G.P.-S.59968—1970-71—2 500

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

(A. ELL TS Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

CLAUDE NEON LIGHTS (S.A.) LIMITED *Appellant,*

versus

D? DANIEL *Respondent*

Appellant's Attorney McIntyre & v.d.Post
Prokureur vir Appellant

Respondent's Attorney Webber & Newdigate
Prokureur vir Respondent

Appellant's Advocate J.W. Edeling
Advokaat vir Appellant

Respondent's Advocate M.P. Jennett
Advokaat vir Respondent

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

28/9/75

Coram: Trollip, Rabie, Galgut, de Villiers et Miller AJA

Edeling - 9.45 - 10.35, 11.25 - 11.45.
Jennett - 10.35 - 11.00, 11.15 - 11.25.

(E.C.D.)

C.A.V.

The Court ...

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

CLAUDE NEON LIGHTS (S.A.) LIMITED Appellant

and

D. DANIEL Respondent

Coram : Trollip, Rabie, Galgut, de Villiers, JJ.A., et Miller, A.J.A.

Date of Hearing : 18 May 1976

Date of Judgment : 19 August 1976

J U D G M E N T

MILLER, A.J.A. :

The appellant, a company carrying on business in Johannesburg as manufacturers and lessors of neon signs, sued the respondent in the Eastern Cape Division for damages in the sum of R1 311. The cause of action appears from the following paragraphs of the particulars of claim :

"3. (a) On or about the 19th October 1971, the Defendant in writing, alternatively orally, represented to the Plaintiff that he was authorised to enter into a certain rental and maintenance agreement with the Plaintiff as agent for Stroboro (Proprietary) Ltd., trading as Jubilee Hotel, (hereinafter referred to

as "the hotel") in terms of which the Plaintiff would lease to the hotel a certain neon sign.

(b) The Defendant thereby induced the Plaintiff, acting upon the faith of such representation, to enter into the said agreement with the Defendant as agent for the hotel for a period of 60 months at a rental of R23-00 per month.

4. The Defendant, by such representation, impliedly warranted to the Plaintiff that he was authorised by the hotel to enter into the said rental and maintenance agreement as agent on behalf of the hotel.

5. The Defendant was in fact never authorised by the hotel to enter into such agreement on its behalf, and during or about March 1972, alternatively, during or about October 1972, the hotel repudiated the said agreement and consequently the Plaintiff was not able to enforce it, and has thereby sustained damages in the sum of R1 311-00."

In reply to a request for further particulars, the appellant said that the representation referred to in paragraph 3. was made verbally by the respondent to Mr. Comley, the duly authorized agent of appellant and was "confirmed in writing by the respondent's act in signing the written agreement of lease on behalf of the hotel." The written agreement, which was annexed to the further particulars and proved at the trial shows that the respondent signed it "For and on behalf of Lessee" above the printed words "Authorized Signatory. Manager." and that it was accepted at Johannesburg, above the signature of one E. B. Bell, for and on behalf of the appellant.

In support of its claim, the appellant led the evidence, inter alia, of Mr. Comley and Mr. Robb. Comley was at all relevant times an employee of the appellant; his duties included the canvassing of business in the Border and Eastern Cape areas. Robb was a director of a company owning the Grand Hotel at Queenstown and also a shareholder of Jubilee Hotel (Pty.) Ltd., which owned the Jubilee Hotel at Burghersdorp. Robb was also one of the four shareholders of Stroboro (Pty.) Ltd.

It appears from Comley's evidence that he visited Queenstown, in the course of his duties as the appellant's representative, during August 1971. He met Robb with whom he concluded an agreement for the lease of a neon sign to the Grand Hotel. Robb suggested to him that he should also visit Burghersdorp with the object of leasing a neon sign to the Jubilee Hotel of which the respondent was the manager; he also informed Comley that the respondent had authority to conclude such an agreement and apparently held out that there were good prospects of his transacting business with the respondent. This information induced Comley to travel to Burghersdorp, a town which he would otherwise not have visited because it fell beyond the area in which he would ordinarily have operated. Upon arriving at Burghersdorp, he approached the respondent who

appeared to be expecting him. The respondent told him that the name of the company which owned the Jubilee Hotel was Stroboro (Pty.) Ltd. and in answer to a direct question put by Comley to respondent, the latter informed him that he had authority to sign, on behalf of the owner, a contract in respect of the lease of a neon sign for the Jubilee Hotel. After some discussion concerning the specifications of the required illuminated sign, agreement was reached. Respondent gave Comley a cheque for R69, representing the rental for the last three months of the period of the lease. The written agreement was signed by the respondent for and on behalf of the lessee, in the manner I have already described, and in due course it was also signed by the appellant in Johannesburg.

Robb's evidence, although it confirmed Comley's regarding their meeting in Queenstown and his suggestion that Comley should also visit Burghersdorp, differed from Comley's evidence in several points of detail. For reasons which will become apparent, it is not necessary to canvass Robb's evidence for purposes of this judgment. Other evidence led by the appellant, in addition to some evidence relating to the quantum of damages, was to the effect that when the appellant in due course attempted to perform its part of the contract by sending to

Burghersdorp a workman to deliver and install the illuminated sign, the then manager of the Jubilee Hotel, (respondent having left) acting on the instructions of the directors of the company owning the hotel, refused to accept delivery and repudiated the contract, on the ground that respondent had no authority to enter into the agreement on behalf of the company.

Upon closure of appellant's case, counsel for the respondent immediately applied for absolution from the instance on the sole ground that the evidence did not show that the appellant was induced by any representation that the respondent may have made concerning his authority, to enter into the contract. This contention was upheld by the court a quo (ADDLESON, J.). The learned Judge found that Comley's evidence was "immeasurably more acceptable than that of Robb," and that, according to Comley's evidence, which he considered to be reliable evidence tendered by the appellant,

> "... it was the words and conduct of Robb and not of the defendant (respondent) which constituted the representation upon which the plaintiff (appellant) contracted."

The learned Judge added :

> "I am satisfied that Robb led Comley to believe that the defendant had authority to sign and to bind the owners of the hotel and that it was this

> conduct of Robb which constituted the representation on which the plaintiff acted and not any representation, express or implied, by the defendant."

The court accordingly granted absolution from the instance, with costs. It is against that decision that this appeal is brought.

Before testing the validity of the trial Judge's conclusion, it is necessary to make some observations concerning the nature of the appellant's cause of action and what was required to be proved to substantiate it. It is very clear that the cause of action pleaded by the appellant is that described by INNES, C.J., in Blower v van Noorden, 1909 T.S. 890. Prior to that decision, it had been held that an agent who represented that he had authority to bind a named principal and thereby caused another to conclude a contract which the alleged principal later justifiably repudiated for want of authority in the agent to bind him, was liable to the other contracting party "on the contract"; i.e. that the ostensible agent was to be regarded as having bound himself to the terms of the contract, save that he could not be compelled to render specific performance. (Wright v Williams 8 S.C. 166; and cf. Langford v Moore and Others, 17 S.C. 1; Parks v Thrupp and Co., 1906 T.S. 741.) In Blower v

van Noorden, however, INNES, C.J., described "the true nature of the transaction" when the ostensible agent contracts in the name of his "principal" with a third party, in these terms :- (at pp. 900 - 901)

> "What takes place is this : the agent in effect represents to the other contracting party that he has authority to bind his principal; and within the limits of that authority he consents to the terms of the agreement on his principal's behalf. There is a representation by the agent personally, and a contract by him in his capacity as agent. The representation is in respect of a matter which is peculiarly within his knowledge, and of which the other party knows nothing at all. But the latter enters into the contract on the faith of that representation, and the agent intends that he shall do so; it forms the basis of the whole agreement. Under those circumstances we are surely justified in implying, on the part of the agent, a personal undertaking that his principal shall be bound by the contract, and that, if not, he will place the other party in as good a position as if the principal were bound."

And later, (at p. 901)

> "It seems to follow, from the nature of such a transaction as we are considering, that the ostensible agent whose representations of authority have induced the contract, must be held to have impliedly promised that his principal should be bound by it, and that if not he would make good to the other party the damages resulting from that fact."

These principles have been accepted in Nebendahl v Schroeder, 1937 S.W.A. 48 at pp. 55 - 6 and appear also to have been accepted in Knox v Davis, 1933

E.D.L. 109 and in Calder-Potts v McMillan, 1956 (3) S.A. 360 (E) at p. 362. (See also per CLAYDEN, J., in Henderson v Bartell and Another, 1950 (3) S.A. 109 (W) at pp. 115-6.) They are also consonant with "the weight of authority" in the United States of America, which is said to be to the effect

> "that the agent is liable not on contract but on an implied warranty of authority",

although

> "some courts hold the agent liable in tort for misrepresentation of authority."

(WILLISTON on Contracts, 3rd Ed., Vol. 2, sect. 282 at p. 327; cf. Restatement of the Law, Agency, sect. 329. And as to the reference by WILLISTON to decisions which hold that the claim is of a delictual nature, cf. De Wet and Yeats, Kontraktereg en Handelsreg, 3rd Ed. at pp. 86-7.)

The question relating to the true foundation in our law of a claim such as this has not, so far as I am aware, been the subject of any decision by this Court. Whether the final word on the subject has been spoken by INNES, C.J., in Blower v van Noorden, might be open to argument, but no argument whatever in that regard was addressed to us. It was common cause in the court below, as in this Court, that the matter

falls to be decided in accordance with what was said in Blower v van Noorden and that if the appellant was induced to enter into the contract by respondent's representation that he had authority to conclude such contract on behalf of the owner of the Jubilee Hotel, it would be entitled to such damages, attributable to the breach of the warranty of authority, as might be established by the evidence. In so far as the question of respondent's liability is concerned (as distinct from proof of the quantum of damages, concerning which more later) the only issue before us is whether the court a quo was correct in granting absolution from the instance, at the stage at which it did so, on the ground that the evidence showed that the appellant was not induced to enter into the contract by any representation of authority made by the respondent, but by what Robb had told Comley. Whatever the true juridical niche of an action such as this might be, what is clear is that a causal relationship between the ostensible agent's representation of authority and the conclusion of the contract would necessarily have to be established. It is to that question that I now turn, bearing in mind that when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to

be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gaspoyne v Paul and Hunter, 1917 T.P.D. 170 at p. 173; Ruto Flour Mills (Pty.) Ltd. v Adelson, 1958 (4) S.A. 307 (T).

That the respondent represented to Comley that he had authority to enter into the contract is very clear. Not only was it admitted in the plea, but Comley's evidence is to the effect that he asked the respondent whether he had the necessary authority and that respondent answered "yes". Moreover, the respondent's signature of the written agreement as the agent of the named principal can, in the circumstances of this case, "only be construed as a representation to the other party that authority so to sign does exist," (per INNES, C.J., in van Noorden's case, at p. 906), for according to Comley, he did not know exactly what the respondent knew concerning the latter's arrangements or understanding with his principal regarding the scope of his authority; if there were such evidence, the agent's signature as such might not imply a representation of authority. It is true that the representation made by respondent related to his authority to bind Stroboro (Pty.) Ltd., which is the company mistakenly named in the written agreement as the lessee,

"trading as Jubilee Hotel." The evidence makes it clear that not Stroboro (Pty.) Ltd. but Jubilee Hotel (Pty.) Ltd. is the owner of the Jubilee Hotel and ought to have been cited as lessee in the agreement. I do not think that anything turns on this error, however; there appears to have been some confusion in the mind of respondent as to which one of the group of companies actually owned the hotel in question. What is manifest is that both respondent and Comley knew that they were transacting business in connection with a lease to the Jubilee Hotel and that what respondent warranted was that he had the authority of the company owning that hotel to enter into the agreement.

It appears to me that in these circumstances, and particularly in the light of the learned trial Judge's very favourable view of Comley as a witness, the conclusion is virtually inescapable that the implied representation of authority by the signing of the agreement as agent, fortified by a direct and unequivocal verbal assurance by respondent that he had the necessary authority; (and at that stage of the proceedings Comley's evidence of that assurance was properly considered as true), must have influenced or induced or caused Comley to believe that he was contracting with the authorized agent of the owner of the hotel

and to have submitted the contract thus procured by him to his principal, the appellant, for its signature. The learned trial Judge (and respondent's counsel on appeal) drew attention to appellant's failure to call anyone from its "administrative branch" to testify to the weight, if any, which it attached to respondent's representation of authority conveyed by the respondent's signature to the written agreement itself. But appellant's very acceptance of the written agreement gives rise at least to a prima facie inference that it was induced to accept the agreement by that written representation of authority. But for the learned trial Judge's clearly and emphatically expressed preference for Comley's evidence over that of Robb, an important inquiry would have been whether that inference was rebutted by reason of the communication said by Robb to have been made to Comley that the respondent lacked authority to bind the owner of the hotel, assuming in respondent's favour that any such knowledge acquired by Comley could be imputed to appellant. The learned Judge having, in effect, rejected Robb's evidence and relied entirely on Comley's, there is no justification for any finding that the prima facie inference to be drawn by appellant from the respondent's signature to the agreement, is rebutted by reason of information said to have been obtained by Comley as to the respondent's lack of authority. On Comley's evidence, the only information he had was to the effect that the

respondent had the necessary authority.

The learned trial Judge appears to have given undue weight to the circumstance that Robb had already told Comley that respondent was authorized to sign on behalf of the owner of the hotel. Indeed, Comley's evidence as to what Robb had told him in Queenstown before he visited Burghersdorp, was the very kernel of the reasoning by which the trial Judge arrived at the conclusion that respondent should be absolved from the instance. The trial Judge appears to have understood Comley to have made an unequivocal admission that it was Robb's representation, not respondent's, that he relied on. The following passage appears in the judgment :

> "As regards the verbal representation, I have already pointed out that on the evidence it was not the representation of the defendant which led Comley to believe that the defendant was authorized to sign, but the conduct and the representations of Robb. That indeed is Comley's evidence."

But I cannot read Comley's evidence to contain any such unequivocal admission. What he frankly admitted was that but for what Robb had told him, he would not have gone to Burghersdorp at all. I quote the following brief passage from Comley's evidence under cross-examination by respondent's counsel; it appears to be the passage upon which the court a quo strongly relied :-

"When you accepted his signature, would it be fair to say that it was really on the strength of what Mr. Robb had told you about Mr. Daniel's authority? — Well, on both : I mean, I was clear in my mind that it was legal, the document.

Yes. But what I'm getting at is, was it not predominantly because of Mr. Robb's assurance in the first place? — I would say, yes.

That was the real inducing factor? — That I went to Burghersdorp, yes.

And accepted the contract? — Yes."

The qualifying words "That I went to Burghersdorp, yes" are consistent with the general tenor of Comley's evidence throughout. Earlier, under cross-examination, he had explained that although Robb's information that respondent had authority to sign and that he was likely to do business with respondent persuaded him to undertake the journey to Burghersdorp, upon arrival there he expressly and pointedly sought confirmation from respondent himself that what Robb had told him concerning respondent's authority was true. He would hardly have sought such confirmation if what Robb told him had already satisfied him that he could safely conclude a binding contract with the owners through their authorized agent, the respondent. The last line of the extract of his evidence quoted above cannot be read in isolation; read in the context of the quoted passage and in the context

of Comley's evidence as a whole, the answer "yes" to the question "And accepted the contract?" cannot reasonably be construed as an admission that it was upon Robb's representation, and not at all upon respondent's, that he relied. Indeed, even in the immediate context of the question which preceded it, the affirmative answer to "And accepted the contract?" is reasonably capable of meaning no more than that it was at Burghersdorp, having been persuaded by Robb to go there, that he accepted the contract. I therefore cannot find justification for the conclusion of the court a quo that it appears from Comley's own evidence that the inducing factor was not the representation made by respondent,but that made by Robb.

To meet this difficulty, Mr. Jennett, for the respondent, contended that, on the evidence, what induced Comley to believe that respondent had the necessary authority was what both Robb and respondent represented to him; and he posed the question whether that was sufficient to establish a cause of action against respondent, the suggestion being that in order to succeed the appellant had to show that it was exclusively, or at least predominantly, the representation by respondent that induced the appellant to enter into the contract. The word "induce" is not used in this context in the sense of active persuasion or coaxing. A common meaning of the word is : to bring about or cause or produce or

give rise to; it is also used in the sense of leading to a conclusion or inference. (The Oxford English Dictionary.) Ordinarily, in a case of this kind, the very fact of a representation of authority made by an ostensible agent to a third party, followed by the conclusion of a contract with the agent's named "principal", would give rise to the inference that what "induced" or caused or gave rise to the contract was the representation of authority. The third party's conclusion of the contract would imply that he "acted upon the profession of authority on the part of the agent". (The words quoted are those of INNES, C.J. in van Noorden's case, at p. 897; and see WILLISTON, ibid. at p. 328.) The complication (if such it be) in this case is that Comley had previously been told that the respondent had the necessary authority. But the evidence shows that notwithstanding that he had been so informed by Robb, Comley required and sought the confirmation of the agent himself, which he obtained. It was only then that he transacted the business with the agent. Non constat that he would have done so had the agent not confirmed that he had authority to sign the contract on behalf of the owner of the hotel. It can hardly be said, in these circumstances, that on Comley's evidence the appellant was not induced by the respondent's representation to enter into the contract and certainly, at the particular

stage of the trial when absolution was sought, it could not properly be said that no court reasonably considering the matter could or might find that the necessary link between the respondent's representation of authority and the conclusion of the contract had been established.

It follows that the court a quo erred in granting absolution from the instance on the ground relied upon by respondent and in the absence of any other ground for absolution, the appeal would succeed with costs. The respondent advanced no other ground in the court below, nor in this Court, but this Court itself raised, during argument, the question whether the appellant had led sufficient evidence to enable the Court to make an assessment of its loss or damages, if any.

The appellant's claim for R1 311 represents the gross rental which would have been payable in respect of the five-year lease, less R69 paid in advance. Even assuming in appellant's favour that it would be entitled to damages in a sum equivalent to the profit it would have derived from the contract had respondent's alleged principal been bound thereby (as to which, cf. Caxton Printing Works (Pty.) Ltd. v. Transvaal Advertising Contractors Ltd., 1938 T.P.D. 209 at pp. 214-5) it is clear from the terms of the contract itself that the appellant's profit would necessarily have

been less than the gross rental value thereof. It is not necessary to detail the several items of expenditure to which the appellant would be committed in terms of the contract; it is sufficient to point, by way of example, to the appellant's obligation to keep in force and pay the premiums in respect of insurance of the leased neon sign and to its obligation to maintain, service and repair the sign. There is no evidence to show how much of the total rental payable under the contract would represent profit in the hands of the appellant, nor is there sufficient evidence to enable a court to make a reasonable estimate of the appellant's loss of profit or of any expenditure it incurred or would incur by reason of the representation made to it. It seems likely that evidence of that kind was, and still is, available to the appellant.

This deficiency in the case presented by appellant having been brought to his notice by this Court during argument, appellant's counsel has rightly conceded in a supplementary, written argument that insufficient evidence was led to enable the trial court to make an assessment of damages. None the less, he has contended that the appeal should be allowed and the judgment of absolution from the instance be set aside, for had the respondent applied for absolution at the close of appellant's case on the ground that insufficient evidence of damages had been led, it would have been open to the appellant forthwith to apply for leave to re-open its case for the sole purpose of supplementing the deficient evidence relating to quantum of loss or damages. Counsel also intimated in his supplementary argument that the question raised by this Court having been brought to the appellant's notice, the appellant had indicated that it was its wish to make such an application for leave to re-open.

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In reply, respondent's counsel has contended that even if this Court were to conclude that the court a quo erred in granting absolution on the issue of liability, its decision to grant absolution was nevertheless correct, albeit on the entirely different ground that damages had not been proved, and that therefore the appeal should be dismissed with costs. I ought to mention that counsel on appeal were not counsel in the court a quo.

That a court has the power, which it may exercise in its discretion, to allow a party who has closed his case to re-open it, is beyond doubt. Such power may be exercised in favour of a plaintiff even after the defendant has closed his case (Oosthuizen v. Stanley, 1938 A.D. 322 at p. 333; Hladla v. President Insurance Co. Ltd., 1965 (1) S.A. 614 (A.D.) at pp. 621-2) and a fortiori it may be exercised immediately after the plaintiff has closed his case. If, in the court below, respondent's counsel had applied for absolution from the instance on the ground that insufficient evidence as to damages had been led, it would unquestionably have been open to appellant to attempt to meet that argument by asking leave to re-open his case for the purpose of leading further evidence relative to quantum of loss. Whether such an application would have succeeded is a question which cannot now be answered by this

Court but there is certainly nothing to indicate that the application would necessarily, or even probably, have failed. The decision of the trial court that appellant had no case on the merits put an effective end to the matter and if that decision was wrong, as I consider it was, it appears to me that considerations of fairness and justice require that the decision should be set aside and the case be sent back for further hearing. It would then be open to appellant, if it were so advised, to ask for leave to lead further evidence on damages and for the trial court to consider and decide upon that application.

In support of his contention that that course should not be followed, Mr. Jennett has relied on the judgment of WESSELS, C.J., in Colman v. Dunbar, 1933 A.D. 141. The learned Chief Justice (at pp. 162 - 3) expressed doubt as to whether the Court's power to allow a case to be re-opened should be exercised where absolution from the instance had been granted, because the unsuccessful party in such a case "can always proceed de novo if he discovers fresh evidence." The question before the Court in Colman v. Dunbar was whether an application made to the Court, on appeal, to hear newly discovered evidence

in regard to the merits or to remit the case to the trial court for the purpose of hearing such evidence, should be granted. The trial court had, apparently, after conclusion of the whole case, correctly absolved the respondent from the instance on the evidence before it. It was in that context that the learned Chief Justice expressed the doubt to which I have referred and it was in that context that he pointed out (at p. 163) that although there was some merit in the contention that by allowing fresh evidence to be led the matter could "more cheaply" be disposed of than by means of the "newand lengthy trial" which would result if it were left to the plaintiff to start de novo, there were weighty considerations against granting the application.

If, in this case, the judgment of the court a quo were left undisturbed the appellant, despite the circumstance that absolution was decreed, would be faced with considerable practical difficulties if it were of a mind to sue the respondent de novo, for what the court a quo held was that even on full acceptance of Comley's evidence the appellant had no case on the merits. It must be

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recognized, however, that if this Court were to dismiss the appeal and allow the decree of absolution to stand, it would do so not on the ground upon which the trial Court decreed absolution but on the entirely different ground of insufficiency of evidence on the quantum of damages. This might well enable the appellant to sue the respondent de novo, and to that extent the case bears some similarity to Colman v. Dunbar (supra). But apart from that, the differences between that case and the matter now before us are manifest. In Colman's case the trial Court, after closure of the defendant's case on all issues, correctly decreed absolution on the evidence before it; here, the trial Court wrongly ruled at the end of the appellant's (plaintiff's) case that there was no evidence to support the claim on the merits. Different considerations therefore arise concerning the equities and costs. For example, here, unlike Colman v. Dunbar (p. 162), an appreciable saving of costs might ultimately be achieved by allowing the trial to continue in the Court a quo which, because of its erroneous termination of the trial at the end of appellant's case on the only ground advanced by respondent, has not yet heard all the evidence on the merits and

has.../22

has not at all considered the question of damages, which respondent failed to raise. In these circumstances, and especially in view of appellant's success on appeal on the important issue in respect of which, alone, the trial Court absolved respondent from the instance, it is equitable and proper to set aside the decree of absolution so that the trial might continue.

Mr. Edeling, for appellant, contended that if the order of absolution were set aside, the appellant should be awarded the costs of appeal. But I do not think that this is a case in which the application of the general rule that costs follow the result will accord with what is fair. The appellant has achieved substantial success in the sense that the trial Court's decision that the evidence could not support a finding that respondent was liable at all, is to be set aside; but because of the deficiency of appellant's evidence on the issue of damages, it has yet to apply for leave to lead further evidence in order to avoid a decree of absolution on a different ground. The requirements of justice will be met, I think, by making no order as to the costs of appeal.

Mr. Jennett suggested that if we were not disposed to order

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appellant to pay the costs of appeal, we should order that costs of appeal be costs in the cause, on the authority of Supreme Service Station (1969) (Pvt) Ltd. v. Fox and Goodridge (Pvt) Ltd., 1971 (4) S.A. 90 (R A D) at p. 95. One of the essential differences between that case and the one now before us is, however, that in the case decided in Rhodesia the appellant succeeded on appeal on a point which it ought to have raised, but did not, ~~raise~~ at the trial, whereas in this case the appellant succeeds on appeal on the sole point raised by respondent at the trial. It is the respondent who ought to have raised, but did not, ~~raise~~ the question of damages in its application for absolution from the instance. Moreover, the respondent has persisted to the very end in his contention that absolution was rightly decreed on the question of liability. But for the fact that this Court raised the question of damages, the appeal would clearly have been allowed with costs, and the only reason why costs of appeal are with-held from the appellant is that its own case was deficient in another respect. In all these circumstances I do not consider that there is justification for making an

order.../24

order which would require the successful appellant to pay the costs of appeal if it should ultimately fail in its action.

The question of costs in the court a quo will be for the decision of that court in due course.

The appeal is allowed. The trial court's order of absolution from the instance, including its order as to costs, is set aside and the case is referred back to the trial court for further hearing. There will be no order as to the costs of appeal.

MILLER, A.J.A.

TROLLIP, J.A.
RABIE, J.A.
GALGUT, J.A.
DE VILLIERS, J.A. } Concur.