CASES / VONNISSE

WINNING A CIVIL CASE WITHOUT GIVING ANY KIND OF EVIDENCE WHATSOEVER?

Jordaan v Bloemfontein Transitional Local Authority [2004] 1 All SA 496 (SCA), 2004 3 SA 371 (SCA)

1 Introduction

The standard of proof in a civil case is the well-known preponderance (balance) of probabilities. This requires of the party on whom the onus lies, in order to be successful, to satisfy the court that he is entitled to succeed on his claim or defence, as the case may be (*Pillay v Krishna* 1946 AD 946 952-953). The onus of establishing a case in accordance with this standard is on the party who makes the assertion since if a person claims something from another in a court of law, he has to satisfy the court that he is entitled to it (*Pillay v Krishna supra* 951; and *Van Wyk v Lewis* 1924 AD 438 444). According to Voet (22.3.10) the position is: "He who asserts, proves, and not he who denies, since a denial of a fact cannot naturally be proved, provided that it is a fact that is denied and that the denial is absolute." The person who makes the claim, and accordingly bears the onus of proof, is invariably the plaintiff. However, there are situations in which the defendant bears the onus. This ordinarily happens when the defendant is not content with a mere denial of the claim against him but sets up a special defence. In respect of the special defence the defendant becomes the claimant. For the special defence to succeed the defendant must satisfy the court that he is entitled to succeed on it (*Pillay v Krishna supra* 952; *Corpus Juris* (D.44.1.1); and Voet 22.3.9).

The word "onus", in this context, refers to the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be. This is the meaning of the word in its true and original (primary) sense. In this sense the onus never shifts from the party upon which it originally rested (*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA 534 (A) 548A-B). In a secondary sense the word means the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by the opponent. In this sense the onus refers to the burden of adducing evidence in rebuttal. This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other (*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd supra* 548).

If the party on whom the onus lies is the plaintiff, as is often the case, this onus is discharged by leading evidence since if no evidence is led at all, the plaintiff must fail because he would not have proved the cause of action. Similarly, if evidence is led but the court cannot decide whether the cause of action has been established or not, the plaintiff again must fail because one of the facts essential to the cause of action would remain unproved (*Pillay v Krishna supra* 955). The question is whether at the close of the plaintiff's case there is sufficient evidence in support of the claim, by which is meant no more than that on the whole the evidence tends to show a greater probability that the facts as alleged by the plaintiff are correct, than the contrary (*Naude NO v Transvaal Boot and Shoe Manufacturing Co* 1938 AD 379 397). If at the conclusion of the case the evidence is evenly balanced, the plaintiff cannot succeed in his claim as he would not have discharged the onus resting upon him (*Van Wyk v Lewis supra* 444).

By contrast, in a criminal trial the burden of proof rests on the prosecution to prove the accused's guilt beyond a reasonable doubt. This burden rests on the prosecution throughout the trial. In accordance with this burden of proof, at the outset of the trial the State must also discharge the evidential burden. It does this by establishing a *prima facie* case against the accused. Once a *prima facie* case is established the evidential burden shifts to the accused to adduce evidence in order to escape conviction. However, the burden of proof will still remain with the prosecution. It is nevertheless possible that even if the accused does not adduce evidence, he will not be convicted if the court is satisfied that the prosecution has not proved his guilt beyond a reasonable doubt (Schwikkard, Van der Merwe, Collier, De Vos, Skeen and Van der Berg *Principles of Evidence* 2ed (2002) 525; and see also *S v Khoza* 1982 3 SA 1019 (A) 1043C-E). This was dealt with in, among others, *S v Alex Carriers (Pty) Ltd* (1985 3 SA 79 (T)) the head note of which reads:

> "Conviction beyond reasonable doubt is what the State must achieve before it succeeds in making 'the wall of guilt fall on the accused'; it is unnecessary for the accused to push any part of that wall over onto the side of the State. An accused will accordingly be discharged if the State's case is not strong enough and ... it will sometimes be sufficient if the accused does nothing at all and sometimes it will be sufficient if he relies on pointing out the weaknesses in the State case (by, *eg*, cross-examination which exposes the unreliability of a witness). The practical effect of the State producing a stronger case might well be that such limited counters to the State case might transpire to be insufficient and that active rebuttal of the State case is necessary to counter the strength of that case. Even then there is no onus of proof on the accused ... The quantity and strength of the rebutting considerations required by [sic] the accused to prevent the State producing a convincing case depends, in the nature of things, on the strength of the State case. The accused has to do nothing more than to cause the court, when reaching its decision, to have a reasonable doubt concerning the guilt of the accused" (88I-89D for original text; and generally Schwikkard *et al* 526; and Zeffertt, Paizes and Skeen *The South African Law of Evidence* (2003) 123).

In delictual claims fault mostly takes the form of negligence. The onus of establishing such negligence rests throughout the case upon the plaintiff and never shifts (*Van Wyk v Lewis supra* 445). As a result there is in such cases just one issue which, as pointed out by Thompson JA in *Arthur v*

Bezuidenhout and Mieny (1962 2 SA 566 (A)), is: "has the plaintiff, having regard to all the evidence in the case, discharged the *onus* of proving, on a balance of probabilities the negligence he has averred against the defendant?" (574B). He went on to say:

> "Before it gives judgment in favour of the plaintiff, the Court must be satisfied that, *having regard to the evidence as a whole*, the plaintiff has proved, on a balance of probabilities, his allegation of negligence against the defendant" (576C-D) (my emphasis).

I submit that the above general principles were somewhat disregarded by the Supreme Court of Appeal in the recent case, as the discussion which follows will try to demonstrate.

2 Facts

The facts of the case were that the plaintiff (appellant) instituted an action in the magistrate's court against the first defendant (first respondent) and second defendant (second respondent), being one R, suing them in the alternative as well as jointly and severally. He claimed an amount of just under R74 000 as damages, following a collision in which his motor vehicle was extensively damaged and which resulted, so it was alleged, from an earlier collision which took place between two motor vehicles, one of which was driven by an employee of the first defendant while the other was driven by the second defendant. The following facts were regarded by the parties as being common cause, namely, that at the time of the collision the plaintiff's vehicle was parked in a demarcated parking area in a street; that a collision occurred between the first and second defendants' respective vehicles and directly thereafter, and as a result of that collision, one or both of the first and/or second defendant's vehicle/s collided with the plaintiff's parked vehicle; that the driver of the first defendant's vehicle had been driving it in the course and scope of his employment with the result that if he was negligent the first defendant would be vicariously liable therefore and finally that the plaintiff did not know which of the first and second defendants was liable for the damage occasioned to his vehicle. As a result he joined the two defendants in the action pursuant to section 42(1) of the Magistrate's Courts Act (32 of 1944) as amended (the Act), which makes provision for several defendants to be sued in the alternative or both in the alternative and jointly in one action whenever the plaintiff alleges that he has suffered damage and that it is uncertain which of the defendants is in law responsible for such damage.

3 Issues

At the commencement of the trial the parties agreed that there was to be a separation of issues and that the trial court was to be asked first to pronounce upon the question whether either or both of the defendants were liable for the damage suffered by the plaintiff, after which, if there was a finding in favour of the plaintiff in that regard, the issue as to the quantum of the plaintiff's damages was to be considered. To that end both defendants put the plaintiff to the proof of the extent of his damages. In what was clearly a tactical move the plaintiff's attorney requested the court to make a ruling

on the question as to who had to commence leading evidence. After the point was argued the court ordered that the duty to begin rested on the defendants in the order in which they were cited in the summons. The legal representatives for both defendants thereupon indicated that they would not lead evidence at that stage but nevertheless placed it on record that this did not mean that the defendants were closing their cases. The magistrate pointed out that he interpreted the actions of the defendants as amounting for practical purposes as if they had closed their cases. The plaintiff then closed his case without leading any evidence (par 4). These were the circumstances in which the court was called upon to decide whether the plaintiff had established a claim for damages based on negligence against either or both of the defendants.

4 Decision of the court *a quo*

The magistrate held that although none of the parties had placed *viva voce* evidence before the court it was clear from the facts which were common cause that the maxim *res ipsa loquitur* (the occurrence/thing speaks for itself) applied and that there was accordingly a *prima facie* case against the defendants which had not been answered. As a result he held that the two defendants were jointly and severally liable for the damage suffered by the plaintiff (par 5).

The first defendant appealed against the magistrate's decision to the High Court. However, before the appeal was heard the first defendant conceded the quantum of the plaintiff's claim by letter and again in its counsel's heads of argument. Two issues were argued before the High Court, namely, firstly whether the magistrate's judgment was appealable and secondly, whether the magistrate had been correct in holding, on the basis of the maxim *res ipsa loquitur* and in the absence of any evidence from any of the parties, that the first defendant's driver was negligent. On the first issue Danzfuss AJ (Hancke J concurring) held that the judgment of the magistrate was appealable in that section 87 of the Act empowered the court of appeal to amend the order of the magistrate to bring it in line with the current state of affairs, which in the instant case was that there was no longer any dispute between the plaintiff and the first defendant because of the concession which had been made concerning the quantum of the plaintiff's claim. However, the court also expressed the view that it was not necessary for it to amend the order made by the magistrate and that it could merely proceed to hear the appeal without altering the order (par 9).

Turning to the merits of the case Danzfuss AJ held that the magistrate erred in holding that the maxim *res ipsa loquitur* applied because even though it was known that one or both of the first and second defendants' vehicles collided with the plaintiff's vehicle which was parked in a demarcated parking area and further that the cause of that collision was known, namely, an earlier collision between the first and second defendant's vehicles, nevertheless no evidence had been led to indicate that either of the two drivers involved in that earlier collision had been negligent with regard to that collision and that the occurrence itself did not justify such an inference (par 10). The court did acknowledge though that the facts relating to the first

collision were within the exclusive knowledge of the defendants and that the plaintiff had no personal knowledge thereof, this having the result that much less evidence was required to make out a *prima facie* case. However, there had to be sufficient evidence to establish such *prima facie* case, it was emphasised (par 11). The court also said that it was clear that one of the two drivers or both of them had been negligent but the problem was that the plaintiff had not succeeded in showing which one. In short there was no evidence placed before the court on the strength of which a reasonable person could find in favour of the plaintiff. This being the case the appeal was allowed with costs and the finding of the magistrate set aside and replaced by an order of absolution from the instance (par 11).

5 Decision of the SCA

On further appeal to the Supreme Court of Appeal (SCA) the decision of the High Court was set aside. Farlam JA (Mthiyane JA and Motata AJA concurring) said that the magistrate had correctly held on the common cause facts before him, read with the failure of both defendants to lead evidence, that both defendants were jointly and severally liable for the plaintiff's damage.

On the question of the appealability of the magistrate's decision, Farlam JA accepted the contention that, despite the first defendant's concession by letter and in its counsel's heads of argument before the High Court, the first defendant should have waited until the magistrate had given judgment against it before appealing. This was due to the fact that the finding made by the magistrate was not a rule or order having the effect of a final judgment and furthermore the first defendant's concession regarding the quantum of the plaintiff's claim did not convert it into such a rule or order. Therefore the High Court's decision that the finding of the magistrate was appealable was incorrect (par 16). Although this point was sufficient to have disposed of the appeal the SCA went on to express its views on the merits of the case as this had been requested by the legal representatives of the parties and had been fully argued.

Concerning the merits of the case, the SCA held that the High Court had been correct in holding that the maxim *res ipsa loquitur* did not apply. However, the High Court had overlooked the fact that both defendants, each of whom had exclusive knowledge as to what happened (as opposed to the plaintiff who did not know how the collision occurred), had decided to place no evidence before the trial court and were correctly regarded as having closed their cases. The plaintiff had succeeded in showing that one or both of the drivers concerned had been negligent in that, even though he did not lead evidence, certain facts were common cause. While the plaintiff presumably had no further evidence to put before the court, the common cause facts gave rise to four possible inferences, namely:

(1) neither driver was negligent; or

(2) the first defendant's driver was negligent; or

(3) the second defendant was negligent; or

(4) both drivers were negligent.

The SCA took the view that failure by both defendants to lead evidence brought into play the rule in *Galante v Dickinson* (1950 2 SA 460 (A)) where Schreiner JA said:

> "It is not advisable to seek to lay down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident, that one which favours the plaintiff as opposed to the defendant" (465).

In considering which of the possible inferences was to be preferred in the instant case, the attitude of the court was that it could, by balancing probabilities, select a conclusion which seemed to be the more natural or plausible from amongst several conceivable ones even though that conclusion could not be said to be the only reasonable one (par 21; see also *Govan v Skidmore* 1952 1 SA 732 (N) 734C-D; and *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 4 SA 147 (A) 159C). The application of the *Galante* rule to the facts before the court meant that the more natural or plausible inference was that both drivers had been negligent (par 21).

The SCA relied heavily on Lord Justice Denning's *obiter dictum* in *Baker v Market Harborough Industrial Co-operative Society Ltd* ([1953] 1 WLR 1472 (CA)) which says:

> "It is pertinent to ask, what would have been the position if there had been a passenger in the back of one of the vehicles who was injured in the collision? He could have brought an action against both vehicles. On proof of the collision in the centre of the road, the natural inference would be that one or other or both were to blame. If there was no other evidence given in the case, because both drivers were killed, would the court, simply because it could not say whether it was only one vehicle that was to blame or both of them, refuse to give the passenger any compensation? The practice of the court is to the contrary. Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them ... In the absence of any evidence enabling the court to draw a distinction between them, they must be held both to blame, and equally to blame" (1476).

6 Criticism of the SCA decision

The decision of the SCA regarding the application of the *res ipsa loquitur* maxim cannot be faulted. However, I submit that the approach of the court on the merits of the case is not correct. The better approach is that of the High Court. This must be so since the reasoning of the SCA is based on probabilities and inferences which apply in favour of the plaintiff who elected not to set out a *prima facie* case by giving *viva voce* evidence. Even though he did not have the full facts the plaintiff was nevertheless in a position to give an outline of the basic facts, for example, as to where his motor vehicle was

left in the parking area and the position of the motor vehicles of the two defendants after the collision with his own. If, for example, the other motor vehicles had been removed after the collision and before the plaintiff arrived at the scene, he could have testified to that effect. On the basis of the facts thus given by the plaintiff it could then have been possible to do some kind of reconstruction of the most likely scenario and accordingly draw the necessary inferences. It is crucial that the necessary foundation for inferences should be laid. Needless to say that there are many cases dealing with this point. For example, in *Mazibuko v Santam Insurance Co Ltd* (1982 3 SA 125 (A)), which was discussed in the instant case, Corbett JA said:

> "where, as in this case, a plaintiff has sued two defendants in the alternative and also, in the further alternative, jointly and severally for damages sustained by him (the plaintiff) and the defendants have denied liability and have also reciprocally pointed to one another as being the party responsible for plaintiff's damages, then, if at the end of the plaintiff's case there is evidence upon which a court applying its mind reasonably, could hold that it had been established that either the one defendant or the other or both of them were legally liable (it being nevertheless uncertain as to which of the alternatives was the correct one), the Court should not grant an application for absolution at the suit of either defendant. In such a case, which is in effect a tripartite suit between three adversaries, it is ... in the interests of justice that the case should be decided on the evidence which all the parties might choose to place before the Court, provided ... that the plaintiff, when presenting his case, has laid the necessary foundation of showing, *prima facie*, that one or other or both of the defendants are legally liable" (135C-F).

In the instant case the SCA appears to have contradicted its earlier stance in *Sardi v Standard and General Insurance Co Ltd* (1977 3 SA 776 (A)) where Holmes JA said:

> "At the end of the case, the Court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the *onus* of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence. In the final analysis, the Court does not adopt the piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a *prima facie* case; and then (b), deciding whether this has been rebutted by the defendant's explanation" (780G-H).

The following further points of criticism are hereby levelled against the approach of the SCA in the instant case, namely:

(1) the defendants' failure to testify is not proof of the plaintiff's case. Evidence is required, even though less evidence would suffice to establish a *prima facie* case in such circumstances (par 11; and Zeffertt *et al* 129-130);

(2) a *prima facie* case, on the part of the plaintiff, was required. If uncontroverted by the defendants' evidence such a case would have become conclusive proof of the plaintiff's case (*S v Veldthuizen supra* 416G-H; *Ex parte Minister of Justice : In re R v Jacobson and Levy supra* 478; *Terry v Senator Versekeringsmaatskappy Bpk* 1984 1 SA 693 (A) 699F; and Zeffertt *et al* 125). In this respect it should be noted that the contents of pleadings are not evidence but mere allegations (par 18);

(3) in all the cases referred to in the instant case the plaintiff did in fact give evidence. The only remaining question was the sufficiency of the evidence thus given, more so since in some of the cases the defendant(s) who had detailed knowledge of the facts elected not to testify;

(4) it was not correct to say, as the court did, that the plaintiff had succeeded in showing that one or both of the drivers were negligent (par 19). How does anybody prove negligence other than through giving evidence and being subjected to cross-examination if need be?;

(5) the balancing of probabilities, drawing of inferences and conclusions (par 21) come into play only after, and not before, the plaintiff has laid a *prima facie* case;

(6) the decision of the court was based on speculation, guesswork and assumptions, rather than proven facts. This increased the risk of erroneous ruling. The position would have been different had the court accepted that the maxim *res ipsa loquitur* was applicable as it would have operated in favour of the plaintiff; and

(7) since the plaintiff did not know what happened and could not lay the foundation for his case, absolution from the instance, as granted by the High Court, should have been confirmed.

7 Conclusion

It is submitted that to be fair, court decisions must be based on proven facts. For this reason if the plaintiff fails to adduce evidence on which to prove his allegations the case should be dismissed. It is not enough for the plaintiff to say something like this:

> "Something happened, somebody did it but I do not know when and what exactly that person did. However, I suspect that it is either A or B and unless they tell me who of them did it and how, I take it that it was both of them acting together."

It will be seen that anything in the nature of the above statement is not proof but pure speculation. It falls far short of proving a case on a preponderance of probabilities. As Thompson JA put it in *Arthur v Bezuidenhout and Mieny* (*supra*):

> "There is ... only one enquiry, namely: has the plaintiff having regard to all the evidence in the case discharged the *onus* of proving, on a balance of probabilities, the negligence he has averred against the defendant" (574B).

Applying the above test to the instant case the answer must invariably be that the plaintiff has not even bothered to try to discharge that onus. In short, the decision of the SCA in *Jordaan v Bloemfontein Transitional Local Authority*, at least on the merits, is, with all respect, not correct.

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