

SOUTH AFRICA / JUDGMENT

Freddie Jaftha Transport CC v Group Five Plant and Equipment (Pty) Limited (39222/14) [2019] ZAGPJHC 76 (12 March 2019)

[2019] ZAGPJHC 76

COURT

South Gauteng High Court, Johannesburg

BEFORE

L T Modiba

CASE / FILE NUMBER

39222/14

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 39222/14

In the matter between:

FREDDIE JAFTHA TRANSPORT CC Plaintiff

and

GROUP FIVE PLANT AND EQUIPMENT (PTY) LIMITED Defendant

J U D G M E N T

MODIBA, J:

- [1] Freddie Jaftha Transport CC (“FJT”), the plaintiff, sues Group Five Plant and Equipment (Pty) Limited (“G5”), the defendant, for damages to its motor vehicle arising from a motor collision that occurred at approximately 02h00am on 11 May 2014 on the N12 highway between Victoria West and Three Sisters.
- [2] By agreement between the parties, I granted an order in terms of Uniform Rule 33(4) separating the merits and from quantum. Consequently, the trial proceeded in respect of the merits only.
- [3] The collision occurred between a freightliner Argosy truck tractor and two Henred Fruehauf trailers (“the truck”)

belonging to FJT, who at all times bore the risk in respect thereto, and a Toyota Light Delivery Van (“LDV”) belonging to G5. The truck was driven by Frank Japhta (“FJ”). The LDV was driven by Wiseman Hlongwane (“WH”), a G5 employee.

[4] It is common cause that when the collision occurred, WH:

[4.1] was employed by G5 as a mechanic, stationed on a project site at Houdembek Farm where G5 provided him and several other employees with sleeping quarters;

[4.2] was off duty;

[4.3] was driving to Houdembek Farm;

[4.4] drove the LDV negligently, thereby causing the collision.

[5] FJT contends that WH was acting within the scope and duty of his employment with G5 when the collision occurred. G5 denies this.

[6] FJT bears the onus to establish that at the time of the collision, WH was acting in the course of his employment with G5.[1] To discharge the onus, FJT relied on the evidence of its only witness, FJ who, as already stated above, drove its truck when the

collision occurred. FJ was not of much assistance to FJT in discharging the onus. He only had personal knowledge of the collision

and how it occurred. As a result, he mainly testified on issues that are common cause between the parties.

[7] FJT also sought to rely on:

[7.1] several statements contained in the trial bundle handed into court marked Exhibit “A”. G5 only admitted that the statements were made but not that they are true and correct. These statements are affidavits WH deposed to and signed on 11 May

2014, 30 September 2014 and 22 February 2015, as well as an accident claim form G5 submitted to its insurance in respect of a claim for damages to the LDV; and

[7.2] the transcript of the enquiry G5 held on 22 May 2014 into WH misconduct arising from the said collision.

[8] Counsel for FJT led FJ on some of the contents of the statements described in paragraph 7.1 above. Counsel for G5 objected to the statements being used on the basis that the persons who made them will not testify and therefore the relevant evidence constituted hearsay. Counsel for FJT contended that he is entitled to use these statements because the statements are G5’s company documents and were discovered by G5. I provisionally allowed the evidence. During the trial, the admissibility of the transcript of WH’s misconduct enquiry also became an issue.

[9] Therefore, the following issues stand to be determined:

9.1 whether the contents of statements referred to in paragraph 7.1 above ought to be admitted as evidence;

9.2 the status of the transcript of WH's misconduct enquiry in these proceedings; and

9.3 whether WH was acting in the course and scope of his employment with G5 when the collision occurred.

WHETHER DOCUMENTS IN PARA 7. ABOVE OUGHT TO BE ADMITTED INTO EVIDENCE

[10] As stated above, G5 conditionally agreed to the admission of the statements in 7.1, only to prove what they contain and not that the contents are true. Counsel for FJT led FJ on the contents of the driver claim form completed and submitted in support of G5's insurance claim as well as his affidavit of 22 February 2015. The evidence by FJ does not change the status of these documents. He had no knowledge of the contents in respect of the circumstances under which WH used the LDV. Therefore he could not state that the contents of the statements are true. Therefore the admissibility of the evidence is governed by section 3 of the Law of Evidence Amendment Act[2] read with Part VI of the Civil Proceedings Evidence Act.[3] WH being the person upon whose credibility the probative value of this evidence depends, was not called to testify at the trial.

[11] Relying on *Botes v Van Deventer*[4] counsel for FJT contended that the exception to the admissibility of hearsay evidence ought to be applied in respect of this evidence. He specifically contended that an averment by WH in his affidavit of 22 February 2015, that he was legally in possession of the LDV keys and that there was no person in charge to grant him permission to travel to Victoria West to purchase food supplies and that he has on many occasions in the past undertaken such trips using the LDV is receivable in evidence in terms of the exception to the hearsay rule and therefore is admissible against G5. Relying on *Makhathini v Road Accident Fund*[5] counsel for G5 invited the court to have regard to the purpose for which the evidence is tendered. He contended that the evidence is tendered to discharge the onus borne by FJT, that WH was acting within the scope and duty of his employment with G5 when the

collision occurred and as such a central issue; therefore the court should be slow to admit it.

[12] The present circumstances are such that this court ought to heed the warning in *Makhathini*. The reasons for doing so become clearer when regard is had to the attitude this court takes to the transcript of WH's misconduct

enquiry.

[13] G5 has consented to the admission of the evidence of all witnesses who testified at the enquiry except that of WH. Whatever WH's evidence was at the enquiry, it is important to note that the chairperson of the enquiry did not accept it. He found that WH admitted that he did not have authorization from any person to use the LDV and to transport a non-G5 employee at that time of the morning. The transcript of the misconduct enquiry therefore does not establish that WH was authorised to use the LDV when the collision occurred.

Counsel for FJT would have this court accept that the evidence of the witnesses who testified at the misconduct enquiry did not prove that WH's use of the LDV was not authorised, that the evidence instead proved that he misused the LDV, hence he was only charged and convicted with the misuse of the LDV.

[14] FJT may not elect to use the transcript where it supports its case and have this court disregard it where it does not support its case. WH's version as set out in these statements was not accepted at the misconduct enquiry. These circumstances require that WH's

credibility be tested in these proceedings. G5 would do so during WH's cross examination. Since WH did not testify, G5 would be prejudiced if the exception to the admissibility of hearsay evidence is upheld in respect of these statements.

[15] To the extent that counsel for FJT would have this court find that the evidence at the misconduct enquiry only proves misuse and not unauthorised use of the LDV, given that the chairman found that WH was not authorised to use the LDV, the probative value of the contents of the statements regarding the circumstances under which WH used the LDV on the day of the collision, specifically whether he was authorised to use the LDV, is weak. Therefore the admission of these statements and the evidence of WH at the misconduct enquiry is disallowed.

[16] WH was off duty when the collision occurred. Thus FJT has not established that WH was permitted to use the LDV on the day in question. Therefore FTJ has not discharged the onus to prove that WH was acting within the course and scope of his employment with

G5 when the collision occurred.

[17] In the premises, the plaintiff's claim is dismissed with costs.

MADAM JUSTICE L. T. MODIBA

JUDGE OF THE HIGH COURT

APPEARANCES:

Plaintiff's Counsel: Mr APD Hartog

Instructed by: Harvey Nossel Attorneys

Defendant's Counsel: Mr Bouwer

Instructed by: Macgregor Stanford Kruger Inc

Date of Judgment: 12 March 2019

[1] Mkize v Martens 1914 AD 382 at 391

[2] 45 of 1988. These sections provide: 3 Hearsay evidence

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
 - (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court, having regard to-
 - (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
- (4) For the purposes of this section- 'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence; 'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

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3 Hearsay evidence

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 - (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;

- (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,
- is of the opinion that such evidence should be admitted in the interests of justice.

(4) For the purposes of this section-

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

[3] 25 of 1965

[4] 1966 (3) SA 182 (A) at 206 A-C

[5] 2002 (1) SA 511 (SCA)

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