KOSTER CO-OPERATIVE AGRICULTURAL COMPANY LTD. v. SOUTH AFRICAN RAILWAYS AND HARBOURS.

(WITWATERSRAND LOCAL DIVISION.)

1973. *October* 29-31; *November* 1, 2, 5-9, 12-16, 19-21; *December* 18.
COETZEE, J.

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Practice.—Trial.—Application for re-opening of plaintiff's case.—No indication in pleadings, discovered documents or cross-examination of nature of defendant's evidence.—Plaintiff taken by surprise by such evidence.—Application granted.—Onus *of proof.—When discharged.—Versions of plaintiff and defendant mutually destructive.—Must be proved that version of party burdened with the* onus *is true and that of the other party false.*

In an action for damages arising out of the destruction by fire of a large quantity of bags of maize which had been stockpiled near a station, only one of plaintiff's witnesses had testified as to the time when the fire had broken out, namely that it had broken out after 1 p.m. Plaintiff's witnesses had not been cross-examined at all by defendant about the time the fire had broken out. From documents discovered by defendant it was clear that the defendant had accepted that the fire had broken out after 2 p.m. Defendant's pleadings only contained a general denial of the cause of the fire. After plaintiff had closed its case defendant called witnesses to testify that the fire had broken out before 12.27 p.m. In an application by plaintiff for the re-opening of its case to lead evidence as to the time when the fire had broken out, defendant contended that it was entitled to take plaintiff by surprise.

Held, as only one inference appeared from the defendant's official documents which had been discovered, namely that defendant had at all times accepted that the fire had broken out after 2 p.m. that plaintiff's legal advisers could never have thought that the time when the fire had broken out was a material issue or was an issue at all.

Held, further, although evidence on this point was available to and obtainable by plaintiff before closing its case, that there was an acceptable explanation

why such evidence was not tendered by plaintiff prior to the closing of its case. Application for the re-opening of plaintiff's case granted.

Held, further, at the conclusion of the evidence, that the versions of plaintiff and defendant were mutually destructive and that the *onus* rested on plaintiff to prove on a balance of probabilities that the plaintiff's version was true and that of the defendant false.

Held, further, on the evidence, that plaintiff had not succeeded in discharging the *onus* on it. Absolution from the instance granted.

The *dictum* in *National Employers Mutual General Insurance Association* v. *Gany,* 1931 A.D. 187 at p. 199, discussed and applied.

Action for damages. Facts of no importance have been omitted.

E. Morris, S.C. (with him *C. Z. Cohen*), for the plaintiff.

L. Le Grange, S.C. (with him *W. P. van der Merwe*), for the defendant.

Cur. adv. vult.

Postea (December 18).

COETZEE, J.: On 6 March 1970 plaintiff suffered considerable damage when a large quantity of bags of maize which had been stockpiled near Derby station was destroyed by a fire. Plaintiff now endeavours to collect the loss suffered as a result of the fire from the defendant on the ground of the latter's alleged negligence.

The case against the defendant is that one of its locomotives caused a fire early on the afternoon of that day in the railway track, i.e. the area of approximately 30 paces wide between the two fences enclosing the railway. The fire was allegedly driven on by a strong north-westerly wind for a distance of about 100 paces over plaintiff's adjoining land to plaintiff's stacks of maize. The defendant, apart from its denial that any of its locomotives was responsible for the starting of the fire, further denies that the origin of the fire was on its land, and submits that it started on plaintiff's own land south of the railway line. The parties agreed on the amount of the damages viz., R24 865,55 and the issue is in regard to liability therefor.

As nobody saw sparks flying from the locomotive or burning coal falling or precisely where the fire started, the plaintiff had to rely on inferences from the surrounding circumstances to prove its case, but

especially on the geographical location of the burnt down veld. As there is no doubt about the general direction of the fire, the probable starting point thereof can be determined with reasonable ease if the location of the burnt down veld is known. If this starting point is between the fences of the railway line, counsel for defendant concedes, in my opinion correctly, that it is a reasonable inference that under the proved circumstances a locomotive caused it, unless the fire was started before 12.27 p.m. Before that time there was no locomotive in the vicinity

which could have been the culprit and diesel locomotives are excluded as potential causes. This question of when the fire was observed was seriously contested. Plaintiff's counsel also conceded, and in my opinion correctly, that if it is so that at 12.27 p.m. the fire was already burning merrily, as described by some of defendant's witnesses, there can be no balance of probabilities in its favour, even if the starting point of the fire was on the railway line.

To evaluate the evidence properly on these two main points in issue (viz. the location of the burnt down veld and at what time the fire started) which sometimes becomes entwined, I shall give a description of the general aspects of the entire vicinity.

[The learned Judge analysed the evidence and continued as follows.]

The following entry in Reyneke's handwriting and signed by himself and the ganger of Koster appears in the train register, exh. 6:

"Fire started Co-operation 2.45 p.m. Rep. management. Ganger Foord reported 4.05 p.m. S.A.R. Police called."

In all the Railway reports of investigations discovered to plaintiff the time of the breaking out of the fire is given as 2.45 p.m. and it is stated that if it was caused by a train, it could only have been caused by train No. 3014 or No. 3981 both of which departed at 1.55 p.m.

In the course of plaintiff's case it was never pertinently put to the witnesses under cross-examination that it was defendant's case that the fire was already raging at the locality as early as 12.27 p.m. To a few witnesses it was put only *en passant* that they did not really know when the fire broke out and it was left at that.

Defendant's very first witness, Pieters, stated that the fire broke out between 12 and 1 p.m. He "saw" when it broke out. Thereafter a number of witnesses followed who testified positively about the time, like, e.g. Mrs. Els.

[The learned Judge analysed the evidence further and continued as follows.]

After Collins (at that time a scholar of the Koster High School) had testified and confirmed the evidence of Jonker as regards the time when scholars, who travelled by railway bus on Fridays of hostel week-ends, were allowed to stop classes, Mr. *Morris* for the plaintiff applied for the re-opening of his case on this point, i.e. the time when the fire broke out. The grounds for his application were that the plaintiff was caught unawares and was prejudiced thereby as there was no indication in any

of defendant's discovered documents which was indicative of anything but a positive acceptance that the fire broke out after 2 p.m. In addition he said that there was no indication at all during cross-examination which could possibly have caused him to think that evidence of this nature would be adduced and consequently he led no evidence to prove that at 2 p.m. there was no visible fire although he had such evidence available.

Mr. *Le Grange,* for the defendant, adopts the attitude that he is entitled to surprise the plaintiff—an element of surprise which is strategically used at the right moment and time is after all part of the armament of the trial advocate. It is so, but if language is used, which applies rather to bodily conflict, to give a vivid description of this aspect of the art of pleading, I may add in the same idiom that it is my duty to see to it that the Queensberry rules are not contravened during the course of the combat in Court. Mr. *Le Grange* submits with reference to *dicta* in decided cases quoted by Mr. *Morris* (*R.* v. *M.,* 1946 A.D. 1023 at p. 1027; *Small* v. *Smith,* 1954 (3) S.A. 434 (S.W.A) at p. 438E; *R.* v. *Scoble,* 1958 (3) S.A. 667 (N) at p. 669A-D) that it was not necessary for him to reveal the defendant's case regarding the time of the occurrence, as he should only put so much of his case to a witness as has a direct bearing on the evidence of the particular witness. And, he continues that no witness testified from his own knowledge about the time of the occurrence. He was, therefore, not required to expose his knock-out blow prematurely. Relying on *Bell* v. *City of Salisbury,* 1962 (3) S.A. 734 (S.R.) and *Mkwanazi* v. *Van der Merwe,* 1970 (1) S.A. 609 (A.D.), he submits that no case is made out for a re-opening.

There must undoubtedly be sound reasons for the re-opening of a case which has already been closed. The correct approach to this matter can be found in the judgment of VAN WINSEN, A.J.A., in the *Mkwanazi* case, *supra* at p. 626C-H, where he is reported as follows (although he delivered a minority judgment, his approach was adopted by the majority (*per* STEYN, C.J. at p. 619C-D)):

"The discretion is not unlimited. In addition to the fact that the discretion must be exercised judicially, the Courts through the years laid down certain considerations which are intended to serve as guides in the exercise of such discretion. The formulation of such guides serves a useful, in fact essential purpose, in so far as they assist in the exercise of the conferred discretion. Indeed, the absence thereof would have created great uncertainty in regard to the object and proper exercise of this power. Applied judiciously these guides have no hampering or petrifying effect on the discretion of the court.

It also appears from the decided cases that the considerations mentioned therein are not all equally important. The importance of particular considerations does not necessarily remain the same and may vary, according to the circumstances of the particular case. On the other hand it is also clear from the decided cases that in the exercise of the discretion certain considerations are usually regarded as more important than others. One of the most important considerations according to which an application for the re-opening of a case which has already been closed, with the object of adducing further evidence, must be dealt with, is that the applicant should advance reasonable and acceptable grounds why the evidence was not led before the closing of the case. The applicant must show that the evidence was not available before the closing of the case, or could not reasonably have been obtained, or, if it was indeed available or obtainable he should advance an acceptable explanation why it

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was not adduced before the closing of the case. This is an accepted basic rule in the exercise of the discretion, and where it is not complied with, the application is normally dismissed."

I think that Mr. *Le Grange* is correct in his general approach to

cross-examination and what he should ask while cross-examining. I do not think that there was anything in the evidence of plaintiff's witnesses (except that of Louwrens) which pertinently referred to the time of the outbreak of the fire. Louwrens said, however, that the fire near the signal definitely started after 1 p.m. He determined this by the fact that they have lunch at 1 p.m. and he only saw the fire after they had had lunch. But even in his case, Mr. *Le Grange* submits, the only risk which he took by not disclosing his case (a calculated risk according to him) was that the Court at the end of the case could have considered the evidence to the contrary more carefully.

I did not agree with the defendant. If the plaintiff was caught unawares merely by defendant's omission to put the contrary situation under cross-examination, I doubt whether I would have allowed the re-opening of the case. What was decisive to me is the fact that from the official documents of the defendant which had been discovered only one inference could be drawn, viz. that the railway administration at all times and after proper investigation accepted that the fire only started after 2 p.m. There is not even a single word which casts doubt on that. Although the time stated (in the particulars it is given as "nearly afternoon") is denied in the pleadings, it is part of a general denial in regard to the cause of the fire. On defendant's papers no legal representative in Mr. *Morris's* or his attorney's position could ever have thought that this was a material issue or was an issue at all. I was very surprised myself when this string of witnesses for the defendant gave a completely new turn to the proceedings. To have collected evidence beforehand that there was no fire before 12.30 p.m. could only have been the action of a crystal gazer and not that of a reasonably alert legal representative. No cross-examination whatever in this regard, was in fact calculated not to disturb this reasonable view of the real issues in the case. Therefore, although such evidence was available and obtainable before the closing of plaintiff's case there was, in my opinion, in the words of VAN WINSEN, A.J.A., quoted above, an acceptable explanation why it was not adduced by plaintiff before the closing of its case. I, therefore, ordered that plaintiff was entitled to interrupt defendant's case there and then and to place any evidence which it thought fit before me as long as it only referred to the time when the fire had broken out. That was then done.

At the end of the case, after further evidence had been led by the defendant on this point, there was little doubt left with me that this fire did not break out before 2 p.m. There are convincing reasons for this finding in the evidence of Van der Merwe and De Jager (when they testified again), Van Niekerk, Herbst and Harmse.

[The learned Judge analysed the evidence further and continued as follows.]

Did the plaintiff prove its case? As already indicated, it entirely depends, in the circumstances, on the location and extent of the burnt

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down veld. The *factum probandum* is of course the negligent setting alight of the veld by a locomotive and the condition of the area after the fire is only a *factum probans*. It is, however, for all practical purposes the only *factum probans* and decisive of the *factum probandum* so that it can really be regarded as *factum probandum*. Is this sufficient reason to find in favour of the plaintiff, that generally speaking, his four witnesses are less susceptible to criticism than those of the defendant; that they in spite of certain differences in regard to detail still corroborate each other to a great extent? Did he satisfy the *onus* of proof in this way?

A well known *dictum* which is applicable to cases where the versions of the litigants are mutually destructive is that of WESSELS, A.J., in *National Employers Mutual General Insurance Association* v. *Gany*, 1931 A.D.187 at p. 199: "....."

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This approach is frequently criticised by jurists because it is felt that it possibly creates a standard of proof at the end of the proceedings which, at least in civil cases, is too high—see, e.g., the following passage from the judgment of CLAYDEN, J., in *International Tobacco Co. (S.A.) Ltd.* v. *United Tobacco Co. (South) Ltd.* (1), 1955 (2) S.A. 1 (W) at pp. 13-14: "....."

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In *R.* v. *M.*, 1946 A.D. 1023 at p. 1026 DAVIS, A.J.A., refers to the *dictum* of WESSELS, J.A., and continues as follows:

"This is in some respects overstated in regard to a civil suit; it certainly applies to a criminal case with a much nearer approach to complete accuracy."

This remark is *obiter*, but coming from the Appellate Division it carries considerable weight.

I consider myself bound by the judgment in the *Gany* case. Apart from the fact that since then the Appellate Division never overruled this approach, which is significant, I would respectfully like to agree with the underlying logic thereof and venture a few remarks in regard to the relationship between this approach and well-known standards of proof.

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In the first place this approach can only avail within the limited field defined by WESSELS, J.A., viz. "where there are two stories mutually destructive". This phrase implies a far more fundamental conflict than those encountered daily in the courts when witnesses contradict each other. It does not only refer to fractions of the different versions. It refers to the case where acceptance of the essence of one version brings about the unavoidable and complete expunction of the other version.

The evidence *in casu* is a textbook example of this mutual destruction. There was either a burnt down fallow land far to the west of the signal or there was no such land.

I am also of opinion that it is implicit in the dictum of WESSELS, J.A., that there are no inherent probabilities or other acceptable pieces of evidence which render the version of one or the other side more probable. I say this because there is no indication in the learned Appeal Judge's judgment which causes one to believe that what he says should result in a deviation from or an exception to the accepted standard of proof which we all know as "a balance of probabilities". What he says, he says within that framework. Where no probability exists and the two versions are mutually destructive, nothing is in fact proved (whatever the standard of proof may be), unless "absolute reliance" can be placed on the evidence of the litigant upon whom the *onus* rests. This is only a formulation in different language of that which is contained in the first sentence of his *dictum,* viz.,

". . . that the story of the litigant upon whom the *onus* rests is true and the other is false".

(My underlining).

In my opinion, there is, as I have endeavoured to indicate, no contradiction between the *dictum* of WESSELS, J.A., and the accepted standards of proof. It is only fundamental logic which the learned Judge makes applicable to particular defined spheres and which he then uses to determine whether a fact is proved on "a balance of probabilities" (to call the doctrine by its name) or not. I find support for this approach in a passage from the judgment of HORWITZ, J., in which VAN BLERK, J., concurred, in *Garzouzie* v. *Smith,* 1954 (3) S.A. 18 (O) at p. 22:

"If Oosthuizen's evidence cannot be taken into consideration in favour of or against any of the parties, then Van der Berg's evidence should also not be taken into consideration, because Van der Berg only contradicts Oosthuizen and not also the defendant. The evidence of the parties is, therefore, all that is left. The probabilities as already mentioned do not materially support one or the other of the parties. In these circumstances and where no finding can be based on credibility, the only conclusion is that plaintiff has not satisfied the *onus* which rested on him. Notwithstanding the fact that in *R.* v. *M.,* 1946 A.D. 1023 at p. 1026 DAVIS, A.J.A., expressed the view that in the passage at p. 199 of the judgment in *National Employers' Mutual General Insurance Association* v. *Gany,* 1931 A.D. 187 the *dictum* is too strongly stated as far as civil cases are concerned, it must, in my opinion, follow that where two directly contradictory versions are placed before a trial court, where neither the one nor the other version contains contradictions, where the probabilities do not favour the one or the other and where the one or the other version is not rejected either on the ground of credibility or for any other sound reason, then the only and inevitable conclusion must be that the party burdened with the *onus* of proof failed to satisfy that *onus.*"

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Cf. also the commentary on the *dictum* of WESSELS, J.A., in Hoffman, *South African Law of Evidence,* 2nd ed. at p. 306 which also supports this view.

In casu, I must, therefore, answer the following question positively

before I can conclude that plaintiff has satisfied the *onus* of proof resting on him: although Duvenage *et al.* were acceptable witnesses for plaintiff, can it on the other hand be said on good grounds that the evidence to the contrary in regard to the location of the burnt down veld is false?

If the evidence of Botha, Foord and Van Tonder were unsupported, there would possibly be room for an argument that the question should be answered positively (it is, however not necessary to consider it, because Coetzer's evidence which supports them in regard to the location of the fire is something completely different. I could hardly find that his evidence in this regard is false.

[The learned Judge analysed the evidence further and continued as follows.]

I cannot accept that the aforesaid criticism of Coetzer, when it is viewed in the light of his personality, is a sufficient ground for regarding his evidence as false. I cannot say that when he testified, that he had seen burnt material on the fallow land and that he walked at the edge thereof and in fact measured it by pacing, that it was false in the sense that I should reject it for some or other reason, or that he mistook ordinary weeds on a fallow land for burnt down veld. For that, he impressed me too favourably as a keen observer of rural affairs.

In the result plaintiff has not succeeded, in my view in discharging the *onus* resting on it.

As far as costs are concerned it is so that defendant raised two separate issues, or was responsible therefor, on which much time and preparation was spent. That entails the time when the fire broke out and the presence or not of persons who did surveying. The defendant was completely unsuccessful on both points and should pay the costs connected thereto to plaintiff. In an endeavour to avoid complicated taxations, I shall only make one order for costs which I trust will roughly compensate plaintiff for its success on these points, taking into account the time wasted thereon.

Absolution from the instance is granted. The plaintiff must pay half of defendant's taxed costs which may however not include costs which are exclusively connected with any of the two issues referred to in the previous paragraph.

Plaintiff's Attorneys: *Moodie & Robertson.* Defendant's Attorney: *Deputy State Attorney.*