenson could not recall when he saw the damage. There is no evidence that the damage was seen on the day of the collision prior to the collision with the Volvo. The evidence of Levenson to the effect that the first defendant had stated that a taxi or something had hit him "on the way to work, on the way to

rugby practice” similarly taking the matter no further as it does not identify the day on which these words were uttered.

[22] In my view the evidence given by the defendants and their witness in the light of the probabilities is unacceptable. In my view the evidence is of crafty witnesses who re-created a state of affairs to avoid the consequences of their acts. It was necessary for the defendants to invent a set of facts, a collision conveniently between the Volvo and an unidentified vehicle not only so as to avoid the consequences of the collision in which the Volvo was involved but also so as to set up a set of facts pursuant to which a claim could be made against the insurance company which insured the Volvo against the risk of damage. Some version had to be given to the insurance company as to what collision had caused the damage in respect of the claim. The defendants’ evidence is simply too convenient and improbable when tested against the evidence of Chetty. Chetty’s credibility was accepted by the court *a quo*. His evidence on the record in my view appears to have been honestly and plausibly given. In my view there can be no criticism of his evidence which is supported overwhelmingly by the probabilities.

[23] It is common cause that the second defendant drove the Volvo on the day in question and the appropriate finding is that she was the driver of the vehicle who is liable for the damages suffered by the plaintiff. The plaintiff failed to establish vicarious liability.

[24] The plaintiff was entitled to institute action against the first defendant, the owner of the Volvo. Once the first defendant revealed that the second defendant had driven the Volvo it was reasonable to join her and pursue the action against both defendants. The plaintiff had no independent evidence against the defendants and could not call either of them as part of his case. The only source of evidence was the sworn testimony of the defendants. In the circumstances it is proper to direct that the costs be paid wholly by the second defendant notwithstanding that the plaintiff is unsuccessful against the first defendant.

[25] I accordingly make the following order:

1. the appeal is upheld with costs;
2. the order made by the Judge *a quo* is set aside and substituted with the following.

- “1. The second defendant is liable to compensate the plaintiff for such damages as it may establish it has suffered in consequence of the collision on 30 June 2005.
2. The question of quantum is postponed sine die.

3. The second defendant is ordered to pay the costs of the action to date, including the costs of the plaintiff in prosecuting it against the first defendant.
4. The claim against the first defendant is dismissed. The first defendant is to pay his own costs.”

LAMONT J

I agree

BORUCHOWITZ J

I agree

KATHREE-SETILOANE AJ