



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, LOCAL DIVISION, DURBAN**

CASE NO: 8585/2016

In the matter between:

ABSA I-DIRECT LTD

Applicant

and

CHERYL LAZARUS N.O

First Respondent

SELVARAJAN ANNAMALAY

Second Respondent

ORDER

- (a) The rulings by the magistrate that the defendant may not cross-examine on documents unless they have been proved first are reviewed and set aside.
- (b) It is declared that the defendant is entitled to cross-examine on documents which have not been proved yet, subject to proof thereof at a later stage.
- (c) The second respondent (the plaintiff) is ordered to pay the costs of the review application.

JUDGMENT

Delivered on: 22 March 2017

PLOOS VAN AMSTEL J

[1] This is a review of two rulings by a magistrate in a civil trial, which has not been concluded yet. Counsel for the defendant in the trial (the applicant in the review) was cross-examining the plaintiff when she asked him about certain documents which had not been proved yet. The plaintiff's attorney objected and the magistrate ruled that she would not allow cross-examination on the documents until they have been proved. The applicant contends that this was a serious irregularity which interfered with the right to cross-examine and that the rulings should be set aside so that the trial can proceed. The magistrate has delivered a notice to the effect that she does not oppose the application and will abide by the decision of this court. The review is however opposed by the plaintiff.

[2] The trial concerned a claim for compensation in terms of the plaintiff's insurance policy, arising out of damage to his car when he collided with a fence. The insurer repudiated liability, inter alia, on the basis that the plaintiff had misrepresented to it in his claim that he had been the driver of the car at the time of the incident.

[3] During cross-examination counsel for the defendant asked the plaintiff whether he had filled in a police accident report form which formed part of the bundle of documents which had been handed in without objection, and which had been discovered by the plaintiff's attorney. The attorney objected to the question on the basis that the report had not been proven and that there had been no evidence as to who had taken the particulars down. Presumably he overlooked the fact that the plaintiff had just been asked whether he had filled the report in. If the answer were affirmative the document would have been proved. The magistrate then told counsel that she was supposed to prove a document before she cross-examined on it. Counsel responded, correctly, that she had asked the plaintiff about the document. Rather puzzlingly, the magistrate responded: 'You can't ask him, you need to prove a document'. It would appear that she also overlooked the fact that counsel had asked the plaintiff whether he had filled the report in, which was a perfectly

permissible question. After an adjournment for the matter to be considered by the parties' legal representatives the attorney placed on record that he was not prepared to accept the authenticity of the document, and the magistrate made a ruling that counsel could not cross-examine on the document until she had proved it.

[4] A while later counsel asked the plaintiff questions about a document which he said he had obtained from Vodacom and provided to the defendant. The attorney again objected to the question on the basis that the document had not been proved. Counsel placed on record that she intended to call the person who had generated the document. The magistrate then told her to call the witness from Vodacom before she could cross-examine on the document. The witness was not available and the magistrate then ruled that counsel could not cross-examine on the document until it had been proved properly.

[5] It would appear that what the magistrate had in mind was that counsel for the defendant should lead evidence on the authenticity of the document while the plaintiff's case was still in progress, before she could cross-examine on it. I do not follow this. I have never heard of such a procedure. Will the plaintiff be entitled to respond by leading evidence to dispute the authenticity of the document? It sounds like some sort of a trial within a trial.

[6] A defendant in a civil case is entitled to cross-examine on a document which has not been proved, provided the document is proved later. It may of course be proved by the evidence elicited by the cross-examination. Otherwise it may be proved in the course of the defendant's case. If it is not proved the evidence elicited by the cross-examination on the document becomes inadmissible. The same applies to an accused in a criminal case. It is entirely impractical to expect of the defendant to prove the document while the plaintiff's case is still being presented, or for an accused to do so while the state case is still being presented.

[7] The decision in *Van Tonder v Kilian NO and Another*¹ is instructive. A magistrate in a criminal case ruled that counsel could not cross-examine a state witness on an expert report regarding a motor vehicle collision until the report had

¹ Van Tonder v Kilian NO and Another 1992 (1) SA 67 (T)

been proved. He also ruled that counsel could not cross-examine another witness for the state on pleadings which had been filed in a civil case until the pleadings had been authenticated. This was in spite of counsel informing the court that he intended to prove both the expert report and the pleadings in the course of the defence case. The matter was taken on review and the court held that there was no rule that a document which an accused or defendant had not yet proved could not be put to a plaintiff or the State's witnesses. The court held that in our accusatory legal system an accused or defendant had perforce to prove his case and his documents after closure of the case for the State or the plaintiff and that it was mandatory that documents which had not yet been proved should be put to the plaintiff or State witnesses, subject to later proof thereof, since an accused or defendant was obliged to put his case to the opposing side fully and completely. The magistrate's rulings were held to be a misdirection which had materially prejudiced the applicant in the continuation of the trial, and that the irregularity could not, after a possible conviction, be corrected on review or appeal. The rulings were accordingly set aside. I am in full agreement with the court's reasoning. Also see the discussion on this topic in Schmidt, Bewysreg.²

[8] It was submitted on behalf of the plaintiff that the review should not be entertained until the trial had been concluded. The difficulty with that approach is that if the irregularity is only corrected at the stage of a review or appeal after judgment had been delivered by the magistrate the order made by her will have to be set aside and the matter be referred back to the trial court. The claim is not substantial (some R69000) and that will involve costs on both sides that can be avoided if I deal with the matter at this stage. I also take into account that cross-examination is a fundamental part of a trial and that the magistrate's rulings constituted a serious limitation on this right.

[9] There is regrettably a further matter on which I feel obliged to comment. This concerns the manner in which the magistrate spoke to counsel at the trial. She said, inter alia: 'Please don't put words into my mouth'; 'Be careful of what you submit to the court'; 'All right, sit down'; 'Seems to me that the defence doesn't even know why, what kind of claim they defending at court'; 'Do you not know what it means to

² Bewysreg, Schmidt and Rademeyer, 4th ed at 339.

prove a document?'; 'Have you asked your colleague's advice on how to prove a document?' It is important that presiding officers treat legal representatives who appear before them with courtesy and respect. This is part of the right of access to courts which is guaranteed in our Constitution. A litigant who sees his legal representative being treated with disrespect by a presiding officer may well feel that he is not getting a fair hearing or form the perception that the presiding officer is not as impartial as she should be. This has the potential to erode the confidence of the public in our courts. There are very few problems in court that cannot be dealt with firmly but politely.

[10] The order that I make is as follows:

- (d) The rulings by the magistrate that the defendant may not cross-examine on documents unless they have been proved first are reviewed and set aside.
- (e) It is declared that the defendant is entitled to cross-examine on documents which have not been proved yet, subject to proof thereof at a later stage.
- (f) The second respondent (the plaintiff) is ordered to pay the costs of the review application.

Appearances:

For the Applicant : J Nicholson

Instructed by : Shepstone & Wylie Attorneys
Durban

For the Second Respondent : C S A Smart

Instructed by : Ash Haripersad & Partners
Durban

Date Judgment Reserved : 23 February 2017

Date of Judgment : 22 March 2017