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G.P.-S.12136—1952-3—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

Distillers Korporasie (S.A.) B.P. Appellant,

versus

Wilhelm [illegible] Respondent.

Appellant's Attorney
Prokureur vir Appellant [illegible]

Respondent's Attorney
Prokureur vir Respondent Kriel Cloete.

Appellant's Advocate
Advokaat vir Appellant

Respondent's Advocate
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op (II)

(C.P.D.1) and Cross Appeal.

2.3.[illegible]

— [illegible] — Bevel van verhoor hof tersyde gestel insluitende die klousule t.o.v. koste. — Die saak word terugverwys [illegible]

[illegible]

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

DISTILLERS KORPORASIE (S.A.)BEPERK. Appellant

and

WILHELM KOTZE Respondent

Coram: Schreiner, van den Heever, Steyn, Reynolds et de Villiers, JJ.A.

Heard: 1st. November, 1955. Delivered: 7-11-1955

J U D G M E N T

SCHREINER J.A. :- The appellant company (which I shall call "the plaintiff") in an action tried by HERBSTEIN J. in the Cape Provincial Division, claimed damages arising out of an accident on a public road between Joubertina and Uniondale, in which a car belonging to the plaintiff and driven by its employee, Wilson, collided during daylight with a tractor belonging to the respondent, (whom I shall call "the defendant") which was being driven by the defendant's employee, Grootboom. The tractor, with a trailer behind it, emerged from a farm road on to the public road and curved across the opposite side of the latter, preparatory to moving along it. The car, which

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was being driven by Wilson along the public road, struck the right rear wheel of the tractor and was badly damaged. The declaration alleged negligence on the part of Grootboom in several respects, the most important of which was that he crossed the road and took his turn at a speed which in the circumstances was too slow and dangerous. The plea denied Grootboom's negligence and alleged that Wilson was either wholly or partly responsible for the accident; various forms of negligence were attributed to him, the main ones being that he had driven too fast, that he had failed to keep a proper look out and that he had failed to avoid a collision when he had ample opportunity to do so.

HERBSTEIN J. found that the accident was caused by the combined and simultaneous negligence of Wilson and Grootboom. He granted absolution from the instance with costs but, acting under Note 6 of the First Schedule to Union Rule 24 (1), directed that the costs should be taxed on the basis that only one counsel should have been briefed instead of the two actually briefed for the defendant.

The appeal was based on two grounds, one being that HERBSTEIN J.'s decision on the merits was wrong and the other that the learned judge had

committed/.....

committed an ifregularity in restricting, in circumstances to be mentioned presently, the cross-examination of the defendant by the plaintiff's counsel. The defendant cross-appealed on the grounds that HERBSTEIN J. should have given judgment in favour of the defendant instead of granting absolution, and that the order limiting the costs to those of one counsel should not have been made.

The irregularity complained of by the plaintiff came about in this way. After the leading of evidence had concluded, counsel for the plaintiff, in argument, raised the point that there was no evidence to establish the make and the model of the tractor involved in the collision. This was important in relation to certain evidence which gave the speeds at which a particular kind of tractor (a 1942 model D Case tractor) could or would normally travel when its different gears were engaged. Counsel for the defendant then applied for leave to call a further witness and this was granted, HERBSTEIN J. stating that the evidence would be confined to the one matter. The defendant, who had not previously given evidence, was then called and gave evidence that the tractor was a 1942 model D Case tractor. He was then cross-examined by counsel for the plaintiff, who claimed to be entitled to

ask questions that were not limited to the make and model of the tractor; in particular he said that he wished to ask questions that might bear upon the credibility of other witnesses. In a short judgment HERBSTEIN J., after referring to the fact that the defendant's counsel had been allowed to call the witness on one point only, refused to allow the cross-examination to be carried beyond the one matter.

At the hearing of the appeal this Court intimated that, if there was an irregularity, this should first be corrected, in order to avoid a duplication of appeal arguments on the merits. Accordingly counsel were heard on the question of irregularity and, in view of the conclusion reached, there was no argument on the merits as such. In the result the Court allowed the appeal and set aside the trial court's judgment, as also the special costs order relating to the number of counsel; the matter was remitted to the trial court to allow the defendant to be fully cross-examined and re-examined and to give judgment afresh. The Court reserved judgment on the question of costs and intimated that the reasons for its decision would be furnished later.

The first question to be considered/.....

-ed was whether there had been an irregularity. The answer could not be in doubt. The disallowance of proper questions sought to be put to a witness by cross-examining counsel is an irregularity which entitles the party represented by the cross-examiner to relief from a higher court, unless that court is satisfied that the irregularity did not prejudice him (see Chester v. Oldham, 1914 T.P.D. 67 at page 72; Stemmer v. Sabina. 1910 T.S. 479 at pages 484 to 485; Jockey Club of S.A. v. Feldman, 1942 A.D.340 at page 359). But it was argued that HERBSTEIN J. had a discretion whether to allow a general or only a limited cross-examination. Counsel sought to extract authority for the existence of such a discretion from Wigmore (3rd.Edition) Vol.6 paragraphs 1867, 1885, 1886 and 1890. These sections appear in a part of the work entitled "Order of Presenting Evidence." In this setting the learned author, in section 1867, states it to be "a cardinal "doctrine, applicable generally to all of the ensuing "rules, that they are not invariable, that they are directory rather than mandatory, and that an alteration of the "prescribed customary order is always allowable in the "discretion of the trial court." Among the "ensuing rules" are those dealing with the scope of cross-examination/.....

-tion - "whether the opponent may upon the cross-
"examination elicit the witness' knowledge as to the facts
"that constitute part of the opponent's own case, or whether
"he is confined to the matters already dealt with in the
"direct examination or at least to the topics connected
"therewith" (section 1885). The author then discusses
~~the-o~~ what he calls the orthodox rule, permitting cross-
examination "as to any matter embraced in the issue," and
what he calls the federal rule, allowing only limited cross-
examination. The learned author comes down heavily in
favour of the orthodox view, which is that of the English
courts and our own. But, in the course of his discussion
of the respective merits of the rules, he says in section
1886 "it is necessary to keep in mind that in their origi-
"nal form they" (the opposing rules) "were never put for-
"ward by their eminent sponsors as anything but rules of
"customary and normal practice, subject always to the
"general principle (ante/section 1867) that the trial court may
"in its discretion allow exceptions." Professor Wigmore
then goes on to express ~~rge~~ regret that sight has often
been lost of what he regards as the valuable discretionary
factor. One is left with the impression that the learned

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author favours discretion, which must obviously exist in relation to the order of presenting evidence in the strict sense, as a possible means of bringing the followers of the federal rule back to orthodoxy. However that may be, there is no reason to doubt that where the orthodox rule obtains today there is no discretion in the trial judge to limit the scope of cross-examination to the topics upon which there has been examination-in-chief or allied topics (cf. Phipson, 9th. Edition page 497; Halsbury, 2nd. Edition, Volume 13, paragraph 831).

Counsel for the defendant, however, contended that, in view of the circumstances, the position was much the same as if the witness had been called by the trial judge himself, and we were referred to what was said by Lord ESHER in Coulson v. Disborough (1894, 2 Q.B.316 at page 318). With this case must be read the comments upon it in in re Enoch v. Zaretzky Bock and Co.'s Arbitration, (1910, 1 K.B. 327 at pages 332 and 333). In a civil case a witness can only be called by the judge with the consent, express or implied, of both parties; it may be assumed that when in such circumstances he does call a witness he can control or limit the cross-examination. But in the present case the witness was not called by the

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learned judge and the record provides no support for the submission that the position was analogous to a case where the judge calls a witness with the consent of the parties. There is no reason to suppose that the plaintiff's counsel would have consented to HERBSTEIN J.'s calling the witness, and, assuming that, as was suggested, it was really the learned judge's attitude that led to an unwanted opportunity to call a witness being taken by the defendant's counsel, this could not affect the fact that he asked for leave to call and did call the witness.

The defendant's counsel argued, in the alternative, that this Court should be satisfied that the irregularity did not prejudice the plaintiff, and in this connection he addressed an argument to us upon certain aspects of the merits. As we did not hear counsel for the plaintiff on this part of the case comment thereon would be out of place. It is sufficient to say that this Court was not satisfied that the irregularity did not prejudice the plaintiff.

It was for these reasons that the Court made the order mentioned above.

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The ~~order~~/.....

The order that costs should be taxed on the basis that only one counsel should have been briefed was set aside not because this Court held it to be wrong, for the matter was not investigated at all, but because the issue raised by this part of the cross-appeal could not be left in the air, and because, since further evidence is to be added to the record, it is possible, theoretically at least, that HERBSTEIN J. might consider it proper to make a different order in regard to the number of counsel.

The question of the appropriate

order/.....

order as to costs is not free from difficulty, and judgment thereon, was, as has been stated, reserved. We were not referred to any closely similar case. In de Beer v. Minister of Posts and Telegraphs (1922 A.D. 377) the appellant had taken exceptions to several defences raised in a plea to a claim in the magistrate's court. He failed in the magistrate's court and his appeal to a provincial division was also unsuccessful. In this court, however, he succeeded as to one of the exceptions and to that extent the appeal was allowed. But as there remained another defence, described as the one of substance or the main defence, which had been held in the proceedings to be good, if proved, it was decided that the fairest course would be to make the costs of appeal costs in the cause.

But the present case is different; the plaintiff has succeeded in having the case reopened so that it may be allowed to exercise a right of which it was deprived at the trial. It is true that the record does not show that HERBSTEIN J.'s decision to limit cross-examination resulted from argument addressed to him on behalf of the defendant. But the judgment of absolution was given on the 27th April 1955 and in its notice of appeal dated the 6th May 1955 the plaintiff specifically raised the point of irregularity; so far from evincing any readiness to concur

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in any steps necessary to restore to the plaintiff the important procedural right of which it had been deprived, the defendant strongly opposed the plaintiff's appeal on this aspect. The nearest analogy to such a situation which the Court has discovered is that of applications to the English Court of Appeal for a new trial. From what was said in Hamilton v. Seal (1904, 2 K.B. 262) by VAUGHAN WILLIAMS L.J., concurred in by STIRLING and COZENS-HARDY L.J.J., the English practice seems to be that "where there "is an application for a new trial and the application is "opposed and a new trial is granted, the costs of that "successful application ought, in the absence of special "circumstances to be borne by those who oppose it."

Our procedure is, of course, different; counsel were in agreement that, in view of the decision in Dickinson v. Fisher (1914 A.D. 424), the plaintiff had no separate right of appeal against the ruling limiting cross-examination and could only obtain relief from this Court in the course of an appeal against the judgment on the whole case that was given by HERBSTEIN J. But however that may be, the substance of the matter so far as the costs are concerned is that the plaintiff had to approach this Court in order to be able to exercise the

right/.....

right that was denied it. In the circumstances it should be indemnified in respect of the costs thereby incurred, as also in respect of costs in the court below that have been wasted as a result of the trial having to be re-opened. But, since in the eventual result the plaintiff may lose its case on the merits, it would not be right, nor did its counsel contend therefor, that the plaintiff should receive all the costs of appeal.

The Court's order accordingly is that the appellant is entitled to the costs of appearance on appeal and to the wasted costs in the provincial division resulting from the necessity of having the trial re-opened. The remaining costs of appeal are to be costs in the cause.

v.d. Heever J.A.
Steyn J.A.
Rumpff J.A.
de Villiers J.A. } Concur

D. Schreiner
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