

SOUTH AFRICA / JUDGMENT

Save-A tyre v Bowers (CA 247/2010) [2011] ZAECHGC 22 (26 April 2011)

[2011] ZAECHGC 22

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.M. Roberson, A. Andrews

CASE / FILE NUMBER

CA 247/2010

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO. CA 247/2010

DATE HEARD: 04/03/11

DATE DELIVERED: 26/04/11

In the matter between

SAVE-A TYREAPPELLANT

and

GLORIA DOLOROS BOWERSRESPONDENT

JUDGMENT

ROBERSON J:-

- [1] On 16 July 2007 the respondent went to the appellant's premises to have one of the tyres of her motor vehicle repaired. While she was inside the appellant's premises, in the work area, a mag wheel which had been hanging from a hook on a ceiling beam, fell and struck her on the shoulder. The respondent instituted action in the Magistrate's Court, Port Elizabeth, for payment of damages in the sum of R50 000.00, for pain, suffering, and shock. She alleged that the defendant was negligent in that it failed to ensure that the mag wheel was firmly attached to the beam from which it hung.

- [2] The appellant denied liability on the basis that it was not negligent and that the respondent had entered an area of its premises in which there was a disclaimer notice containing the words “enter at your own risk”.
- [3] The magistrate gave judgment in favour of the respondent and awarded her R25 000.00 damages. The appellant appealed to this court, both in respect of liability and the amount awarded. The respondent abided the decision of this court.
- [4] The record of the trial reflected a number of factual disputes, the principal one being whether or not the disclaimer notice was in fact displayed
- [5] The magistrate’s judgment read as follows:

“The claim arises from an incident that happened at defendant’s place of business.

Plaintiff had been at the premises to have a puncture repaired. A mag wheel suspended from the ceiling beam fell onto her right shoulder causing her injuries. The claim is based on the defendant’s negligence.

The evidence shows clearly that the defendant had a duty of care towards its customers. Defendant should have appreciated that the suspended mag wheel posed a threat to its customers.

Defendant is held liable for the injuries suffered by the plaintiff.

Plaintiff’s claim succeeds as follows:

Shoulder and soft tissue injury R15 000-00. Shock and trauma R10 000-00. Party and party costs.”

- [6] It will be noted that the magistrate effectively gave no reasons for his judgment. He did not deal with the disputes of fact and one has no idea why he found for the respondent on the merits. He did not even mention the disclaimer notice. He gave no reasons to justify the amount of damages awarded. There is no indication in the judgment that he applied his mind to the evidence and the legal issues. When requested in terms of rule 51
- (1) of the Magistrate’s Court rules for a written judgment showing the facts he found to be proved and his reasons for judgment, he simply referred to the judgment quoted above and had nothing to add. When the notice of appeal was delivered, he was obliged, in terms of rule 51 (8) of these rules, to furnish a written statement showing the facts found to be proved, the grounds upon which he arrived at any finding of fact specified in the notice of appeal as appealed against, and his reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against. Such a statement forms part of the record. There were numerous grounds of appeal but there was no rule 51 (8) statement in the record.

- [7] The magistrate's judgment and lack of response to the notice of appeal did not do justice to the parties. A similarly unhelpful judgment was the subject of comments by Plasket J in *Value Truck Rental (Pty) Limited v John Dirker Engineering (Pty) Limited* ECG case number 127/07 judgment delivered on 10 May 2010. At paragraph [5] Plasket J said the following:

"This is not acceptable and smacks of unprofessional conduct on the part of the magistrate. The parties paid good money to engage the services of legal representatives and expert witnesses. They presented their cases and argued the issues only to be sent away guessing as to how the outcome was arrived at and what the judgment means."

At paragraph [7] Plasket J referred to the judgment in *Mphahlele v First National Bank SA Ltd* 1999

- (2) 667 (CC) where Goldstone J said, at paragraph [12]:

"There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of s 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer."

- [8] This court must therefore do the best it can from the record, without any assistance from the magistrate who heard the trial and observed the witnesses.
- [9] Only two witnesses testified at the trial: the respondent, and Mrs. Petronella de Souza, a partner in the appellant business.
- [10] As already mentioned the respondent, who was 63 years old at the time, went to the appellant's premises to have a tyre repaired. She testified that when she arrived there, she left her vehicle outside and entered the premises through a roll up door which led into the work area. There was another roll up door to the right, but it was closed. One of the appellant's employees assisted her and went with her to her vehicle to fetch the tyre from the boot. She followed him back into the premises through the same door, into the area where the staff were working. No-one warned her not to stand in that area and there was no sign displayed

that she was at risk. If she had seen such a sign she would not have entered the work area. She went to the person who was at the

reception area, which was to the right of the work area, to find out what the cost of repair would be. There was no division between the reception area and the work area. She then went back to the work area and while waiting for her tyre to be repaired, she looked at mag wheels which were suspended from a beam and which had price tags on them. She had to go close to the mag wheels in order to read the prices, and then saw other mag wheels suspended from the back wall. As she stepped forward to look at these mag wheels, a mag wheel fell from the beam onto her right shoulder blade. She was assisted by de Souza and informed her that she would consult a doctor and a lawyer. She was in shock and wanted to get away from the defendant's premises.

[11] She consulted her doctor that day. There was a lump and a bruise where the mag wheel had struck her and she felt pain in the whole of her back. She had two sessions of physiotherapy and was given pain medication. An x-ray revealed no fractures. At the time of testifying she said now and again she had pain in her back but she could not say what the cause was. The incident had an impact on her life to the extent that she is nervous about going into shops where goods are stacked to a height, in case they fall on her.

[12] De Souza testified that the appellant had been operating from those premises since 2002. The mag wheels had been on display since mid-2003 and up to the time of the incident none had ever fallen. She never had reason to believe that one would fall, and the hooks they used were fairly secure. When the mag wheels were first put up, they (presumably she or her staff) checked that they were secure. The mag wheels were sold regularly and when they were replaced they were checked as well. She could not say how often she checked to see if they were secure. Being busy, she could not say that she checked a mag wheel after it had been replaced

but it was something that could have been checked. If a mag wheel had fallen in the past she would have made sure that they were secured. She could not say how this particular mag wheel had fallen. It had been on a hook and she was confident that it was safe at the time.

[13] When she and her son, the other partner of the appellant, bought the business, there was an old sign warning persons that they entered at their own risk, but it was replaced with the present sign in 2004. The sign was put up because they had a problem trying to tell people not to stand in the work area and sometimes people felt that they were entitled to stand there if their car was parked on the ramp. Customers should have known not to be in the work area because there was equipment there. She did not consider the work area to be dangerous and anyone who entered would have realised that it was a work area. The layout was similar to that

of other tyre businesses.

[14] She was working at the appellant's premises on the day of the incident. Both the roll up doors were open, specifically so that the premises would be visible from the street and they would not be vulnerable to a robbery. There had previously been only one door to the premises, and an office in the area of the door on the right hand side. After they had been "held up" in 2003 they put in the second door so that the premises were visible from the street. Every morning both doors were opened and locked in position so that they could not

be closed. There were arrows painted on the floor leading from the door on the right to the reception area, indicating to customers where they should go. She did not see the respondent enter the premises but heard the crash when the mag wheel fell. She was informed that the respondent had been standing on a flatbed lift under the mag wheels,

in the work area of the premises. She assisted the respondent and noticed a little red mark on her shoulder blade.

- [15] Photographs of the premises which were taken some time after the incident, showed that the alleged disclaimer notice was on the left hand wall of the work area, as one entered the work area from the street. It was roughly half way up the wall and the words were in red capital letters and easily legible.
- [16] Without having had the benefit of observing the witnesses, the content of their evidence does not suggest that either of them was dishonest or evasive, or that they tailored their evidence to suit their case. Both of them appear to have answered questions honestly and unhesitatingly.

Disclaimer notice

- [17] Where a party sues in delict, the onus is on the party relying on the disclaimer clause to prove it. (*Durban's Water Wonderland (Pty) Ltd 1999 (1) SA 982 (A)* at 991B-D.) The appellant therefore bore the onus to prove that the disclaimer notice was displayed at the time the mag wheel fell on the respondent. From the record, both the respondent and de Souza appear to have been certain about their evidence on this aspect. In my view, the evidence of de Souza was the more probable. She referred to the previous sign which was replaced, and the reasons for putting up the existing sign, all of which reasons were sensible and logical. While it is possible that the sign was put up after the incident, I do not think, in the context of the evidence as a whole, that it is probable. I shall deal with the issue of negligence later in this judgment, but I think it was a sign of de Souza's honesty that she did not try to fabricate reasons for the mag wheel falling, or suggest a rigorous and routine procedure for checking that the mag wheels were properly secured. She admitted that because she was busy, she could not check that a mag wheel was secure immediately after it had been hung. The respondent's evidence was merely a denial that the notice was displayed. This was not persuasive evidence and does not exclude the possibility that she simply did not see it, preoccupied as she was with having her tyre repaired and looking at the mag wheel prices while she waited. She would also not have been specifically looking for such a sign. In my view, having regard to the prominence and design of the notice, which I have described, the appellant took sufficient and reasonable steps to bring the notice to the attention of customers. In particular, the notice would have faced customers who walked from the reception area to the work area,

and, as de Souza said, it was obviously a work area. The respondent was therefore bound by the terms of the notice.

[18] I do not think that a resolution of the dispute concerning whether or not the second door was open is relevant to a decision in this matter, but I am of the view that De Souza's evidence was preferable to that of the respondent on this aspect. She gave persuasive reasons for keeping both doors open. The respondent could quite probably have entered the first door she saw open, without noticing the second door. As a customer, she would have had no special reason for noticing whether or not the other door

was open or closed. In any event, whether she entered the work area from the door or from the reception area, the notice was sufficiently

displayed.

[19] The disclaimer notice did not expressly set out the circumstances in which the appellant had contracted out of liability and in such a case the appellant could only avoid liability for the least degree of blameworthiness, namely negligence. (*Essa v Divaris* 1947 (1) SA 753 (AD) at 767.) However that is not the end of the matter. The nature of the occurrence for which the appellant intended not to be liable, still has to be determined. In my view, it was clear from de Souza's evidence that the reason for the disclaimer notice was to avoid liability for occurrences relating to work being done by the appellant's employees in the work area. She said that they had a problem with customers standing in the work area and customers felt they were entitled to stand there while their vehicle was on the ramp. Customers should also have realised it was a work area because there was equipment there. In my view this evidence shows that the disclaimer notice was intended to cover work related occurrences. The mag wheels were however on view in the work area for the purposes of sale. They had price tags on them and customers were impliedly invited into the area for the purpose of looking at the mag wheels and their prices, and choosing which ones to buy. The respondent's evidence that one had to go quite close to the mag wheels in order to read the price was not disputed. The appellant could not both invite

customers to look at the mag wheels for the purpose of sale, and also warn them not to enter in case they were injured. The respondent's

injury was therefore not sustained as a result of work being performed in the work place and the disclaimer notice did not exempt

the appellant from liability for this particular occurrence.

Negligence

[20] It was submitted on behalf of the appellant that the incident was not foreseeable in the context of the following factors: the disclaimer notice was obvious; the respondent entered the work area; and for a number of years no wheel had become dislodged from its hook and fallen. I do not agree with this submission. I have already dealt with the ambit of the disclaimer notice.

- [21] In my view this is a case where the maxim *res ipsa loquitur* applies. The cause of the mag wheel falling was unknown and unexplained, and the mag wheel was under the control of the appellant. In the normal course of affairs, a mag wheel which is properly secured does not fall. If it does, the inference can be drawn that it was not properly secured, and hence an inference of negligence can be drawn. A heavy object suspended from a ceiling beam in an area where customers are present, should be properly secured to prevent it from falling. If it is not properly secured injury to persons in its vicinity is foreseeable. The appellant was unable to explain how the mag wheel fell and therefore the appellant did not displace the inference of negligence. It did not assist the appellant to say that it had not happened before and the occurrence was therefore not foreseeable. The mag wheels were sold and replaced and each time a replacement was hung up the appellant had a duty to ensure that it was secure. De Souza herself said that the mag wheels were checked.
- [22] The respondent therefore proved that the negligence of the appellant caused the mag wheel to fall and injure her.

Quantum

- [23] It was submitted on behalf of the appellant that the amount awarded to the respondent was excessive. I agree. Although she must have had a tremendous fright when the mag wheel fell on her, her injuries and their sequelae were not extensive. Mr. de la Harpe, who appeared for the appellant, suggested that an amount of R10 000.00 would be a suitable award, and referred to two cases involving whiplash injuries. I have had regard to the injuries in both those cases, which were far more severe than in the present case. I have also had regard to other cases involving back and neck injuries, all of which were far more severe than the present

case. Comparing the injuries in the present case to the injuries and sequelae in those cases, and the amounts awarded in those cases, I am of the view that the amount suggested by Mr. de la Harpe is suitable, if not generous.

Costs

- [24] The appellant has succeeded in respect of quantum only. In *Llama Restaurant Franchising Co (Pty) Ltd v Ivano (Pty) Ltd* 1990 (1) SA 474 (C), after considering various costs orders in matters where partial success had been achieved on appeal, Comrie AJ said the following at 478D-E:

“The foregoing citations illustrate, I think graphically, the variety of costs orders which may properly be made by a Court of appeal when an appellant enjoys partial success. The citations also reveal, in my view, the three main factors which will usually influence the Court in the exercise of its discretion. They are: the measure of appellant’s success; the measure of appellant’s failure; and the extent, if any, to which appellant has unnecessarily or unsuccessfully added to the costs.”

It is correct, as was submitted, that it was necessary in the present case for the appellant to approach this court in order to have the quantum reduced, and that the respondent could have abandoned a portion of the amount awarded by the magistrate. There has also been a substantial reduction in the quantum. Even if the appellant had appealed against quantum alone, the preparation of the record was necessary. The complete record was only ninety pages. Argument in this court took barely half an hour. On the other hand, the appellant has been unsuccessful on the issue of liability, which involved both negligence and the disclaimer notice. The bulk of the evidence at the trial related to these issues. In all these circumstances, I think that the appellant should be awarded only 40% of the costs of appeal.

[25] In the result the appeal succeeds in part.

25.1 The judgment of the magistrate is set aside and substituted as follows:

“Judgment is granted in favour of the plaintiff for payment of damages of R10 000, and costs.”

25.2 The respondent is ordered to pay 40% of the appellant’s costs of appeal.

J.M. ROBERSON

JUDGE OF THE HIGH COURT

ANDREWS AJ:-

I agree

A. ANDREWS

ACTING JUDGE OF THE HIGH COURT

Appearances:

Appellant: Advocate D.H. de la Harpe, instructed by Netteltons Attorneys, Grahamstown.

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