450

TALJAARD v. SENTRALE RAAD VIR KOÖPERATIEWE ASSURANSIE LTD.

(APPELLATE DIVISION.)

1973. *November* 15. 1974. *March* 4. VAN BLERK, J.A., WESSELS, J.A., JANSEN, J.A., RABIE, J.A. and MULLER, J.A.

Insurance.—Insured house burnt down.—Defence that insured had set the house alight.—Onus *on insurance company.—Nature of.—Appeal.—Appeal on the facts.—Court's approach.*

Where the insurance company which insured a house against fire avers that the insured deliberately set the house on fire the *onus* is on the company throughout to prove arson and that the insured set the house on fire. The arson and the identity of the arsonist are mutually dependent on each other.
The Court's approach to an appeal on the facts restated.
The decision in the Orange Free State Provincial Division in *Taljaard* v. *Sentrale Raad van Koöperatiewe Assuransie Bpk.*, confirmed.

Appeal against a decision in the Orange Free State Provincial Division (ERASMUS, J.). Facts of no importance have been omitted.

M. E. Kumleben, S.C. (with him *H. C. J. Flemming*), for the appellant.

M. T. Steyn, S.C. (with him *H. J. O. van Heerden, S.C.*), for the respondent.

Cur. adv. vult.

Postea (March 4th).

VAN BLERK, J.A.: The appellant, a farmer of the farm McGrathspark, district of Bultfontein, as the owner of the farm, insured the house on it and his property in the house with the respondent, an insurance company, against fire. In the late afternoon of 27th February, 1969 the house with all its contents, apart from a negligible amount of damaged property which was saved, was partially burnt down. Appellant's claim for R18 000 against respondent in payment of the damage he suffered was rejected by the Orange Free State Provincial Division on the ground that he had intentionally set the house alight with the intention to defraud the respondent.

451

The *onus* was on the respondent throughout to prove arson and that the appellant set the house alight. The arson and the identity of the arsonist are mutually dependent on each other.

Although there was no duty on respondent to exclude all possible causes of the fire by evidence (cf. *Elgin Fireclays Ltd.* v. *Webb,* 1947 (4) S.A. 744 (A.D.)) it must satisfy the Court that its explanation of how the fire arose is the correct one (cf. *Cooper & Nephews* v. *Visser,* 1920 A.D. 111 at p. 115 because it is the most acceptable and probable. (*Ocean Accident and Guarantee Corporation, Ltd.* v. *Koch,* 1963 (4) S.A. 147 (A.D.) at p. 159).

[The Honourable Judge analysed certain facts and proceeded as follows.]

Before us it was conceded that appellant was a poor witness and that he showed certain deficiencies as a witness which could affect the reliability of his evidence, but it was argued that the finding that, according to his demeanor in the witness-box and the contents of his evidence, he was an unreliable witness, was unfounded. It was also contended—with reference to *Gates* v. *Gates,* 1939 A.D. 150 at p. 155—that the reasonable mind will not easily be convinced that a person will intentionally set fire to his house with his possessions, of which some have sentimental value and are irreplaceable. This is certainly a circumstance which must be kept in mind when considering the probabilities. It cannot have more weight than that.

[The Honourable Judge analysed the facts further and proceeded as follows.]

Where a trial court has been influenced by errors or misdirections in deciding on the credibility of witnesses this court, in certain circumstances, is free to reconsider the whole case without being bound by the trial court's findings on credibility.

The question which arises here is whether the finding about appellant's credibility must be ignored as a whole or whether it may be accepted in those parts where it is well founded. Although it is naturally difficult to determine whether the trial Judge would have rejected the evidence of appellant as unreliable apart from the error and misdirections, it still appears that there are sufficient grounds upon which this finding may be maintained. (Cf. *R.* v. *Dhlumayo and Another,* 1948 (2) S.A. 677 (A.D.) at p. 706, para. 11).

This being so, the approach to be adopted by this Court is that which was stated by SOLOMON, J.A. in *Kunz* v. *Swart and Others,* 1924 A.D. 618 at p. 655: "....."

[The Honourable Judge further analysed the evidence and concluded as follows.]

452

There is no justification for setting aside the decision of the trial court. As against the justifiable criticism which may be expressed against certain aspects of the judgment of the Court *a quo,* there are therefore also weighty considerations which indicate the correctness of the crucial finding. In reconsidering the evidence on appeal, the question, as stated

above, is not whether there is reasonable doubt about the correctness of the conclusion of the trial court, but whether the Court of Appeal is satisfied for sound reasons that it is wrong. In the present case, despite certain reservations as stated, it is not possible to be so satisfied.

The appeal is dismissed with costs, including the costs of two counsel.

WESSELS, J.A., JANSEN, J.A., RABIE, J.A. and MULLER, J.A., concurred.

Appellant's Attorneys: *Goodrick & Franklin,* Bloemfontein. Respondent's Attorneys: *Siebert & Honey,* Bloemfontein.

476

S. v. OLIFANT.

(CAPE PROVINCIAL DIVISION.)

1974. *March* 7. VAN WINSEN and BANKS, JJ.

Fish and fisheries.—Contravention of sec. 13 *of Act* 58 *of* 1973.—*Crayfish unlawfully caught sold by Department of Fisheries.—Sec.* 16 (2) (a) *not applicable.*

The accused had been charged with and convicted of a contravention of section 13 of Act 58 of 1973, read with regulation 20 (2) promulgated under the provisions of that Act in that he had caught crayfish unlawfully. A portion of the sentence which had been imposed had been suspended. In addition he was, in terms of section 16 (2) (*a*) of the Act, sentenced to a further term of imprisonment or, in default, a fine. It appeared that the crayfish had been sold by the Department of Fisheries. In a review,

Held, as the accused had obtained no advantage from his unlawful act, that the provisions of section 16 (2) (*a*) did not apply.

Review.

VAN WINSEN, J.: The accused was correctly convicted of contravening sec. 13 of Act 58 of 1973 read with reg. 20 (2), published in terms of that Act, in that he had unlawfully caught crayfish. He was sentenced to R200 or 180 days' imprisonment, of which R50 or 45 days was suspended for three years on certain conditions. In addition he was sentenced to a further R15 or 15 days' imprisonment in terms of sec. 16 (2) of the said Act.

This latter fine was imposed in terms of sec. 16 (2) (*a*), which reads as follows:

"Whenever any person is convicted of an offence in terms of this Act, the Court shall summarily enquire into and determine the monetary value of any advantage which he may have gained in consequence of that offence, and, in addition to any other punishment that may be imposed in respect of that offence, impose a fine equal to the amount so determined and, in default of payment thereof, imprisonment for a period not exceeding one year."