J B ZWART AND V G MANSELL

AND

SNOBBERIE (CAPE) (PTY) LTD

261/82/AV

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

J B ZWART and V G MANSELL NN.O
in their capacities as the duly appointed
executors testamentary in the Estate of
the late Mrs M P Beckerling Appellants

AND

SNOBBERIE (CAPE) (PTY) LTD Respondent

CORAM: Trengove, Cillié, Nicholas, JJA, Smuts et
Grosskopf, AJJA

HEARD: 8 March 1984

DELIVERED: 22 March 1984

J U D G E M E N T

NICHOLAS, J A

Snobberie (Cape)(Pty) Ltd ("Snobberie") is a small

private .....

private company dealing mainly in women's clothing.

The dresses it sold were exclusive and expensive - the prices per garment ranged from R1 500,00 upwards. It also acted as a commission agent in the sale of antique furniture, silver, paintings and other objects d'art. It had a comparatively small number of clients, with whom Mr Wessels, Snobberie's managing director dealt personally, occasionally at his office in his house in Waverley, Johannesburg, but mostly at their respective homes.

One of Snobberie's clients was the late Mrs Maxine Beckerling. In her lifetime she was a married woman with substantial independent means: she owned a sea-going yacht and a large house in The Valley Road, Parktown,

Johannesburg; and she possessed a valuable collection of pictures, antique furniture and silver.

On 12 October 1979 Mrs Beckerling died in a motor accident. Mr J B Zwart and Mr V G Mansell were appointed as executors testamentary in her deceased estate on 7 February 1980. Shortly afterwards Snobberie made substantial claims against the estate. These were not admitted, and on 30 June 1981 Snobberie issued summons out of the Transvaal Provincial Division against the estate, claiming R69 263,00 in respect of goods sold and delivered; R45 250,00 in respect of work done; and interest and costs.

After a trial lasting several days, judgment was

delivered .....

delivered in favour of Snobberie on 24 May 1982 for

(i) R45 200,00 in respect of goods sold and delivered;

(ii) R43 250,00 in respect of work done;

(iii) Interest; and

(iv) Costs including the costs of two counsel.

The estate now appeals against this order.

(a) Goods sold and delivered.

This claim related to 16 items, which it was alleged had been sold and delivered to Mrs Beckerling between April and September 1979. The trial judge found in the plaintiff's favour on items 1,2,3,4,5 and 15 and against the plaintiff on the remaining items.

Items 1,2 and 3 related respectively to a canteen of silver cutlery (R10 000,00), 6 silver gilt spoons and

salt cellars (R2 350,00), and a quantity of loose silver (R10 000,00). Item 4 related to a silk jersey trouser suit, which Mrs Beckerling bought as a gift for her close friend, Mrs Dressner (R1 650,00). And item 5 related to a small Pierneef painting (R1 200,00).

The trial judge found that these articles had been delivered to Mrs Beckerling in pursuance of agreements of sale, and that the prices in brackets had been agreed by her. The only attack on appeal was in regard to the prices.

Item 15 related to a canteen of continental silver which had been given to Wessels by a Mrs Lorch for

sale on commission. The trial judge found that it had been proved that this canteen had been sold to Mrs Beckerling for R20 000,00, although delivery had not been effected while she was alive. (Delivery was subsequently tendered to the executors). Here again it was only the finding in regard to the alleged agreed price which was in issue in the appeal.

Proof of the alleged agreements in regard to prices depended entirely on the evidence of Wessels.

He was not a credible witness. The trial judge described him as follows:

> "He struck me as intelligent, very excitable, loquacious and argumentative and not truthful in all respects. He tended to give answers even before

> questions were completed and sometimes his evidence was in conflict with what he had previously testified under oath."

After giving some examples of contradictions and unsatisfactory features in his evidence, the learned judge said,

> "It is clear from the above that Wessels' evidence cannot be relied upon unless he is supported or corroborated on material aspects on the various claims."

In a detailed analysis, counsel for the appellants gave further examples in their heads of argument of Wessels's unsatisfactory and contradictory evidence, and submitted that the trial judge should have found that he was a completely unreliable witness, and rejected his evidence in toto.

The respondent's counsel did not challenge the

trial judge's finding in regard to Wessels's credibility, and they accepted the analysis of Wessels's evidence in the appellants' heads. They submitted, however, that because of the extent to which it was corroborated, and having regard to the probabilities, it could not be rejected entirely.

In my opinion, the proper approach to his evidence was to accept it only where it was shown by reliable evidence or the surrounding circumstances to be probably true.

Wessels suffered under the disability that there existed no contemporaneous documents which might have supported his evidence. This was due to the way in which the plaintiff's business was conducted. Snobberie

had .....

had no invoice books; no written orders were received; no client's ledger accounts were kept, even where sales were on credit; and formal statements of accounts were rarely sent. When a sale was effected, Wessels would write out details on one of the plaintiff's letter-heads and show it to the customer, but this was not a record which was kept by the plaintiff. It was either thrown away, or put in a file and used as "scribbling" paper. The plaintiff's only records were its cheque book and bank deposit book. Its books were written up from its bank statements.

In regard to the prices of items 1,2 and 3, the trial judge said -

"Obviously .....

> "Obviously, the items were not donated by the plaintiff. The price claimed by the plaintiff was not attacked as exorbitant. I find the contract proved in respect of items 1,2 and 3."

In regard to item 4, he said -

> "It is clear that there was a contract of sale in respect of this item and the price was not attacked during cross-examination as exorbitant."

In regard to item 5, he said that it was not alleged that the price of R1 200 was exorbitant. In regard to item 15, he said:

> "As far as the price is concerned we only have Wessels' word. On the other hand Mrs. Lorch's price was R15 000, and R20 000 alleged by Wessels to have been agreed upon is not excessive and was never attacked as such. It is therefore not improbable. On this basis therefore, I find that there was a contract between the plaintiff and Mrs.

Beckerling for the sale of item 15 at a price of R20 000."

No doubt Mrs Beckerling must have agreed in each of these cases to pay a price for the goods bought - either an agreed price, or the plaintiff's usual price or, possibly, a fair and reasonable price. The plaintiff alleged an agreed price, and that is what it had to prove. Whether the price claimed was exorbitant or not was not in issue. Nor was it relevant to the issue: the fact that the defendants did not attack a price as exorbitant or excessive did not make it probable that it was an agreed price.

It was submitted on behalf of Snobberie that, because Wessels's evidence in regard to price was not disputed .....

puted in cross-examination, the trial court was entitiled to accept it.

The general rule is that where it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation; and failure to cross-examine may amount to an acceptance of a witness's testimony. This is not, however, an inflexible rule. See R v. M 1946 AD 1023 at pp 1027-1028.

In the present case, although it was not specifically put to Wessels in cross-examination that the defendants

disputed .....

disputed his evidence in regard to price, no inference could be drawn from that omission. The whole purpose of the cross-examination was to show that Wessels was not a credible witness, and that purpose was achieved. In these circumstances a specific challenge of Wessels's evidence in regard to price would have been an empty formality.

In my opinion, therefore, the plaintiff failed to discharge the onus of proving its allegations in regard to price. This result maybe id unfortunate for the plaintiff because it is clear from the unchallenged findings of the trial court that Mrs Beckerling purchased the items concerned and (except in the case of item 15) took delivery

of them, so that plainly the estate became indebted to the plaintiff in some amount. Nevertheless, because of Wessels's lack of credibility and the plaintiff's lack of records, the claim should not have succeeded.

(b) Work done ("Jeans").

The plaintiff's second claim related to work alleged to have been done for Mrs Beckerling on 550 pairs of jeans.

In his evidence Wessels described how he had conceived the idea of hand-painted jeans while travelling in Europe in 1975-6. He started experimenting, and he and three others (Mrs Kritzinger, Mrs De Rossner and Mr Naude) became

associated in a project for the exploitation of the idea of jeans which were hand-painted with African and modern motifs. They caused about a dozen samples to be made, and Wessels went overseas (to Switzerland, England, France and America) in order to accertain whether people liked the hand-painted jeans, and whether the idea was saleable.

He met with a favourable response. After investigation, however, he came to the conclusion that "enormous" capital and "enormous" storage facilities would be required. The idea was then left "in abeyance".

At this stage Mrs Beckerling became interested. She had seen a sample pair of hand-painted jeans (Wessels

thought .....

thought that it was a pair which he himself was wearing at the time), and she told him that she would like to sell the jeans overseas. Reluctantly (and only because Mrs Beckerling and her mother, Mrs Köhler, and her whole family were good clients of his) Wessels agreed to do the necessary work for her. This was "enormous", and involved repeated careful bleaching, and the painting on of motifs, followed by washing and ironing.

Wessels told Mrs Beckerling that she could get reject jeans from a firm of wholesalers called GAP.

Wessels and Mrs Beckerling did not agree on a

final price for the work, but they agreed on a minimum price of R120,00 per pair for 50 pairs of jeans (on which there was more work) and R80,00 per pair for the remainder. The work was to be done at Wessels's house in Inanda, Johannesburg.

Mrs Beckerling purchased 550 pairs of jeans for a total of R2 480,00 from GAP and had them delivered to Wessels's residence. (It appears from documentary evidence that the date of delivery was 26 May 1977, and that the purchase price was paid by means of a cheque drawn in favour of GAP by Mrs Beckerling and debited to her banking account on 11 June 1977.)

The work was begun in June-July 1977 and was completed according to Wessels during 1979. The jeans had still to be bleached in the sun, however, in order to get rid of the smell of paint, and to give them an older appearance. From Wessels's house, Mrs Beckerling spoke on the telephone to Mrs Kritzinger, who had a farm in the Delmas district and was one of those originally associated in the project. Arrangements for the further bleaching were made directly between Mrs Beckerling and Mrs Kritzinger. Wessels's responsibility was at an end: his work had been completed. Thereafter the jeans were removed from Wessels's house to Mrs Kritzinger's farm.

In .....

In February 1980 the jeans were left by Mrs Kritzinger at the offices of Mr Zwart, one of the executors.

The trial judge found, on the basis of the evidence of Wessels, Mrs Kritzinger, a Mrs Iafrate and a Mrs Steyn, that the plaintiff had proved that there was a contract between the plaintiff and Mrs Beckerling pertaining to work to be done on jeans supplied by Mrs Beckerling. Although evidence as to the prices alleged to have been agreed upon could only be given by Wessels, the learned judge held that, in the absence of a clear challenge to Wessels's evidence as to price, that evidence stood.

Where one party to an alleged transaction is dead,

the court must scrutinize with caution the evidence given by, and led on behalf of, the surviving party. The court must examine with a very cautious eye evidence which is uncorroborated by evidence which is itself cogent enough to overcome the caution. See Borcherds v. Estate Naidoo 1955(3) S.A. 78(A) at p 79.

To the extent that the plaintiff's case depended on Wessels's evidence, it rested on a broken reed, and the fact that it was not specifically challenged so far as price was concerned did not lend it verisimilitude. The story which Wessels told was, moreover, an improbable one. The evidence of Mrs Kritzinger was inherently

unreliable .....

unreliable. And the evidence of Mrs Iafrate and Mrs Steyn did not provide the required corroboration.

In my opinion it is improbable that Wessels would have entered into the alleged agreement with Mrs Beckling.

Wessels said that when he agreed to do the work for Mrs Beckerling, his idea of selling hand-painted jeans was "in abeyance", because of lack of capital and storage space. It is plain that if he had not abandoned the project, he would not have applied what he regarded as a valuable idea, and devoted his time, energy and facilities, to producing hand-painted jeans for Mrs Beckerling to sell.

It .....

It is clear, however, that in May - June 1977, when Mrs Beckerling signed the cheque in favour of GAP, the project was still very much alive.

A letter received by Wessels dated 26 July 1977 shows that on that day Wessels had discussed with the writer of the letter the airfreighting of jeans from Jan Smuts and Durban to Zurich, Geneva, Frankfurt, London, New York and Los Angeles.

And it appears from the minutes of a meeting held at Wessels's house on 17 October 1977 and attended by the four persons engaged in the project (Wessels, Mrs Kritzinger, D Naude and Mrs De Rossner) that Wessels was to leave for

Europe on 20 October, taking samples of "ready hand-painted denims" to London to sell in the Portobello Road. Naude was to investigate the Flea Market for a stall. Mrs Kritzinger was to take 4 samples for boutiques outlets and other retail outlets. And Mrs De Rossner was to collect samples at 72 5th Avenue for postage to America.

Giving evidence for the plaintiff, Mrs Kritzinger said that Mrs De Rossner obtained an order for a very large quantity of jeans that could not be supplied, and it was at that stage that the project was practically abandoned. This must have been after October 1977.

Mrs Kritzinger also gave evidence as to her dealings with Mrs Beckerling. She said that she had never met Mrs Beckerling

personally .....

personally. Their only contact was two telephone conversations.

The first was late in 1978. She presumed that Wessels had given Mrs Beckerling her telephone number. Mrs Beckerling asked her to wash, bleach and iron jeans because no one else had the necessary facilities. She said that she and Mrs Beckerling agreed on a remuneration of R10,00 per pair of jeans. Subsequently the jeans were delivered at the farm. Mrs Kritzinger was not there at the time and she did not know who brought them. (In a letter to the plaintiff's attorneys in February 1978, however, she had said that she had received the jeans from

Snobberie).

Mrs Kritzinger's evidence in regard to the second telephone conversation was vague. She said:

> "Ek dink een keer daarna het sy vir my gesê wanneer die jeans moet reg wees." (My emphasis)

And again:

> "Sy het my net geskakel en gesê die goed moet op 'n stadium reg wees en dan sou dit waarskynlik na Kaapstad gegaan het, die instruksie - wel nie die instruksie nie, maar so het sy gesê. Dit is wat sy gesê het."

In February 1978, after Wessels telephoned her and told her what to do with the jeans, she left them at the offices of Mr Zwart, one of the executors. In an

acoompanying "delivery note" she wrote,

> "Our account has been sent to Snobberie for their attention."

She was unable to give an acceptable explanation why, if her contract was with Mrs Beckerling, the account should have been sent to Snobberie, and not to the estate. Nor was any claim for the remuneration alleged to have become due to her ever made against the estate either by herself or by Wessels on her behalf. It is not credible that if the alleged agreement referred to by Mrs Kritzinger had been made, there would not have been such a claim. In addition Mrs Kritzinger's evidence was vague, halting and uncertain, and was in general not such as to overcome the caution required in a case such as

the present.

On 26 February 1980 Wessels wrote a letter to the executors in which he said,

> "The order for jeans placed by Mrs Beckerling for 30/3/80, is ready for delivery from Delmas.
> Please inform us where to deliver these jeans."

It is difficult to avoid the inference that this was a false statement contrived by Wessels in an attempt to explain the suspicious circumstance that jeans were being tendered for delivery after the death of Mrs Beckerling, and nearly three years after the conclusion of the alleged contract. For it is clear from Wessels's own evidence

that Mrs Beckerling did not place with him any order for jeans to be delivered on 30 March 1980. And the evidence of Mrs Kritzinger, which is quoted above, does not show that any such order was placed with her.

The evidence of Mrs Iafrate and Mrs Steyn touches only the fringe of what is the central issue, namely, the alleged contract between Wessels and Mrs Beckerling.

Mrs Amanda Iafrate had known Wessels for about 20 years, during which time she did dress alterations for him. When Wessels was away overseas, she used to visit his house in order to keep an eye on it. Upon occasion she saw Mrs Beckerling there.

She .....

She remembered visiting the house in August-September 1977. Her son, who was then 18 and was doing his army service at Kimberley, was with her. He saw the jeans and asked Mrs Beckerling for a pair. She said,

> "Look if I don't sell it in Sardinia then when I come back I will give you one for present."

They had a problem with the stitching, which was a hard job, and they were considering buying a very heavy sewing-machine. Mrs Beckerling told her, "If you buy the machine, you come and I will give you the cheque." Because the work was nearly finished, however, the machine was not bought.

At .....

At the beginning of 1979, Wessels, who was about to leave for overseas, telephoned Mrs Iafrate and told her to fetch the keys to his house, because Mrs Beckerling would be wanting to fetch her jeans. Mrs. Beckerling arrived with two black men and a Kombi, and took away three or four boxes containing jeans. That was the last time Mrs Iafrate saw the jeans.

Mrs Steyn said that she was related to Wessels by marriage. She had met Mrs Beckerling in 1977 in connection with the sale to her of waterless cooking pots. Upon occasion, especially when Wessels was overseas or on

holiday .....

holiday, she had visited Wessels's house to make sure that there was food for the dogs and that everything was in order. On various occasions she had seen painted jeans lying about near the swimming pool and people working on them. She had spoken to Mrs Beckerling about these jeans, who told her that she intended to purchase some of the jeans from Wessels and then to resell them after Wessels had finished working on them. Mrs Beckerling had later telephoned her and made an appointment to meet her at Wessel's house on 24 September in connection with the acquisition of pots, mentioning that she was going to pick up jeans and silver. But Mrs Beckerling did not

keep .....

keep the appointment.

Mrs Steyn's evidence did not advance the plaintiff's case. On the contrary, Mrs Beckerling's expressed intention to purchase jeans from Wessels was inconsistent with a contract with Wessels for him to paint jeans already belonging to her.

In my view the evidence in regard to the payment of the R2 489,00, and the evidence of Mrs Iafrate and Mrs Steyn, proved no more than that Mrs Beckerling had displayed an interest in jeans, and that she might have had some contractual relationship with Wessels in regard to them. It did not provide any support for Wessels's

evidence in regard to the terms of the alleged contract, more particularly in regard to the alleged term as to price. This claim should accordingly also have been dismissed.

The result is that the appeal is upheld with costs, including the costs of two counsel. The order of the court a quo is set aside, and there is substituted therefor, "Absolution from the instance with costs, including the costs of two counsel".

H C NICHOLAS

Trengove, JA
Cillié, JA
Grosskopf AJA
} concur

14A/84

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and

SNOBBERIE (CAPE) (PTY) LTD — Respondent

CORAM : Trengove, Cillié, Nicholas, JJA, Smuts et Grosskopf, AJJA.

HEARD : 8 March 1984.

DELIVERED: 22 March 1984

J U D G M E N T

SMUTS, AJA :

I have had the advantage of reading the judgment. ...2

judgment prepared by my brother NICHOLAS, JA, and agree that the appeal must be upheld for the reasons stated by him save that I am not persuaded that it has been shown that the Court a quo erred in finding that there was an agreement between plaintiff and Mrs Beckerling in regard to work to be performed by plaintiff on jeans. I do however agree that there was insufficient corroboration of plaintiff's evidence as to the price which Mrs Beckerling agreed to pay for that work and that the price alleged by him was accordingly not established. For that reason I agree that the appeal in regard to the award of R43 250-00 in respect of work done must succeed.

I 3

I accordingly agree with the order proposed by NICHOLAS,JA.

F S SMUTS, AJA.