213/64

G.P.-S.33967—1968-69—1,000.

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.

SANTOSHI STORES *Appellant,*

*versus*

MRS. E. JOOSAB *Respondent*

*Appellant's Attorney* / *Prokureur vir Appellant* Lovius, B.M & C.

*Respondent's Attorney* / *Prokureur vir Respondent* [illegible]

*Appellant's Advocate* / *Advokaat vir Appellant* R.O Domeier

*Respondent's Advocate* / *Advokaat vir Respondent* K.R McCall

*Set down for hearing on* / *Op die rol geplaas vir verhoor op* 21-1-70

1.2.4.7.8

Coram: Steyn C.J. van Blerk, Botha, Trollip, JJA et de Villiers, AJA

(N.P.D.) 9.45 am —— 11.30 am
11.15 am —— 12.15 pm

Respondent not called upon

C.A.V.

Order 2.6.70 per de Villiers A.J.A.:-
appeal dismissed with Costs

REGISTRAR, APPEAL COURT,
OFFICIAL APPEAL SHOP,
BLOEMFONTEIN.
12 JUN 1970

Bills Taxed.—Kosterekenings Getakseer.

| Date. Datum. | Amount. Bedrag. | Initials. Paraaf. |
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| | | |

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

SANTOSHI STORES .....Appellant.

AND

MRS. E. JOOSAB .....Respondent.

CORAM: STEYN, C.J., VAN BLERK, BOTHA, TROLLIP, JJ.A. ET DE VILLIERS, A.J.A.

HEARD: 21st May, 1970. DELIVERED: 2nd June, 1970.

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J U D G M E N T.

DE VILLIERS, A.J.A.:

This is an appeal, the necessary leave having been granted, from a decision of the Court a quo dismissing an appeal against an order of ejectment and costs made in the Durban Magistrate's Court at the instance of respondent, hereinafter referred to as plaintiff, against appellant, hereinafter referred to as defendant. The latter is a business, managed by one D. Morar, which his wife owns.

In the particulars of claim to the summons plaintiff alleged that she let the premises in question, which belonged to her, to defendant on a monthly basis, that she duly terminated

the tenancy by notice but that defendant unlawfully continued in occupation. In the plea defendant denied the monthly tenancy and that she was in unlawful occupation and alleged that she was in lawful occupation by virtue of an agreement in terms of which (~~it was agreed that~~) she would be entitled to remain in occupation for a period of 10 years and that plaintiff would sign an agreement of lease to this effect.

The admitted background to the action, as established by the evidence, may be briefly stated thus: the premises in question were initially let to defendant in 1962 on a monthly basis. Between that year and the 28th November, 1968, when notice was given in the instant case, two attempts were made by plaintiff to obtain judgment for the ejectment of defendant. On the first occasion the action was settled, defendant remaining in occupation as a monthly tenant, while paying an increased rental. The second action, commenced in 1966, was compromised in or about August, 1967. The terms of the compromise are in dispute. Before the compromise was effected the attorneys acting for plaintiff, on the 19th May, 1967, wrote the following letter (exhibit E) addressed to plaintiff:

3/ " The .....

" The writer is rather perplexed as to what is going on in this matter. Please inform us whether you wish us to act for you or not.

The Defendant's Attorneys phoned a couple of days ago to inform us that their client was willing to settle this matter on the following basis:-

(1) You will sign a ten year lease with the son of the proprietor of Santoshi Stores.

(2) This lease will be registered at the Deeds Office as a long lease.

(3) Rental in terms of the lease will be R10 more per month than Santoshi Stores is paying at present.

(4) Santoshi Stores will pay your Attorney and client costs.

Please advise us whether we still act for you in this matter and if so, whether you agree to the above proposed settlement or not. "

On the 10th of August 1967, after the compromise, defendant's attorneys addressed a letter (exhibit B) to plaintiff's attorneys in the following terms:

" Further to the above matter we write to advise that we have been informed by our client that this matter has been settled between the parties direct.

We believe that the terms of settlement are as follows:

(a) Our client will pay an increase of R10.00 per month on the current rental which he is paying.

4/ (b) There .....

(b) There will be no question of the rental being increased but this may be increased when the rates on the property are increased and then such increase will be pro rata.

(c) The licence must remain in the name of the present licence holder. However, we understand that the trading name may be changed if desired.

(d) Our client is to have a monthly tenancy agreement.

(e) The action by your client is to be withdrawn and the Defendant is to pay either agreed or taxed costs of the Plaintiff to date. "

After the compromise defendant remained in occupation of the premises, the rental then being about double what she had paid in 1962. By written notice dated the 28th November 1968 plaintiff gave defendant a month's notice expiring on the 31st of December 1968, to vacate the premises. The notice was ignored.

Plaintiff testified ~~in~~ on her own behalf and called her husband, Mohamed, to support her testimony. She stated that Mohamed usually handled the letting of the premises in question and that he negotiated the compromise on her behalf in 1967. Exhibit E was never received by her personally, but its contents were communicated to her by her attorneys. She was never personally approached by anybody on behalf of defendant in regard to the compromise proposed in exhibit E, nor

did she authorise Mahomed to compromise on that basis. On the contrary she told a clerk in the employ of her attorneys that she was not prepared to compromise on that basis. Mahomed stated that he, acting on the authority of plaintiff, negotiated the compromise with defendant's husband, D. Morar, on the terms set out in exhibit B, namely, on the basis of a monthly tenancy. He denied specifically that he agreed to a compromise on the basis of a 10 year lease as proposed in exhibit E or that D. Morar ever mentioned a 10 year ~~base~~ lease to him. The proposed 10 year lease was only mentioned to him by plaintiff's attorneys and rejected by himself and plaintiff.

D. Morar and his son, P. Morar, testified on behalf of defendant. D. Morar stated that he negotiated the compromise on behalf of defendant with ~~pl~~lai~~i~~ntiff and Mahomed in the presence of P. Morar. The terms were that plaintiff would withdraw the action and allow defendant to remain in occupation of the premises on condition that defendant paid an extra R10 per month as rental and plaintiff's costs and on condition that plaintiff gave defendant a lease for 10 years. Shown exhibit B he said he knew nothing about it. Although he ~~or his son~~ had informed defendant's attorneys about

6/ the .....

the compromise, he certainly gave no instructions to defendant's attorneys or Mr. Lewin, the writer, for it to be written. He could not explain why there was no mention in exhibit B of a 10 year lease or why a monthly tenancy was mentioned. He added: "my son must have instructed them and he could have been misunderstood." In cross-examination he stated that he often approached "plaintiffs" to obtain execution of the 10 year lease but was as often put off with excuses such as "we are busy at the moment", "we have given instructions to the attorneys", and "I should not worry about it." He also stated that he approached defendant's attorneys once or twice with the object that they should contact plaintiff in regard to the execution of the lease; but he added that he did not know whether they ever did anything about it. Asked why legal action was not taken in this connection, he said this was not done, because every time he approached plaintiff "they keep telling me: Look you don't have to worry, we have let you stay here so long, you must trust us and we will have everything done in good time." It was put to him in cross-examination that he had fabricated the version about a 10 year's lease. He denied it. P. Morar confirmed the evidence of D. Morar in

regard to the negotiation of the compromise and stated that at the instance of D. Morar he communicated the terms thereof to Mr. Lewin, a member of the firm of attorneys representing defendant at that time. He also could not explain why exhibit B referred to a monthly tenancy and not a lease for 10 years. The suggestion that his version of a 10 year's lease was fabricated was impliedly, not expressly, made in cross-examination.

The last witness called on behalf of defendant was M. Raman, who was employed by the firm of attorneys representing plaintiff at the time of the 1966 action. He stated that P. Morar came to pay the costs of the action and told him what the terms of the compromise were. Counsel for defendant thereupon sought to elicit from him the particulars of the compromise as communicated to him by P. Morar. It was claimed that such evidence was admissible on two grounds, namely, that it formed part of the res gestae, and that it would show that P. Morar had made a previous statement consistent with his and D. Morar's testimony in Court in order to rebut the suggestion that their testimony in regard to the terms of the compromise was a recent fabrication. Plaintiff's counsel objected. The magistrate ruled in favour of plaintiff

8/ on .....

on the ground that the evidence sought to be elicited was hearsay and did not form part of the res gestae.

The magistrate commenced his reasons for judgment by saying that on the pleadings the onus was on defendant. But then, after stating that defendant claimed to be in occupation by virtue of a 10 year lease, said: "The plaintiff and her husband have adamantly and consistently denied such an agreement and persisted throughout that the defendant derived its occupation only by virtue of a monthly tenancy. I am quite satisfied that they have spoken the truth and the Court is not in a position to disbelieve them or to reject their evidence for any good and sufficient reasons." He also stated that the evidence of defendant's witnesses was ~~were~~ not only in conflict with the documentary evidence before the Court but also against the probabilities. He concluded: "The plaintiff has proved conclusively that the defendant is in occupation as a monthly tenant and that the defendant was given the required notice to vacate."

The learned judges in the Court a quo accepted, and it was common cause before us, that the onus had throughout been on plaintiff and that the magistrate had misdirected himself

in this regard. On this basis the Court a quo considered the evidence before it in the light of the findings of credibility made by the magistrate, and concluded that the probabilities were substantially in favour of the version given by plaintiff and Mahomed and substantially against the version given by defendant's witnesses, and that the plaintiff had therefore discharged the onus. The Court assumed that the magistrate was wrong in refusing to allow M. Raman to testify what the terms of the compromise were as reported to him by P. Morar, but came to the conclusion that the weight which might be given to such evidence, although relevant to the question of the credibility of P. Morar and, could not possibly disturb the findings of credibility made by the magistrate or the substantial probabilities in favour of plaintiff. The Court accordingly dismissed the appeal and refused a request by defendant's counsel to remit the case to the magistrate to hear the evidence of Raman.

In my view the decision of the Court a quo is correct for the following reasons:

Although there are certain unsatisfactory features in the evidence of plaintiff and Mahomed the magistrate believed

them. He had the opportunity of studying their conduct in the witness box and made a strong finding as to their credibility as opposed to the credibility of defendant's witnesses, a finding which in my view was not coloured by the fact that he misdirected himself on the question of onus. Moreover the documentary evidence and the probabilities are overwhelmingly in favour of the plaintiff's version of the terms of the compromise.

In the first place the terms of exhibit "B" are quite inconsistent with the evidence of defendant's witnesses. Both D. and P. Morar admitted that they told defendant's attorneys, what the terms of the compromise were. Exhibit "B" was written by Mr. Lewin, a member of that firm. The same firm represented defendant in the instant case and Mr. Lewin signed the relevant documents. He was not called, although he must have been available, to explain how the letter came to include as one of the terms of the compromise a monthly tenancy, if in fact he was informed that a 10 year lease had beem agreed upon. The inference is irresistible that had he been called as a witness he would have said that the letter contained exactly what had been conveyed to him.

11/ It .....

It is clear that plaintiff had for a number of years tried to obtain the premises in question for her own purposes. It is improbable that she would have agreed to a lease for as long as 10 years at an increased rental of only R10 per month.

If defendant's witnesses are to be believed, it is difficult to understand why more effective steps were not taken by her or on her behalf by D. or P. Morar or her attorneys to perfect her right to a fixed tenancy of 10 years by insisting that a lease should be executed and registered. After all plaintiff had once before endeavoured to eject her and it must have been a great relief to her when the second attempt ended in such a favourable compromise. All that is alleged to have happened, in this regard, is that some verbal approaches were made to plaintiff which were met with vague promises, and that D. Morar once or twice asked defendant's attorneys to endeavour to have the execution and registration of the lease expedited, but he did not even take the trouble to find out whether anything was done by the attorneys. This state of affairs continued for a period of over 18 months.

12/ Furthermore ....

Furthermore, there is nothing to show that after defendant was served with the notice to vacate in the instant case, anything was done by her or on her behalf to assert her right to a tenancy of 10 years. Had such a tenancy been agreed upon it is inexplicable why the notice of termination of an alleged monthly tenancy did not evoke an immediate response in the form of a claim that the notice was ineffective in view of the fact that she had a right to a 10 year occupancy. This improbability was specifically raised during cross-examination of P. Morar, who owing to absence at the relevant time could not give an explanation, but defendant put nothing before the Court to negative the effect thereof.

Before us it was not contended that the evidence which it was sought to elicit from M. Raman was part of the res gestae, but merely that it was admissible to rebut the suggestion of recent fabrication. As such it cannot be used to establish the truth of the reported terms of the compromise made to him by P. Morar. It can only be used to prove the fact that a prior consistent statement was made in order to rebut the suggestion that P. and D. Morar's evidence in regard to the terms

of the compromise was recently fabricated. (cf. R. v. Vlok, 1951(1) S.A. 26(C) ). In other words it could only affect D. and P. Morar's credibility. It was therefore not hearsay evidence as the magistrate held. But its relevance now is remote, for neither the magistrate nor the Court a quo based their findings on any fabrication by the Morars. They rightly decided the case on credibility and the probabilities. In so far as such evidence could have affected the Morars' credibility, I respectfully agree with the Court a quo that the weight which might be attached to the answers given by M. Raman, even if they were given in a manner most favourable to defendant, is unsubstantial and can hardly have any affect on the strong finding of credibility made by the magistrate or the overwhelming probabilities in favour of plaintiff. I might add that it would appear to be doubtful whether the answers sought to be elicited from M. Raman would in any event be favourable to defendant, because in one of the answers already given, he made a vague statement that P. Morar reported to him "that there was a lease or something and that the matter was settled and that we should not do anything further." The 14/ ~~should~~ .....

The appeal is accordingly dismissed with costs.

DE VILLIERS, A.J.A.

STEYN, C.J. )
VAN BLERK, J.A. ) concurred.
BOTHA, J.A. )
TROLLIP, J.A. )