



IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

NOT REPORTABLE

CASE NUMBER: 11991/2005

DATE: 30 April 2009

P.G. STRYDOM
APPLICANT

V

B.R. VAN DER GRIENDT
RESPONDENT

JUDGMENT

SAPIRE, AJ

This is an application for leave to appeal to the full court of this division against a judgment I gave on the 26th of March this year. The issue before me at the time was limited to finding who the driver was of a vehicle, described as a bakkie at the time of an accident in which both parties were seriously injured.

It had been agreed by the parties that my decision would determine the outcome of claims made by the parties the one against the other. I do not intend, in this judgment, to again traverse the evidence upon which my judgment was based. I will instead examine the some of the

grounds upon which the applicant, who was defendant in the action, seeks leave to appeal.

The issues raised by the applicant are all questions of fact. Because of this the applicant's first obstacle is a disinclination of courts of appeal to overrule a lower court's decisions on questions of fact. The lower court usually has the advantage of seeing and hearing the parties and on the basis of this first hand observation is usually better placed than an appeal court to come to a conclusion.

The plaintiff's case rested on the evidence of the plaintiff himself who described how the accident happened and was quite firm that he was a passenger in the car at the time and wearing his seatbelt. He has no doubt that it was the defendant who was the driver of the car and that the defendant was driving in order to test the car. The plaintiff has recounted how the defendant lost control of the car which left the tarred road and careered into the veld landing in a ditch far from the edge of the tarred road.

The first ground of appeal is that I erred in accepting the respondent's testimony that the applicant was driving the vehicle at the time of the occurrence in order to get a feel of the engine. In order to determine this, a number of other aspects have to be considered.

The respondent was able to offer no direct evidence to contradict what the plaintiff said. This is because the defendant claimed complete retrograde amnesia. There was no confirmation of this by a doctor who attended on the defendant at any time after the accident. I did not hold this against the applicant and accepted that because of his loss of memory he was unable to give a version.

The evidence adduced by the defendant was that of one Strydom, unrelated to the applicant, who, on the basis of the facts and circumstances of the accident, as he ascertained them two years after the occurrence determined that it was the respondent who was the

driver of the vehicle. The basis of this deduction was that the applicant must have been thrown from the vehicle before it came to rest, and he was found some 30 metres from the vehicle in the direction of the tarred road from which it had come. The respondent on the other hand, was found lying next to the vehicle on the left hand side immobilized by hip and leg injuries. The fact that the respondent was found lying next to the left hand side of the vehicle, where it came to rest, was I considered, a significant factor. To speculate on how the applicant was thrown from the vehicle poses a problem but it is not possible to exclude, in the light of other evidence, the plaintiff having left the vehicle through the right hand side.

The other evidence to which I refer is the direct evidence of the respondent, as well as the hospital records which became part of the evidence. The hospital record shows that a version of the collision to which the plaintiff had testified, was indeed the manner in which the accident took place. The hospital record is subscribed to by the applicant with his signature. I bore in mind that the record which is not in the Applicant's handwriting, is in English, and the Applicant is Afrikaans speaking. The subscribing signature is nevertheless admittedly that of the Applicant. While this is not proof that the accident did indeed occur in the manner so described, it is an indication that that version of the occurrence was current at the time of the applicant being in hospital and that he accepted what was there written.

My acceptance of the hospital record is stated to be an error on my part. As indicated above I did not accept the hospital record as describing the truth of the manner in which the accident occurred. What it is, is a record of what the applicant or someone on his behalf informed the hospital. It was not claimed by the defendant that at that time he was suffering from amnesia and there is no medical

evidence that this was so. I am satisfied that I was correct in placing the interpretation of the record in the manner I did.

Of significance is the question as to why the Applicant should have been in the vehicle at all. The probabilities favour the parties having been on a test drive, and the Applicant driving the vehicle in order to get a feel of the engine's performance.

A further ground of appeal is that I erred in finding that the applicant's expert, Mr Hans Strydom, was not an objective witness. By this I understand is meant impartial. Mr Strydom was only consulted some two years after the accident, at the time when it became necessary for the Applicant, to offer a version of what to place which excluded negligence and consequent liability on his part, because the respondent had issued summons claiming a substantial amount. My observation was that experts in many cases tend to offer opinions which support the version of the party who has employed them. In this case the expert did not even meet with the respondent to ascertain his version as what had taken place.

A further error on my part, so the applicant states, is my not mentioning the evidence of Alex Strydom and Martinus Dry in my judgment. The reason for this is that I did not consider that their evidence was useful in coming to a conclusion.

These are the principal grounds upon which the applicants seeks leave, but the ancillary grounds are not such as would incline a court of appeal to come to a different conclusion to that which I have come. Although a fair amount of money is at stake, making the matter an important one for the parties. This is not sufficient ground to grant leave to appeal. The primary consideration is whether I consider that another court may come to a different conclusion. I do not think this is so, as on the evidence I have outlined, the respondent's version has to be accepted as , on the balance of probabilities, correct.

The application of leave to appeal is accordingly refused with costs.

SAPIRE, ACTING JUDGE
OF THE HIGH COURT