

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

Case No. A38/2010

In the matter between:

GARY LOUBSER LEEUW

Appellant / Plaintiff

and

ANTONIO CANDIDO DOS SANTOS

Respondent / Defendant

JUDGMENT DELIVERED ON 17 SEPTEMBER 2010

FITZGERALD AJ

By notice dated 7 September 2010, respondents erstwhile attorneys withdrew as his attorneys of record in terms of Uniform Rule 16(4). It has been confirmed that respondent is aware thereof and of today's appeal. There is accordingly no appearance for the respondent before us.

In his particulars of claim in the Magistrate's Court for the district of Bellville, appellant claimed damages in the amount of R19 928,28 being the alleged reasonable and necessary costs of repairing his motor vehicle in consequence of a collision with the motor vehicle driven by the respondent.

In paragraph 4.1 of the request for further particulars appellant was asked whether the damage to his vehicle was sustained in the front or back thereof. In reply to this request respondent was

referred to the quotation of Bernie's Coachworks which was annexed.

A perusal of the quotation of Bernie's Coachworks indicates, inter alia, that a left front door and left rear door were supplied and fitted to appellant's motor vehicle.

In contrast to the supply and fitting of a left front and left rear door to appellant's motor vehicle - and which involved both labour and the supply of parts - the left parking headlamp, left front fender liner, front bumper and left rear taillight were removed and refitted but not replaced.

I have dealt in some detail with the nature of the repairs set out in the quotation of Bernie's Coachworks because, during the course of the cross-examination of appellant's wife, the driver of his motor vehicle at the time, it was pertinently put to her that if indeed the collision had occurred in the manner postulated by her then no damage could have been sustained inter alia to the front bumper of the motor vehicle.

More particularly, appellant's wife testified that the motor vehicle driven by the respondent reversed into the left rear passenger door while she was driving past. Appellant's wife was unable to explain in cross-examination how, if indeed the collision occurred in the manner described by her, damage occurred inter alia to the front bumper of the motor vehicle. Indeed, it was suggested to her in cross-examination that the respondent's version of the collision was that he had already reversed into the road and that she collided with the tow bar at the rear of his vehicle. I point out in this regard that on the version put in cross-examination it appears that defendant was probably also not keeping a proper lookout and would, in those circumstances,

arguably be contributory negligent, inter alia, on the further ground that he performed an inherently dangerous manoeuvre by reversing into the path of oncoming traffic.

In any event, based essentially on the inability of appellant's wife to be able to provide any explanation as to how damage was allegedly caused to the front of the motor vehicle, the court a quo at the conclusion of appellant's case granted absolution from the instance.

The appellant has appealed the finding of absolution from the instance. Included amongst the grounds of appeal is the allegation that:

“5. Die Landdros het fouteer deur te bevind dat die getuienis van Rykie Leeuw, die eiser se getuie, in verband met die plaasvind van die botsing en waar die impak van die botsing op eiser se voertuig was ten strydig is met die kwitansie van Bernie's Coachworks”.

In my view there is merit in the appeal.

The court a quo made reference in its judgment to various authorities including what is described in the judgment as **Eckhard's Principles of Civil Procedure in the Magistrate's Court, 5th edition by T.M. J. Patterson**. In his judgment upholding the application for absolution the court a quo stated, inter alia, as follows:

“As I have already stated, the court has a discretion here and if you look at what the author Jim J Patterson, if the court has got a doubt and cannot determine which party is telling the truth, the court has to order absolution from the instance”.

The court a quo also expressed the view that it “**should agree with the representative of the defendant that this dispute point is not explained away by the plaintiff, since the plaintiff has failed to put evidence before this court as to this dispute about the damage. The court is of the opinion that there is no prima facie evidence from the evidence of Rykie Leeuw that the court can state that it’s [sic] prima facie evidence as far as damage is concerned on the other parts of the vehicle from the plaintiff’s side**”.

As is apparent from a mere analysis of the quotation of Bernie’s Coachworks, the repair work relevant to the front of appellant’s motor vehicle was confined to the removal and refitting of certain parts, including the front bumper. No parts were, however, supplied, and I infer therefrom that no impact damage to the front of the motor vehicle occurred.

The fact that there was also a supply and refitting of both the left front and left rear door also does not, in any way detract from the evidence of appellant’s wife that the actual point of impact was on the left rear passenger door.

Although she stated that she did not observe any damage in addition to that sustained to the rear passenger door it is difficult to accept that the damage at the point of impact would have been confined solely to the area representing the left passenger rear door.

The approach to be adopted by a court in determining whether absolution from the instance should be granted at the conclusion of the plaintiff’s case is well established. In **Gordon Lloyd Page and Associates v Rivera and Another** 2001 (1) SA 88 (SCA) at 92E Harms JA with

reference to Claude Neon Lights v Daniel 1976 (4) SA at 409 G-E stated inter alia that

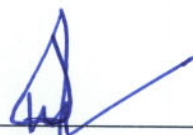
“.....[w]hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff...”.

Applying this approach, and bearing in mind that in the present matter the issue of quantum was separated by agreement from the merits, it does not seem upon a proper analysis of the quotation of Bernie’s Coachworks that it can be said that there is no evidence upon which a court applying its mind reasonably, could or might find for the plaintiff.

It may well be in the context of the evidence of quantum that a representative of Bernie’s Coachworks, or some other expert, is able to explain why, if indeed there was impact damage to the left rear passenger door of the plaintiff’s vehicle there was also damage to the left front passenger door and why, more particularly, it was necessary to refit but not replace the front bumper.

In the premises I would recommend that the appeal be upheld and that the order of absolution granted by the court a quo be set aside. I accordingly recommend that the following order be granted:

1. The appeal is upheld.
2. The order of the court a quo granting absolution from the instance is set aside and replaced with an order that absolution from the instance be refused with costs.
3. The matter is referred back to the court a quo for the further prosecution of the trial.
4. Respondent is directed to pay the costs of this appeal.



FITZGERALD AJ

TRAVERSO, DJP:

I agree and it is so ordered.

TRAVERSO, DJP