THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO. 105/2003

In the matter between

SANTAM BEPERK **Appellant**

and

VINCENT BIDDULPH **Respondent**

CORAM: HARMS, ZULMAN and HEHER JJA

HEARD: 26 FEBRUARY 2004

DELIVERED: 23 MARCH 2004

Insurance fraud – credibility - upsetting finding of credibility on appeal

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JUDGMENT

ZULMAN JA

[1] This appeal concerns an alleged insurance fraud. The appeal is brought with the leave of this court. The appellant, an insurance company, unsuccessfully sued the respondent, a farmer, for payment of R691 745,00 together with interest and costs. The cause of action was that the appellant was induced by the respondent to pay the amount as a result of a false claim made by the respondent on a policy of insurance issued by the appellant. The claim related to the destruction of a house on a farm and its contents in a fire.

[2] It was common cause that in the event of it being found that the fire was started at the instigation of the respondent the appellant would be entitled to a refund of the amount it paid to the respondent.

[3] One central issue fell for decision by the court *a quo*. It was the question of whether the claim that the respondent made was false or not. In this regard the onus rested upon the appellant. The appellant led evidence from six witnesses in support of its claim. The main witness relied upon by the appellant was a Mr Sigasa. The other witnesses called by the appellant were the respondent's wife; Mr P C Bezuidenhout; the respondent's brother in law, Mr Du Randt, a police officer; Mr J Murray, who was attached to the appellant's Forensic Investigation Unit; and Mr Jansen van Rensburg, the owner of a video production business and an expert in the making of video recordings. The respondent closed his case without leading any evidence.

[4] Sigasa's evidence was to the effect that he set the house and its contents on fire at the behest of the respondent. The court *a quo* found that the evidence of Sigasa was not only unlikely but that it was untruthful. In addition it found that the respondent's wife had given acceptable reasons

for retracting certain sworn statements she made in which she accused the respondent of arranging for the fire. The court *a quo* made no mention in its judgment of the other four witnesses called by the appellant. The primary issue on appeal is whether the court *a quo* erred in rejecting the uncontradicted evidence of Sigasa.

[5] Whilst a court of appeal is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong (*R v Dhlumayo and Another* 1948 (2) SA 677 (A) 706). This is especially so where the reasons given for the finding are seriously flawed. Over-emphasis of the advantages which a trial court enjoys is to be avoided lest an appellant's right of appeal 'becomes illusory' (*Protea Assurance Co. Ltd. v Casey* 1970 (2) SA 643 (7) 648 D-E and *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) 623H – 624A). It is equally true that findings of credibility cannot be judged in isolation but require to be considered in the light of proven facts and the

probabilities of the matter under consideration.

[6] An analysis of the evidence as a whole, including that of Sigasa, proper regard being had to the probabilities, leads to the conclusion that the finding of credibility by the court *a quo* is untenable (cf *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) para 14I–15E. Almost at the outset of its judgment the court *a quo* concluded that the appellant's claim depended exclusively upon the evidence of Sigasa. This was not a correct assessment of the matter since the court was plainly obliged to consider the evidence of all the other witnesses called by the appellant.

[7] Quite apart from the bare say-so of Sigasa the Court had before it as objective facts, not dependent on the credibility of any witness, the following-

(a) The respondent's wife made a video recording of all the movable property in the farm house. The date on the film is 8 October 1998.

In the ordinary operation of the camera that date would have been generated by the person operating the camera.

(b) On 10 October 1998 the respondent, his wife and children left their house unattended and went to spend the night with the respondent's brother-in-law, Bezuidenhout, at Bapsfontein.

(c) During the night of 10 October 1998 the house was destroyed by fire.

(d) Either before or after the fire Sigasa, with the respondent's concurrence, fetched from the farm a defective motor car for which the respondent had previously asked R2000 and which Sigasa had been unable to afford.

(e) During November or December the respondent's wife phoned Bezuidenhout. She told him that the respondent had been responsible for the fire and that she feared for her life.

(f) On 2 December 1998 Bezuidenhout phoned Crime Stop and reported the conversation with his sister. In turn, the police communicated with the appellant which then initiated enquiries.

(g) Towards the end of January 1999, the respondent's wife secretly recorded a conversation with her husband in the course of which she attempted to entrap him into making incriminating admissions about the burning of the house.

(h) Also during January the respondent's wife prepared a statement (dated 4 January 1999) which she posted to Bezuidenhout. The stated purpose was to provide evidence in the event of her untimely decease or unexplained disappearance. In it she described in detail the events surrounding the fire. Most important, she implicated Sigasa in respects which materially accorded with the evidence which he eventually gave in Court including the meeting with Sigasa in the

township where he lived, the handing to him of a container of inflammable fluid and the instructions given by the respondent.

(i) Towards the end of January the respondent's wife left her husband and sought refuge with the said Bezuidenhout. She delivered the two videotapes to him for safekeeping. She confirmed to Bezuidenhout the contents of the letter which she had sent. There is a necessary inference that the first videotape was not destroyed in the fire because the respondent's wife removed it to safety before the fire took place.

(j) At the beginning of February the appellant's representatives, aware that the respondent's wife was no longer within her husband's sphere of influence, interviewed her at Bapsfontein. She agreed to make a statement in the presence of her attorney.

(k) On 2 February 1999 at Pretoria the respondent's wife duly deposed to an extensive affidavit in which she described the respondent's

conception and development of the scheme to defraud the appellant, how Sigasa's services were procured to that end, the subsequent arrival of Sigasa at the farm to remove the motor vehicle with the respondent's consent, the dealings with the proceeds of the insurance pay-out and the disclosure made by her to the appellant's representatives. Once again there were material and striking coincidences between her account and Sigasa's later evidence.

(l) On 3 February 1999 Sigasa was taken to Sandton where he made an affidavit setting out his version of the events before, during and after the fire. He implicated the respondent as the prime mover. The statement corresponded in most (but not all) material respects with his subsequent evidence.

(m) On 4 February 1999 the respondent and Sigasa were arrested. The remains of the motor vehicle which had come from the respondent's

farm were recovered from a place at which Sigasa had abandoned them.

(n) In April or May 1999 the respondent's wife was placed in a witness protection programme. She remained there for a year or more before absconding. She tried to persuade Bezuidenhout to hand back the letter and the tapes but he declined to do so.

(o) The respondent and Sigasa were prosecuted for arson. The respondent's wife did not testify. At the close of the State case both were discharged.

(p) At the time of the proceedings in the court *a quo* the respondent's wife had returned to her husband.

(q) The respondent did not give evidence notwithstanding his direct implication in the fraud and the ease with which he could have rebutted the evidence of Sigasa if it were untrue.

[8] It was against this background that the trial Court was required to assess Sigasa's credibility and reliability as a witness and to consider whether it should believe or disbelieve the respondent's wife, particularly concerning the reason for her retraction of her previous statements, namely that they were simply an untruthful attempt on her part to vent her anger on her husband for his violent and abusive conduct towards her. It is important to note that there was no basis whatsoever for concluding that she and Sigasa collaborated in preparing their versions. On the other hand her evidence that the content of the letter was the result of a joint fabrication by herself and Bezuidenhout was patently untrue – but not found to be so by the court *a quo*. On a balanced overall assessment of the probabilities, and subject to what is said below, the trial Court must have found that the fact that the respondent's wife gave the accounts of the fire that she did provide material corroboration for the evidence of Sigasa, not because they were true (although that must also follow) but because she could not have

produced a version which so closely coincided with that of Sigasa unless it was the product of her own experience.

[9] There was a further overwhelming probability in favour of the acceptance of Sigasa's evidence which was overlooked by the court *a quo*. There was no reason to believe that the fire was started by anybody other than Sigasa. There was no suggestion that he conspired with the respondent's wife to start the fire. His confession was against his interest, even allowing that he (together with the respondent) had already been acquitted on a charge of arson arising out of the same events. It was nowhere suggested that Sigasa had any reason or motive to lie about the matter or falsely to implicate the respondent; indeed his undisputed evidence was that he was on good terms with the respondent when he left his employment on the farm, when he met the respondent and the discussion took place about setting the house on fire, when he returned to collect the vehicle and in the period preceding his arrest.

[10] Sigasa may not have been a satisfactory witness in all respects. However, the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true (cf *R v Kristusamy* 1945 AD 549 at 556 and H C Nicholas Credibility of Witnesses (1985) 102 SALJ 32 especially at 32 – 35). This is particularly so in this case where the trial court rejected Sigasa's evidence on the basis of his veracity as opposed to the reliability of his evidence.

[11] The court *a* quo gave various reasons for rejecting the evidence of Sigasa and for finding in favour of the respondent. First, it concluded that the manner in which Sigasa set the house on fire was 'niks anders as 'n verdigsel en 'n versinsel'. I do not agree. Sigasa is an unsophisticated person with a standard three education. He gave evidence in simple terms as to how he set the house and its contents on fire. The fact that a professional arsonist or a person of more skill or imagination would have

gone about the task in a more efficient way did not indicate that Sigasa's evidence was either a fiction or a fabrication. Second, the court *a quo* took Sigasa to task because he originally made no mention of a purchase price of R500,00 for the engine of the Mazda vehicle. In my view nothing turned on this since it was not disputed that the vehicle had been removed by Sigasa with the consent of the respondent and was found in his possession after the fire. Third, the court *a quo* concluded that because of the contradictory evidence given by Sigasa as to when he removed the vehicle that 'hy verdoesel dan die waarheid verder deur geveinsd te huigel waar hy erken dat hy vroëer getuig het dat hy die Mazda voor die brand gaan haal het en dat hy daarvan seker is'. If regard is had to the manner in which the cross-examination was conducted (with, regrettably, a great deal of often unwarranted hostile and sarcastic participation by the court) and the fact that Sigasa's evidence was given through an interpreter, I do not believe that anything of any consequence flowed from this contradiction. The

probability remained that Sigasa obtained the vehicle from the respondent either before setting the house on fire as an inducement to do so or received it afterwards as a reward for the deed.

[12] The court *a quo* gave as a further reason for rejecting the evidence of Sigasa the fact that in a statement to the police he made no mention that in addition to the vehicle, money was offered to him to set the house on fire and that Sigasa was unable to explain why he omitted this. In my view nothing is to be made of this failure especially if regard is had to the fact that Sigasa made the statement through an interpreter and at a time when he was obviously fearful of the consequences of his conduct. In addition the court *a quo* drew attention to the fact that Sigasa alleged in the statement that the respondent handed a can containing liquid to him and told him that one of the windows of the house had been left open to enable him to gain access so that he could pour the liquid inside the house. In his evidence, although he first admitted that the contents of the statement were correct,

he later denied that he said what was attributed to him in regard to the can but was unable to say why there was this difference. Again, if regard is had to the often unfair pressure which Sigasa was subjected to in the witness box, his lack of a coherent explanation is understandable. The previous statement was given in Sesotho and translated into English. Sigasa stated that he did not know English very well. As I have already pointed out he gave his evidence in court through an interpreter (a different person from the police officer who translated the original statement, and who translated into Afrikaans, not English). In circumstances such as these very little significance can be attached to relatively minor discrepancies between words and nuances of meaning in comparing a prior statement with *viva voce* evidence. The discrepancies relied upon (i.e. pouring out liquid from a bottle as opposed to spraying it from a can, or the vessel being discarded when empty as opposed to when some of its contents had been used), were minor and inconclusive. On both versions, the respondent gave Sigasa a

receptacle containing a flammable substance, which was used by him to start the fire. Sigasa's evidence was substantially consistent with the contents of his prior statement. The fact remained that on the simple version deposed to by Sigasa he set fire to the house using a substance given to him by the respondent. There was nothing to contradict this basic version.

[13] It cannot be fairly said that Sigasa's evidence was so improbable or vague and ineffectual that it could be rejected out of hand as being untrue thereby relieving the respondent of any obligation to contradict it (cf *Siffman v Kriel* 1909 TS 538 at 543 and *Minister of Justice v Seametso* 1963 (3) SA 530 (A) 534 H – 535 A). Indeed he did not deviate from his essential statement that it was the respondent and nobody else who instructed him to set the house on fire. He had no motive to lie and this statement was, in all the circumstances, probably true.

[14] The court *a quo* also drew attention to what it described as ‘’n vreemde verskynsel wat onbeantwoord gelaat is’. The feature was that Sigasa’s statement was given a day after the statement made by the respondent’s wife. It found it ‘agterdogwekkend’ that Sigasa had been taken to Sandton to make the statement and that no warning was given to him before he made the statement. The fact that Sigasa made his statement the day after the respondent’s wife made her statement does not advance the respondent’s case. Indeed the probabilities and the evidence of Murray indicate that the statements came to be made as a consequence of arrangements made by him. The fact that no warning was given to Sigasa before he made his statement did not detract from his credibility or from the probabilities of the matter.

[15] The court *a quo* regarded it as improbable that the respondent would enlist the services of Sigasa to carry out the deed when he had had no contact with Sigasa for two and a half years. If anything, however, this fact

supported the probability that the respondent set about arranging for Sigasa to set the house on fire rather than detracted from it. Sigasa knew the respondent very well, they were on friendly terms and Sigasa knew the farm and farm workers. In all likelihood Sigasa was chosen for the very reason that it would be difficult, if a later investigation took place, to link Sigasa to the respondent or indeed even to ascertain his whereabouts. This would not have been so had the respondent chosen one of his farm workers, for example. In addition there was an inducement readily available which could be offered to Sigasa at little cost to the respondent namely the Mazda vehicle.

[16] Finally the court *a quo* relied upon the demeanour of Sigasa in the witness box as being such that he was ‘’n patetiese en wankelrige figuur wat nie die stempel van betroubaarheid waardig is nie’. This characterisation was unwarranted bearing in mind the record of his evidence, the lengthy cross-examination of him, the fact that he gave

evidence through an interpreter and the deplorable attitude of the learned judge towards him to which I have already referred. In any event the importance of demeanour as a factor in the overall assessment of evidence should not be over-estimated. As pointed out in *President of the Republic of South Africa and Others v South African Football Union and Others* 2000 (1) SA 1 (CC) para 79 p 43:

'The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, the probabilities . . . a finding based on demeanour involves interpreting behaviour or conduct of the witness while testifying. A further and closely related danger is the implicit assumption, in deferring to the trier of fact's findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact.'

It is plain that Sigasa was of a different 'culture, class and race' whose 'life experience differs fundamentally from that of the trier of fact'.The learned

judge's failure to have regard to the social dynamic is quite apparent from his questioning of Sigasa and his assessment of his evidence. As to the limited value of the finding on demeanour where evidence is given through an interpreter see *S v Malepane and Another* 1979 (1) SA 1009 (W) 1016H - 1017A, *S v Martinez* 1991 (4) SA 741 (NmHC) 758 B – D and Nicholas (supra) 36 - 37.

[17] Counsel for the respondent contended that there was another essential matter of probability which favoured the respondent and which entitled the court *a quo* to reject Sigasa's evidence. It was unlikely that a person would ask someone to set fire to his own house. There are simple answers to this contention. First, on a factual basis, the house in question belonged to the respondent's father. More importantly, however, the respondent required finance for another project at the time and set about the entire scheme so as to derive the benefit of an insurance policy.

[18] In all of the circumstances I have no hesitation in finding that the rejection by the court *a quo* of the evidence of Sigasa was wrong. Accordingly the court *a quo* should have found that the appellant had discharged the onus resting upon it.

[19] The following order is made:

19.1 The appeal succeeds with costs, such costs to include costs consequent upon the employment of two counsel.

19.2 The order of the court *a quo* is set aside and replaced with an order granting judgment in favour of the defendant for:

19.2.1 payment of the sum of R10 000,00 together with interest thereon at the rate of 15,5% per annum from 12 February 1998 to date of payment;

19.2.2 payment of the sum of R681 745, 00 together with interest thereon at the rate of 15,5% per annum from 9 November 1998 to date of payment;

19.2.3 costs of suit including the costs of employing two counsel.

R H ZULMAN
JUDGE OF APPEAL

HARMS JA)
HEHER JA) CONCUR