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Case No 167/1990

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter of:

B.F. MDANI — Appellant

and

ALLIANZ INSURANCE LIMITED — Respondent

CORAM: VAN HEERDEN, NESTADT, KUMLEBEN, EKSTEEN JJA et GOLDSTONE AJA

HEARD: 24 SEPTEMBER 1990

DELIVERED: 28 SEPTEMBER 1990

JUDGMENT

VAN HEERDEN JA:

On 21 August 1983, and in the vicinity of the turn-off to Pinelands, a collision occurred on Settlers Way, Cape Town, between a motor vehicle driven by one da Costa and the appellant who was at the time a pedestrian. The appellant sustained serious injuries and later instituted an action for damages against the respondent with which the motor vehicle had been insured in terms of the Compulsory Motor Vehicle Insurance Act 56 of 1972. The appellant alleged that the collision had been caused by the negligence of da Costa. For the purposes of this appeal it is unnecessary to set out the other averments in the particulars of claim or to refer in any detail to the plea. It suffices to mention that the respondent denied that da Costa had been guilty of causal negligence.

When the matter came to trial the court, at the request of the parties, in terms of Rule of Court 33(4) ordered that the issue of negligence be tried first, the question of damages to stand over for later

determination if necessary. The appellant then called two witnesses. The first was Dr Oxtoby who testified that the appellant, as a result of his injuries, did not have a reliable recollection of the events immediately preceding the collision. The second witness was Sergeant Basson who went to the scene some time after the collision. There he spoke to da Costa and later prepared a sketch plan, a key thereto and a motor accident report. He had no independent recollection of his visit to the scene and when testifying relied entirely upon the documents prepared by him.

It appears from Basson's evidence that Settlers Way is a dual carriageway. In the vicinity of the turn-off to Pinelands, the western carriageway ("the road") runs from south to north and consists of three lanes. Basson also testified that:

1) da Costa told him that he had been driving from south to north and that the pedestrian had walked from west to east across the road;

2) the point of impact, as pointed out by da Costa, was some 10 metres from the western side of the road, i e, on the eastern-most lane;

3) the road is 11 metres wide.

If the collision occurred at the above spot, it follows that the appellant had very nearly succeeded in crossing the road when he was struck by da Costa's vehicle.

Whilst Basson was testifying the respondent raised the objection that any evidence relating to extra-curial admissions made by da Costa would be inadmissible. The court then decided that the evidence in question could be led and that a ruling on its admissibility would be given at a later stage. After the appellant had closed his case, the court held the evidence to be inadmissible. An application for absolution from the instance having been dismissed, the respondent closed its case. The court then granted absolution with costs against the appellant.

In its judgment the court gave reasons for its said ruling. It went on to conclude that once the statements made to Basson by da Costa were excluded, the remaining evidence was insufficient to establish a _prima facie_ case. It did, however, grant the appellant leave to appeal to this court against the order of absolution from the instance.

Prior to 1988 the evidence relating to da Costa's statements (hereinafter referred to as Basson's evidence) would have been clearly inadmissible against the respondent as insurer of da Costa's vehicle: _Union and South West Africa Insurance Company Ltd v Quntana, N O_, 1977 (4) SA 410 (A). In the court _a quo_ the appellant relied, however, upon the provisions of s 3(1) of the Law of Evidence Amendment Act 45 of 1988 ("the Act") which reads as follows:

> "Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
>
> (a) each party against whom the evidence is

to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

In the view of the court a quo Basson's evidence could not be admitted in terms of this subsection. The reasoning of the court may be thus summarised. The rule in Quntana is not concerned merely with the question whether or not hearsay

evidence should be admitted, but relates also to the inadmissibility of vicarious admissions and other extra-curial statements. In our law such admissions and statements are generally inadmissible. It is true that s 3(1) of the Act permits the court to admit hearsay evidence, but that subsection does not impinge upon the rule that vicarious extra-curial admissions and statements are as a rule not admissible. That much is indeed borne out by s 3(2) which states that the provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence. _In casu_ Basson's evidence related to extra-curial statements of da Costa who was not a party to the suit, and they were therefore inadmissible also because of their vicarious nature. (A similar conclusion was reached by Berman J in his as yet unreported decision in _Stevens and Another v South African Eagle Insurance Company Limited_, Cape

Provincial Division, 4 May 1990.)

In this court counsel for the appellant contended, rightly in my view, that the ruling of the court a quo and that of Berman J in Stevens rest upon a misreading of the judgment in Quntana. In that case a pedestrian had also suffered serious injuries as a result of a collision between him and a motor lorry. Subsequently his wife, in her capacity as duly appointed curatrix-ad-litem to her husband, instituted an action for damages against the defendant, the registered insurer of the lorry in terms of the Motor Vehicle Insurance Act 29 of 1942. She claimed damages as compensation for the injuries and resultant loss suffered by her husband. She alleged that the defendant was liable because the collision had been caused by the negligence of the driver of the lorry. The trial court found that the collision had been due to the negligence of both parties involved and awarded the plaintiff one-half of the assessed damages. The

evidence led by the plaintiff in regard to how the accident occurred was extremely sparse. In fact, the plaintiff's case depended almost entirely upon the evidence of the police officer, who had investigated the accident, as to a statement made to him by the driver of the lorry. According to the police officer the driver stated that the pedestrian had crossed the street from his (the driver's) right to left. This evidence was admitted by the trial court and its finding on the issue of negligence rested primarily on the driver's statement.

On appeal this court held that the statement was inadmissible. At the outset Corbett JA emphasized that the question at issue was the admissibility of evidence given by a witness (A) as to an extra-curial statement made to him by the driver of the insured vehicle (B), where such evidence is tendered against another party, viz the registered insurance company, as defendant in order to prove the truth of the content of

B's statement. It was then pointed out (at p 419) that such evidence by A falls into the category of hearsay evidence and that it is, therefore, inadmissible unless it comes within the ambit of one of the exceptions to the hearsay rule. Corbett JA proceeded to deal with two such exceptions, viz, statements forming part of the res gestae and extra-curial admissions made by a party to an action. Finally he turned to the question whether under our law extra-judicial admissions by strangers are receivable against a party to the action. His conclusions were:

1) That an extra-judicial admission by a stranger to a suit is admissible against a party thereto if there was at the time a privity or identity of interest or of obligation between the stranger and the party (p 420).

2) That there was no such privity or identity between the defendant, as insurer of the lorry, and the driver thereof (p 424).

The court *a quo* seems to have been under the impression that in *Quntana* the statement was held to be inadmissible because it was hearsay *and* because of the lack of the necessary privity or identity of interest or obligation between a stranger (the driver) and a party to the suit (the defendant). That, however, is not what this court decided. It is quite clear from the judgment that the statement in question was held to be inadmissible on a single ground, viz, that it was hearsay. It was only in the context of discussing exceptions to the hearsay rule that Corbett JA dealt with the admissibility of so-called vicarious admissions. He concluded that such admissions may in certain circumstances be admissible as falling within the ambit of one of the exceptions to the hearsay rule, but that that exception did not apply because the driver of the lorry was not "in privity" with the defendant. It follows that the only reason for the exclusion of the driver's admission was its hearsay

nature. It was not _also_ excluded because it had been made by a stranger to the suit.

Counsel for the respondent submitted that _in casu_ da Costa had made admissions to Basson, and that although an extra-curial _statement_ may be admitted in terms of s 3(1)(c) of the Act, s 3(2) precludes the reception in evidence of an extra-judicial _admission_. It suffices to say that in _Quntana_ Corbett JA dealt specifically with the admissibility of an extra-curial admission which, as I have said, was held to be inadmissible on no other ground than that it constituted hearsay.

The court _a quo_ also relied, as did counsel for the respondent in this court, on the following passage in Hoffmann and Zeffert, _The South African Law of Evidence_, 4th ed, at p 195:

> "If the driver gives evidence, his admissions may be put to him in cross-examination and if necessary proved against him as previous inconsistent statements. The possibility now arises that the statements may be admitted

> under s 3 of the Law of Evidence Amendment Act 1988; but, as has been submitted above, the rule that admissions are not vicariously admissible still obtains, and, consequently, the reception of the evidence under the Act would mean that it would be admissible against the declarant and not the Fund."

The phrase "as has been submitted above" refers to what is said at p 175. There the authors deal with the effect of s 3(4) of the Act. That subsection defines "hearsay evidence" as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving evidence". According to the authors the words "depend upon" should be given the meaning of "to rest primarily upon" or "to be governed by". They then conclude:

> "If a witness testified that X had admitted something to him, the probative value of his testimony would depend to some extent on the credibility of X; but it would usually rest primarily upon the credibility of the witness, or be governed by it. In other words, its probative value would not 'depend upon' a person other than the person who is giving the evidence and, therefore, would not

be hit by s.3 [of the Act]."

If I understand this passage correctly, the authors appear to be of the view that the probative value of hearsay evidence given by a witness depends primarily upon the credibility of that witness, and that, having regard to the definition of "hearsay evidence" in s 3(4), evidence given by a witness as to extra-judicial admissions by another person therefore cannot be admitted under s 3(1). Apart from the fact that on this view s 3(1)(c) would have little, if any, practical significance, there is a basic flaw in the authors' reasoning. I say so because in my view the passage confuses two different questions, i e whether an extra-curial admission was made and whether its content is true. If A testifies that B made such an admission, A's evidence in itself is clearly not hearsay. Whether B in fact made the admission, depends upon A's credibility and can be tested by cross-examination. What is hearsay, is the content of the

admission if it is to be used to establish the truth of what was said. And whether the content is true or not, depends entirely upon B's credibility. (Indeed s 3(1)(b) makes it perfectly clear that the witness giving hearsay evidence is not "the person upon whose credibility the probative value of such evidence depends".)

Accordingly, in the postulated example A's evidence as to the content of B's admission falls within the definition of "hearsay evidence" in s 3(4) of the Act and may therefore be admitted in terms of s 3(1)(c) of the Act. It follows that the court _a quo_ was not precluded from admitting Basson's evidence if, having regard to the provisions of s 3(1)(c) (i) to (vii), it was of the opinion that it should be admitted in the interests of justice.

As a result of its wrong view of the law the trial court did not apply its mind to the question whether Basson's evidence should have been so admitted.

Its ruling that the evidence could not be admitted in terms of s 3(1)(c) resulted in the respondent closing its case without leading any evidence. If we were now to hold that in the proper exercise of its discretion the court should have admitted Basson's evidence, it would be difficult to draw an adverse inference from the respondent's failure to call da Costa as a witness. (See Galante v Dickinson 1950 (2) SA 460 (A) 465, and Marine and Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) 30, 37, 40 and 48.) In the result counsel agreed that - and this appears to be the fairest solution - the matter should be remitted to the trial court so that it can exercise its discretion whether or not to admit the hearsay evidence in terms of s 3(1)(c) of the Act. If it is admitted, the respondent will have to consider whether it wishes to apply for leave to re-open its case.

The appeal succeeds with costs and the trial court's order is set aside. The matter is remitted to

that court in order to decide whether the hearsay evidence should be admitted in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 and to make such further rulings as may be necessary to bring the trial to a conclusion.

H.J.O. VAN HEERDEN JA

NESTADT JA

KUMLEBEN JA

EKSTEEN JA

GOLDSTONE AJA

CONCUR