IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION, PIETERMARITZBURG

AR 280/13

In the matter between:

PROTEA COIN GROUP (PTY) LTD Appellant
(Defendant in the Court *a quo*)

and

LESLEY CHETTY Respondent
(Plaintiff in the Court *a quo*)

JUDGMENT

STEYN J et BEZUIDENHOUT AJ

ORDER:

1. The appeal is dismissed with costs.
2. The wasted costs occasioned by the adjournment of the appeal on 7 February 2014 including the reasonable travelling and subsistence costs of the attorney of record and the counsel is to be paid by J. Budree & Associates and Aggie Govender Attorneys jointly and severally.

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[1] The appellant with leave of the court *a quo* appeals against the judgment handed down on 4 July 2011 ordering the appellant to pay to the respondent the sum of R180,000.00 together with interest thereon at the rate of 15.5% per annum from date of judgment to date of payment and cost of suit. When the matter was heard the following facts appear to have been common cause:

(a) The court *a quo* had the necessary jurisdiction;

(b) That at all times material Mr Sheldon James acted within the course and scope of his employment with the appellant.

(c) During March 2004 the respondent applied for a job with the appellant and was appointed as a driver by the appellant.

(d) The respondent commenced his employment on 16 March 2004.

(e) On 16 November 2005 the respondent was injured in an attempted hijacking by unknown persons whilst he was the driver of an armoured vehicle, owned by the appellant.

(f) The respondent sustained two gunshot wounds, one bullet entered the left side of the chin and passed through the neck to the right back; the other entered the left arm and passed through the left side of the chest.

[2] The respondent was employed by the appellant as a driver since 16 March 2004. He contacted the appellant and enquired about a vacancy and was interviewed by Mr James. James informed him that he would be driving a fully armoured vehicle and that the front section of the vehicle, i.e. the glass, was bullet proof. He further elaborated that no bullet could penetrate the front glass and also not the steel body. When the respondent was shown the vehicle that he would be driving he noticed an emblem on the windscreen stating that it was bullet resistant glass and understood this

to mean bulletproof. This was also what James had explained to him. If this was not so he would not have taken the job. He testified that drivers did not wear bulletproof vests but when they were used as a third man, bulletproof vests were worn. On 16 November 2005 whilst driving a vehicle on behalf of the appellant an attempted hijacking took place and shots were fired at them and he was struck by two bullets. He was thereafter hospitalised for approximately 20 days and underwent operations, *inter alia*, where a steel plate was inserted at his chin bone. He has a 4cm scar under his chin and also still has pain.

[3] During cross examination he stated that he returned to work during May 2006 and was on light duty until December 2007 when he resigned. Prior to the incident he was mostly employed as a driver but there were some days that he was used as a third man and in that case he wore a bulletproof vest. The agreement signed on 17 April 2007 was signed when he was on light duty and was only to update the contracts so that they were in compliance with the bargaining council's requirements and to ensure that they receive the correct salary. Everyone employed had to sign the new contracts. He denied that he had ever after the incident driven for the appellant. He had no knowledge of rifles and which were considered as high velocity rifles. When he went to look at the vehicle he was informed by James that it was bullet resistant and bulletproof and that the window would not be penetrated. When it was put to him that he never went to inspect the vehicle because it would not have been done for security reasons, he stated that he had even been given a test drive of the vehicle with one Morgan Doorasamy and that this was for about one hour. When he was referred to a statement he had made where he stated that it was a high velocity rifle used during the incident he testified that he was told so by the police and accordingly stated that.

[4] Doctor Perumal thereafter testified about the injuries which the respondent suffered explaining entrance and exit wounds and indicating that he had seven scars resulting from the bullets and four surgical scars. It is not necessary to deal any further with his evidence. That was the case for the respondent.

[5] Mr Lembede, an employee of the appellant, testified that on 30 August 2007 he was a crewman when the respondent was the driver of the vehicle. According to him, the respondent also drove for one Rieckert and one Sibisi during August 2007. The respondent however complained that he no longer wanted to drive. He confirmed that there were logbooks kept by the appellant of each journey and that the drivers signed these logbooks. He also stated that he never looked at the records. It had been his evidence that he was asked by one Rakesh Kismet to come and testify and was picked up on the road on the morning of the trial. He was only asked whether he had worked with the respondent and if so to go to court. Later in his evidence he stated that he had looked at the records and furthermore that on 22 August 2007 the respondent drove for one Rieckert. Subsequent to his earlier testimony he claimed that the respondent drove for one Sibisi on 22 August 2007.

[6] Sheldon James testified that he was the operations manager who interviewed the respondent during March 2004. He could not remember the date but would normally have asked for a CV and would also normally have interviewed the applicant. He denied that they had discussed whether the glass windscreen of the vehicle would be penetrable or not. He also denied that he showed the respondent the vehicle and stated that he could not recall if a test drive was allowed. Because of the security risk he would not have taken him to the vehicle. The vehicle was armoured to an AK47 level and he could not recall if the emblem which the respondent testified about was

on the vehicle at the time. He had never noticed it before. According to him, he would have made notes of the interview but he did not have a look at them prior to testifying. He did not have a specific recollection of the interview with the respondent and was speaking in general terms and not about what was specifically discussed. When asked if he remembered the interview his response was that he remembered what a normal interview would be.

> "Mr James, it would therefore be a correct proposition to put to you that you do not have a specific recollection of your interview with the plaintiff, that is Mr Leslie Chetty. But when you speak about the interview, you are saying what the norms were in relation to the interviews you conducted for BOE. --- Yes, Sir."[1]

In re-examination James' recollection became very different to his earlier testimony.[2]

He claimed not to have had a discussion about the penetration of the windscreen with the respondent. He could however not deny that the respondent had signed his employment contract on the day of the interview and could also not deny that a test drive took place on that day. He testified that all three employees in an armoured vehicle would be supplied with bulletproof vests. That concluded the evidence on behalf of the appellant.

[7] The court *a quo* found that the appellant had to rebut the evidence of the respondent and failed to do so. James confirmed under cross-examination that he had taken down notes during the interview but never refreshed his memory prior to

[1] See record pages 273 lines 3-7.
[2] See pages 294 lines 21-14.

testifying from the said notes. James as the operations manager had a legal duty to furnish information which was accurate and correct to the respondent and that his misrepresentation was material and influenced the respondent to rely on it. James was aware that the armoured vehicle could be penetrated by ammunition of a higher calibre than an AK47 but informed the respondent that the vehicle would be impenetrable. He accordingly acted negligently. The court *a quo* held that there was a causal link between the misrepresentation made to the respondent by Sheldon James and the damages suffered by him as a result of the injuries sustained. It accordingly found that the appellant was liable to compensate the respondent and awarded an amount of R180,000.00 as damages.

[8] Mr Boot argued that the finding by the court *a quo* that James indeed made a misrepresentation to the respondent was incorrect. He submitted that the court had to take into account the *viva voce* evidence by the respondent and that on behalf of the appellant. The evidence adduced by the appellant and the respondent had to be weighed up and compared. He submitted that the court was incorrect in accepting the evidence of the respondent as it was unreliable. In his view the respondent contradicted himself and his version was improbable due to the following:

8.1 He exaggerated when he testified about the overtime worked as well as the length of time spent in hospital.

8.1 He failed to call the witness who took him for a test drive despite such witness being available.

8.3 By using the wording ‘a high velocity armour piercing rifle’ in his affidavit he had knowledge of such ammunition.

8.4 He never testified during his evidence in chief that he went for a test drive but only mentioned this during cross-examination.

8.5 He tried to read into the record the wording of the emblem that he apparently saw on the right hand side of the windscreen when it was not visible to the court and appellant's legal team.

8.6 His evidence was not independently corroborated by any of the proven facts.

[9] It was submitted that the evidence of James should be accepted, as he was no longer employed by the appellant and had no reason to fabricate his evidence. He further submitted that the evidence of James was corroborated by Mr Lembede. The evidence of James must be interpreted that he was adamant that he never in any of his interviews followed a work method as testified to by the respondent. The respondent consented to being a crewman at times. There was thus a break in the chain of causation as he consented to this other risk.

[10] Mr Naidu submitted that the respondent readily conceded when he made a mistake and withdrew his claim for loss of income. The logbooks relating to the test drive etc. should have been produced by the appellant and no reliance could be placed on the evidence of James as he could not remember any detail of the interview.

[11] The documentation submitted to the court *a quo*, including payslips of the respondent show that after the incident the respondent worked lengthy hours of overtime. From exhibit "A", the salary slip for September 2006, it would appear that overtime in the amount of R2,664.23 was earned as well as overtime for Sundays in the amount of R1,487.18. There are indeed other payslips which indicate lesser amounts in respect of overtime. At times the respondent worked long hours and accordingly it cannot be said that his evidence in this regard was a total exaggeration.

The response by the respondent that he went for a test drive was a spontaneous reply when it was put to him that he in fact never went down to the vehicle with James. He stated 'at the same time why did Sheldon James send me on a trial basis with a guy called Morgan Doorasamy, the transport manager to drive in the vehicle for one hour and come back?' This evidence came out in response to what was put to the respondent. No adverse inference can be drawn from the fact that the respondent did not call Mr Doorasamy. There was no evidence to suggest that he was available. Indeed the appellant in rebuttal could have called Doorasamy who was an employee of the appellant. It elected not to do so. The reference by the appellant to the high velocity armoured piercing rifle was explained by him when he testified that he had been informed by the police what firearm was used during the incident. We can find no misdirection by the court *a quo* in accepting the evidence of the respondent. His evidence was satisfactory and probable. The evidence of James was riddled with replies such as 'normally would'; 'do not recall'; 'I'm testifying about what the norm is'; 'I am speaking in general terms not what was specifically discussed'; 'I do not have a specific recollection of the interview with Chetty'; 'I remember what normal interviews would be'; 'I do not remember the interview in detail'; 'I do not deny that a test drive took place'; 'I do not remember the specifics of the interview'. His evidence was repleted with evasion and the court *a quo,* in our view, correctly analysed it.

[12] Mr Lembede also contradicted himself as to the dates and although he indicated that records were available which were signed by drivers and the crew showing that the respondent had driven on the day in question such were never produced. His evidence did not corroborate that of James. The findings of the court *a quo* that the appellant failed to rebut the evidence of the respondent, and that James owed a legal duty to the respondent to furnish the correct information, cannot be

faulted. The findings were fully motivated by the court and we find no misdirection.[3] A reasonable person in the position of James when making such representation as to the impenetrability of the vehicle, knowing it could be penetrated by certain calibre firearms, would act negligently.[4]

[13] The respondent had on a balance of probabilities discharged the *onus* that there was a misrepresentation, that he relied thereon and as a result thereof suffered damages.

[14] The appellant submitted that the amount of damages awarded by the court *a quo* should be lower. Respondent suffered serious injuries and although he has recovered he was off work for some time, suffered severe pain and a loss of amenities of life. He also has permanent scars. The court *a quo* carefully considered the amount of damages and the award of R180,000.00. In our view the amount appears to be reasonable and equitable given the said circumstances.

[15] The appeal can thus not succeed and must be dismissed with costs.

[16] A further issue which remains is the wasted costs occasioned by the adjournment on 7 February 2014. On 7 February 2014 an order was granted directing attorneys Aggie Govender and Saneel Nadoo to file affidavits dealing with the question of wasted costs occasioned by the adjournment and for the appellant to file an affidavit in that regard and the respondent a replying affidavit if he so wished. Affidavits were filed by Agadhevi Govender of Aggie Govender Attorneys and Saneel Naidoo

[3] See *National Employer's General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D-G.
[4] See *Ehlers NO and Others v Graphorn NO and Others* (2005) 4 ALL SA 601 (SCA).

employed by Jenny Budree & Associates in Pietermaritzburg who were the local correspondents of Aggie Govender. An affidavit was also filed by Nicolaas Jakobus Viviers, appellant's attorney. The issue of the wasted costs can accordingly now be decided on the affidavits which have been filed.

16.1 It is apparent that Saneel Naidoo on 14 December 2012 sent a copy of the notice of appeal to Aggie Govender. He was unaware that the notice of set down of the appeal was served at his offices on 15 August 2013. The notice of appeal was sent by the registrar to Budree & Associates on 25 June 2013. According to a letter of the appellant's attorney dated 15 July 2013 the date of the appeal, namely 7 February 2014, was communicated to Aggie Govender Attorneys in that letter. On 5 February 2014 Aggie Govender Attorneys enquired from J. Budree & Associates about a notice of set down for the appeal. They were unaware of such notice. Both the attorneys failed to comply with their respective mandates as a result of which they were not prepared for the appeal on 7 February 2014. There is no indication that the respondent was responsible therefore and accordingly it would be unjust that he bears the wasted costs of the adjournment. The costs of the adjournment should thus be borne jointly and severally by the attorneys.

[17] ORDER

I accordingly make the following order:

1. The appeal is dismissed with costs.
2. The wasted costs occasioned by the adjournment of the appeal on 7 February 2014 including the reasonable travelling and subsistence costs of the attorney

of record and the counsel is to be paid by J. Budree & Associates and Aggie Govender Attorneys jointly and severally.

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STEYN J **BEZUIDENHOUT AJ**

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POYO-DLWATI J

Date of Hearing:	02 February 2015
Date of Judgment:	24 February 2015
APPELLANT'S COUNSEL: Instructed by:	Mr B. Boot (Jhb) Weavind & Weavind Attorneys c/o Venn Nemeth & Hart 281 Pietermaritz Street Pietermaritzburg Tel: 033-355 3100 Ref: D. Schaup
DEFENDANT'S COUNSEL:	Mr V. Naidu
Instructed by:	Aggie Govender Attorneys c/o J Budree & Associates 19 Drummond Street Pietermaritzburg Tel: 033 345 2779 Ref: J Budree