REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A5026/2018

CASE NO: 41104/2016

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED.

Date: 27/6/19

In the matter between:

M Schneider & Hans Schneider Investments (Pty) Ltd — Appellant/Plaintiff

and

Renasa Insurance Company Ltd — Respondent/Defendant

Judgment

The court:

[1] The plaintiff *a quo* appeals against the judgment and order of His Lordship Mr Justice Mabesele delivered on 13 December 2017, dismissing its claim for damages to its motor vehicle arising out of a motor vehicle collision. For convenience, the parties' nomenclature in the court *a quo* is used.

[2] It is common cause that in or about August 2013, the parties entered into an agreement of insurance, in terms of which the defendant undertook to insure several motor vehicles listed in a schedule to the insurance agreement ("the schedule") against all risk, including damage to the listed vehicles in the event of a collision, including other vehicles involved in such a collision. The plaintiff's motor vehicle, a Dodge Ram 2012 ("the Dodge") is included in the schedule.

[3] It is also common cause that on 17 July 2014, in Port Shepstone, a collision occurred between the Dodge and two other vehicles, a Ford Bantam and a Daewoo Matiz. The Dodge was damaged. Consequently, it was written off as uneconomical to repair.

[4] The defendant raised the following grounds of defence to the plaintiff's claim:

[4.1] the plaintiff's ownership of the Dodge and consequently, its *locus standi*; and

[4.2] an exception in the insurance agreement relating to driving the insured motor vehicle while under the influence of intoxicating liquor or drugs.

[5] The court *a quo* found against the plaintiff on the first ground of defence and against the defendant on the second ground. On the basis of these findings, the court *a quo* dismissed the plaintiff's claim.

[6] It is for that reason that the plaintiff specifically appeals the court *a quo's* finding that it failed to discharge its onus in respect of its ownership of the Dodge and consequently, *locus standi.* The defendant opposes the appeal and cross-appeals the court *a quo's* finding that it did not discharge its onus in respect of its reliance on the exception. The plaintiff opposes the cross-appeal.

[7] The appeals are only confined to these two narrow issues.

THE PLAINTIFF'S OWNERSHIP OF THE DODGE AND LOCUS STANDI

[8] The defendant amended its plea with the leave of the court *a quo* to challenge the plaintiff's incorporation and *locus standi.* However, the averments in the original plea admitting that the plaintiff notified the defendant of its claim in respect of the Dodge, the exception and by implication, the insurance agreement and the schedule relied on by the plaintiff, remained. The defendant's averments in respect of the alleged breach of the exception by the insured driver, a director of the plaintiff named Mr. N. Schneider, as well as its repudiation of the plaintiff's claim, also remained. Through these admissions and allegations , the defendant effectively admitted the identity of the plaintiff as cited. The defendant's plea on this issue is a bare denial. It offered no conflicting version as to the identity of the plaintiff. Under these circumstances, the amendment to the plea was inconsequential. However, the court *a quo* upheld the *locus standi* challenge, in our view wrongly so.

[9] It is trite that, in civil proceedings, the quantum of proof is on a balance of probabilities. For reasons set out below, the court's *a quo* finding stands to be set aside and a finding that the plaintiff proved its *locus standi* on a balance of probabilities stands to be made.

[10] In the particulars of claim, both the plaintiff and defendant are cited by their registered names. The plaintiff was previously registered as Hans Schneider Investments (Pty) Ltd. When the collision occurred, it had changed its registered name to the cited name. The plaintiff's registration number was not changed. Mr Schneider testified that he has been a director of the plaintiff for 20 years. When he testified, he did not have the plaintiff's registration number to hand.

[11] There is no requirement in the Companies Act 71 of 2008, that a company is only identified by its registration number. In terms of section 32 of the Companies Act, it is sufficient for a company to provide its full name or its registration number to any person on demand. Section 14, relied on by the court *a quo,* does not provide that a registration certificate is the only evidence of proof of registration of a company. The plaintiff discovered two documents relating to its *locus standi.* These were the registration document reflecting the details of Hans Schneider Investments (Pty) Ltd, and a document reflecting the change of name to M Schneider and Hans Schneider Investments (Pty) Ltd. Both documents contain the same registration number.

[12] Changing the name of the company does not change its identity. Section 19(1) of the Companies Act provides:

"From the date and time that incorporation of a company is registered as stated in its registration certificate, the company:
(a) is a juristic person which exists continuously until its name is removed from the companies registered in accordance with the Companies Act;
(b) has all of the legal powers and capacity of an individual, ..."

[13] In terms of section 19(7), after a company has changed its name, any legal proceedings that might have been commenced or continued by or against the company under its former name may be commenced or continued by or against it under its new name. Therefore for the purposes of the plaintiff's claim, the change of name is inconsequential.

[14] From the inception of the insurance agreement, the defendant accepted premiums from the plaintiff in respect of the motor vehicles reflected in the schedule, including the Dodge. The schedule contains the details of the Dodge, together with the description of the owner, reflected under the plaintiff's previous name. The defendant has not repudiated the insurance agreement or applied for its rectification. It has also not tendered repayment of any insurance premiums paid by the plaintiff.

[15] In the premises, the court *a quo* erred by finding that the plaintiff failed to prove its ownership of the Dodge and *locus standi*. The plaintiff has proved its ownership of the Dodge and consequently its *locus standi* on a balance of the probabilities.

THE EXCEPTION

[16] The exception clause excepts the defendant from liability if the damage to the insured vehicles was caused by the driving of the vehicles by:

> *"the insured while under the influence of intoxicating liquor or drugs (unless administered by or prescribed by and taken in accordance with the instructions of a member of the medical profession other than himself) or while not licensed to drive such vehicle: and any other person with the general consent of the insured, who to the insured's knowledge, is under the influence of intoxicating liquor or drugs (unless administered by or prescribed by and taken in accordance with the instructions of a member of the medical profession other than himself) or while not licensed to drive such vehicle".*

[17] The defendant alleged that when the collision occurred, Mr Schneider drove the motor vehicle while under the influence of alcohol. He denied this. At the trial, the parties agreed that the *onus* to prove that Mr Schneider was driving while under the influence of alcohol when the collision occurred, was on the defendant. The court *a quo* found that the defendant failed to discharge its onus, in our view wrongly so.

[18] It is accepted in our hierarchical structure of courts that appeal courts are reluctant to interfere with factual findings made by trial courts, particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial. A material misdirection is the threshold for interference. In *Makate v Vodacom Limited*[1] the Constitutional Court (Jafta, J), underscored this proposition at paragraph [37] and following. The court stressed the words of Wessels, CJ in *Bitcon v Rosenberg*[2] where the learned Chief Justice said:

> *"The trial judge is not concerned with what is or is not probable when dealing with abstract businessmen or normal men, but is concerned with what is probable and what is not probable as regards the particular individuals situated in the particular circumstances in which they were."*

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[1] 2016 (4) SA 121 (CC)
[2] 1936 AD 370 at 396 to 397

[19] Continuing, Jafta, J said:

> "*[38] In our system, as in many similar systems of appeal, the cold record placed before the appeal court does not capture all that occurred at the trial. The disadvantage is that the appeal court is denied the opportunity of observing witnesses testify and drawing its own inferences from their demeanour and body language. On the contrary, this is the advantage enjoyed by every trial court. Hence an appeal court must defer to the trial court when it comes to factual findings.*"[3]

[20] In this case three witnesses were called by the respondent to support the proposition that Mr Schneider was driving the vehicle under the influence of alcohol when he collided with two parked vehicles. The court *a quo* accepted the evidence of all these three witnesses. The first was a Mr Freidberg, the second a Sergeant Mvundla and the third, a Sergeant Msomi. It was a reliance on the veracity of the observations of those three witnesses of Mr Schneider immediately after the collision that led the court to conclude in paragraph [28] of the judgment, that Mr Schneider had consumed liquor on the day on which the collision occurred.

[21] Further, the court *a quo* in fact concluded that Mr Schneider was not a credible witness. It would follow that, absent a misdirection on the part of the court *a quo*, the findings of the acceptability of the evidence of the three witnesses who testified to the intoxication of Mr Schneider, and the rejection of the evidence of Mr Schneider, all stand. In our view, no misdirection has been shown.

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[3] See also R v Dhlumayo 1948 (2) SA 677 (A) AT 705-706, *Saamwerk Soutwerke (Pty) Ltd v Minister of Mineral Resources* (1098/2015 & 206/2016) [2017] ZASCA 56 (19 May 2017) para 38, *JMYK Investments CC v 600 SA Holdings (Pty) Ltd* 2003 (3) SA 470 (W) para 7.

[22] The court proceeded to deal with two of these by reasoning that because Mr Schneider's one leg is shorter than the other, it could not be said "*with certainty*" that his unsteady movement was caused by drunkenness. As to the red eyes and the breathalyser reading of 0, 83 milligram of alcohol per litre of blood, the court *a quo* said nothing as regards the first, and as regards the second, said simply that it was "*not sufficient to prove that it disturbed his normal condition*".

[23] What appears ultimately to have swayed the court, was the fact that Mr Schneider was "*able to read and understand charges that were laid against him and signed the documents at the police station ...*" which demonstrated "*clearly that Mr Schneider had retained composure of mind and emotions*".

[24] The court *a quo* accepted the evidence of the defendant's witnesses that painted a holistic picture of a person who had consumed alcohol - he smelt of alcohol, his eyes were red, and he was unsteady on his feet. It does not disturb the overall picture by picking one by one at these individual features and forcing an admission from a witness that, yes, conceivably, the particular feature could also have been brought about by other suggested causes. The thrust of the evidence of the three witnesses for the defendant was that, taken together, the picture that was painted, in accordance with normal expectation of human conduct, was that Mr Schneider drove under the influence of alcohol when the collision occured.

[25] The evidence by Sergeant Mvundla and Sergeant Msomi, dispels the plaintiff's conspiracy theory on Mr Friedberg's part, allegedly due to JP Panel Beater's business relationship with the defendant . Sergeant Mvundla and Sergeant Msomi are completely independent and had no reason to falsely accuse him of being

drunk. They responded to their observation that Mr Schneider is drunk as required of any police officer.

[26] The contradictions between these complainants are not material and therefore do not detract from their generally consistent observations of Mr Schneider's alleged drunk state. Mr Schneider's limping walk, not observed by Sergeant Mvundla, is watered down by Sergeant Msomi's evidence that Mr Schneider's difficulty in walking was not occasioned by his disability. He struggled to get into the back of the police van and held onto tables at the hospital. It is improbable that his shortened leg, which affected his gait, caused these difficulties. These difficulties are more consistent with his drunken state as observed by the defendant's witnesses.

[27] Lack of scientific evidence in the form of the preparation of the breathalyser before it was administered, the competency of the officer who administered it, as well as lack of the results of the blood test also do not water down the observation of these witnesses, particularly when one has regard to the quantum of proof in civil proceedings. That charges were laid and not prosecuted could be for a variety of reasons in respect of which evidence was not placed before the court *a quo*.

[28] The court *a quo* also erred with the application of *Incorporated General Insurances v Boonzaaier* to its factual findings. The words under the influence of alcohol has been interpreted to mean the influence of alcohol has reached a point such that it disturbs the quiet and equable exercise of the intellectual abilities of the consumer.[4] In *Incorporated General Insurances v Boonzaaier,*[5] the court held that

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[4] *Baijnath v Atlas Assurance Co Ltd* 1927 NPS, 467 at 469-470.
[5] 1974 (4) SA 200 © at 203 F-H

if the alcohol blood content is very high, whether an insured driver drover under the influence, is decided with reference to the manner in which he reacted at the critical moment to the quality of alcohol he consumed, from which a determination is then made whether he carried the alcohol to the extent that he remained in full possession of his faculties as judged by ordinary everyday standards.

[29] The breathalyser reading, which was three times above the legal limit, as well as Mr Schneider's conduct as testified by the three defendant's witnesses, justify a negative determination to this enquiry. In his response when asked to explain these factors, he essentially admitted that his faculties would be impaired if he consumed the same amount of alcohol, the only difference in his answer and the events of that day being that he would not been able to work or drive and that he would be sick. In the final analysis, he did not provide any basis for disputing the breathalyser results and the defendant's witness's observations.

[30] The manner in which the collision occurred is another important consideration in this enquiry. The court *a quo* also erred by not paying attention to this. Mr Schneider managed to collide with two parked cars while driving along a single lane within an area, or at least within a space, in which ordinarily he would not have collided with stationary objects on either side of a normal single lane. Mr Schneider testified that a male pedestrian had crossed the single lane in front of him from left to right and had then become stationary on the middle white line which divided the traffic going in the two opposite directions. What was left for Mr Schneider and his vehicle (which was wider than a normal passenger car) was a normal single lane. Mr Schneider, when driving normally, was able to negotiate normal single lanes

without colliding with stationary objects on either side of a single lane. Yet on this day he was not able to do that.

[31] In the premises, the court *a quo* misdirected itself when it found that the defendant failed to discharge its onus in respect of its reliance on the exception.

[32] The question arises as to which order to make. The court *a quo* had dismissed the plaintiff's claim. This court stands to dismiss it too, albeit for different reasons. Since the order is what is appealed and not the reasons, we need only dismiss the appeal and uphold the cross-appeal.

[33] Therefore, the following order is made:

ORDER

1. The appeal is dismissed with costs.

2. The cross-appeal is upheld with costs.

It so ordered.

Mr Justice W.H.G. van der Linde
Judge of the High Court

I agree.

Madam Justice L.T. Modiba
Judge of the High Court

I agree.

Mr Justice S.A. Thobane
Acting Judge of the High Court

APPEARANCES

Counsel for the plaintiff:	Adv. N Riley
Instructed by:	Snaid & Edworthy Attorneys
Counsel for the defendant:	Adv. E J Ferreira
Instructed by:	Gerrie Nel Incoporated
Date heard:	15 April 2019
Date judgement delivered:	28 June 2019