CASE NO. 572/96 IN

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

SOUTHERN CAPE CAR RENTALS CC

t/a BUDGET RENT A CAR

APPELLANT

and

PIERRE EMILE BRAUN

RESPONDENT

BEFORE: HEFER, VIVIER, HOEXTER, HOWIE and SCHUTZ JJA

HEARD: 10 SEPTEMBER 1998 DELIVERED:

22 SEPTEMBER 1998

SCHUTZ JA

JUDGMENT

SCHUTZ JA:

The dispute is whether the respondent ("Braun") is liable to compensate the appellant ("Budget") for damage caused to its Toyota car in an accident which occurred while it was being driven by Braun through Riversdale on 14 March 1993. Budget's case is that it had a car rental agreement with Braun and that it imposed liability for the damage upon him because of his breach of its terms in driving at a speed much in excess of the limit. Braun denies that there is any agreement between Budget and himself alternatively, he contends that the term in question, which forms part of the fine print, is not included in any contract that may have been concluded. He says that the car was hired and the terms of hire

were established in Brussels before he came out to South Africa and that Budget's document, which he admittedly signed at George a few days before the accident, was a mere receipt, acknowledging delivery of the car. Budget's action for the agreed damage of R20 203,21 succeeded before the magistrate at George. He found that the document signed there did indeed constitute a car rental agreement, not a receipt for delivery, that Braun had breached one of its terms by driving at a speed far in excess of the limit, that this had been the cause of the accident, and that Budget was accordingly entitled to recover the costs of repair. An appeal by Braun succeeded before Conradie and Traverso JJ in the Cape Provincial Division. The correctness of the magistrate's finding on the cause of the accident was not debated at all, the court holding that Braun's version that he did not know that the George document contained contractual terms was acceptable, and in any event that even if he did realize that it contained contractual terms he was owed a warning as to their contradiction of what he said had been agreed in Brussels, a

warning which he did not get. Leave to appeal was refused by the court below but

was granted on petition to the Chief Justice.

It seems to me that the appeal can be most speedily decided by considering whether the magistrate was correct in one of the findings which was essential to his conclusion, namely that Braun had been proved to have driven at a speed exceeding the limit. If proved this would have constituted a breach of the agreement, if there was one. If not proved Budget must fail.

The main road from Cape Town to Mossel Bay passes through Riversdale, where the speed limit is 60 kph. One Prins was travelling from east to west. He turned right into Mulder Street at a point where an oncoming car approaching from the Cape Town side would become visible over a hummock at a distance of about 150 m. Braun approached from ahead in the hired Toyota to the point where its left front collided with the left rear side of Prins's Datsun. This point of impact was roughly in the middle of Mulder Street at about the stage where it begins to

cross the main road from the North. Braun's car travelled some distance after the collision before it came to a halt.

The central finding of the magistrate was that Braun's car left brake marks some 61m long (41 m before the point of collision, and 20 m after, according to some of the evidence). The question arises whether this finding was supported by the evidence. Budget called five witnesses who gave evidence of the scene or the accident itself. They were Saaiman, a police sergeant who arrived after the accident; Prins, the driver of the Datsun; Engelbrecht, an employee of Budget's attorney, who prepared a plan including matters pointed out to him; Joubert, who heard the collision and went to the scene, where he held conversation with the two drivers; and finally Jonker, who was presented as an expert capable of translating the length of the 61 m brake marks into the speed of the Toyota. Braun was the only witness on the defendant's side. The magistrate regarded Prins, Joubert and Jonker as honest and reliable witnesses. His views on Engelbrecht will be dealt

with later. Saaiman's evidence is not contentious and may be ignored. The magistrate did not find Braun to be "as reliable and honest as any of plaintiffs witnesses".

In my opinion Prins, who was later also to institute proceedings against Braun, was not an impressive witness, particularly with regard to the crucial question of the length of the Toyota's brake marks. According to him he stopped to see if there were any cars approaching. Seeing none he turned right ("regs geswaai" is the expression he several times used). At no stage did he say that he signalled a right hand turn. As he turned right his passenger called out "Oppas" and Prins then saw the Toyota approaching at speed. In cross-examination he gave no satisfactory answer to the question why he had not seen it sooner. One reason that he gave (which is hardly a reason) was that he was turning right. Another was that his passenger saw the Toyota first (if this be a reason). He agreed, however, that the passenger had kept a better look-out than he had. In

chief he attributed to the Toyota's brake marks the astonishing length of 150

paces, which he then corrected to 40, which he confirmed at the start of his cross-examination as 41. Later in cross-examination, when his earlier evidence was put to him he corrected 150 paces to 150 feet, but then again reverted to 150 paces. Then it became 40 metres before the point of collision and 25 thereafter. It is difficult to make anything of this evidence. It is certainly unreliable.

Joubert presented himself as a man with close foreknowledge of the driving proclivities of visitors to his town. His quiet Sunday afternoon was disturbed by the screech of brakes and the crash of impact. Upon repairing to the scene he found an agitated Braun accusing Prins of being drunk and having turned in front of him. Not having seen what had happened, Joubert took it upon himself to accuse Braun of driving like a maniac and having caused the accident. Joubert then paced off the brake marks left by the Toyota before and after the collision and found them to be 41 m and 25 m respectively. He confronted Braun with these

figures but the latter maintained his stand. When he was cross-examined about Engelbrecht's plan, which showed brake marks of only 25 m before the collision and none thereafter, Joubert suggested that they may have faded progressively between the accident and Engelbrecht's observations. He did not know when Engelbrecht had been on the scene and he denied ever going there with him to point out the brake marks. Engelbrecht had taken a statement from him in his office and that was all.

To be contrasted with the fluctuating version of Prins and the confident assertions of Joubert as to brake marks, is the evidence of Engelbrecht, who was sent by Budget's attorney to prepare the plan already mentioned. The key to it gives the length of brake marks before collision as 25 m, but in evidence he said that it could be 20 m only, which he further reduced in cross-examination to 20 paces. He added that there were also brake marks of about 25 m length after the point of collision up to where the Toyota was said to have come to a halt, which

marks he had not shown on the plan, although he conceded they were important.

Joubert was with him at the scene pointing out the same points as had already been

pointed out by Prins. A direct contradiction of Joubert's evidence thus emerges.

He had gone to Joubert's garage across the road and from there they had gone to

the scene. This was about a week after the accident and the marks were still clear.

The magistrate acknowledged the conflict between Engelbrecht on the one hand

and Prins and Joubert on the other, but dealt with it in the following terms:

> "This may seem to be a fatal misstatement on the side of plaintiffs witnesses and that a Court should reject their evidence. This was however the only piece of essential evidence where plaintiffs witnesses did not corroborate each other and [in the opinion] of the court rather showed their honesty than otherwise. It showed that they did not try to intentionally make a watertight case against defendant."

I have difficulty with this passage. Although conflicts between witnesses

on points of detail may be a pointer to honesty and an absence of concertment (see

Mr Justice Nicholas Credibility of Witnesses (1985) 102 SALJ 32 at 42), I fail to

see how this is or can be so in this case. Engelbrecht had been sent to the scene to measure. He did so in the presence of the two witnesses. And he made a record. There really was no room for mistake. Even if there were, who made the mistake? And if the conflict indicates honesty, whose honesty? All that need be said is that on the plaintiffs own case there must be a serious doubt as to the reliability of the distances of 41 m and 20 m deposed to by Prins and Joubert.

Once that is so the technical edifice erected by Jonker to prove a minimum speed of 139 kph is without foundation and must collapse. Even if that were not so, his evidence and the form of test that he used left much to be desired, despite the fact that he impressed the magistrate favourably. He did not use the same make of car, nor did he drive on the same surface. Nor did he know what Braun's load was, as he was unaware of the number of passengers or the weight of baggage carried. There was also no attempt to compare the state of the tyres of Budget's Toyota and the Nissan Sentra that he used in his test. Overall Jonker's evidence

does not advance Budget's case.

Apart from the witnesses already mentioned the plaintiff also called its attorney, Van Zyl, and its controlling member, Gibbs, who deposed to a conversation with Braun at the Fancourt Hotel at George after the accident, in which Braun was said to have admitted to travelling at 100 kph. There was, however, an important conflict between the two witnesses. According to Van Zyl he had charged Braun with travelling at an enormous speed, up to 160 kph. It was in response to this that Braun said that it was not so much but only about 100 kph. Gibbs, on the other hand, whilst agreeing that a speed greatly in excess of the speed limit was mentioned, said that he and Van Zyl were very careful not to state how fast Braun was supposed to have travelled. Braun entirely denied having made the admission. When the conflict was put to Van Zyl in cross-examination, Budget's attorney objected, saying that Gibbs had not said that no speed was mentioned. Ill-founded as this objection was, the magistrate upheld it and Braun's

counsel moved on to other matters. The magistrate did not expressly rely on this conversation in his reasons for judgment, although he was clearly under a misapprehension, and I think it would be dangerous now to attach weight to it, because cross-examination was unfairly halted, with consequences that no-one can tell.

So much for Budget's case. Braun gave evidence, stating that Prins's car turned right across his path without any warning or indication. He applied his brakes, but it was too late and there was nothing he could do to avoid the ensuing collision. He was emphatic that he was travelling at less than 100 kph. His speed was roundabout 80 kph until he saw the speed limit sign, when he slackened pace. He would not commit himself to any speed. As the interpreter put it, speaking in the third person "He had other things to do than to look at his speedometer, to try and avoid an accident". Nor did he make any estimate as to the length of his brake marks.

Braun was an evasive and unsatisfactory witness, and had he had to face a case of substance he may have been in difficulty. I say this making due allowance for the fact that he was speaking through a French interpreter. But the case against him is so inconclusive that I do not think that Budget has discharged the onus of proving that Braun was exceeding the limit, or was driving in other than the "cautious and prudent manner" required by the agreement.

This conclusion renders it unnecessary to decide highly debatable questions as to whether a contract was concluded at George and if it was, whether the fine print on the reverse, which contains the terms on which Budget relies, formed part of it.

At the commencement of the hearing in this court two petitions for condonation were moved on behalf of Budget. They related to the woeful state of the record. The petitions were allowed to be argued together with the appeal. Volume 5 is supposed to contain exhibits vital to the decision of the contractual

questions. By the time of the appeal volume 5 had run into three editions, and a supplement was promised for filing after the hearing had concluded. It would have been impossible to adjudicate the appeal on the two editions that had been filed by the time that the appeal was set down. Much depended particularly upon the appearance and content of the single sheet that was handed over and signed at George, but neither appearance nor content could be extricated from the record. Such small print as was included was illegible, or nearly so. Another document contained in the record was in French and Flemish without a translation into any official language. In retrospect it might have been wiser to allow the appeal to founder in due course. But the court called for an improvement, which led to a third edition which comes within striking distance of attainment to a proper volume 5.

Practitioners have been warned repeatedly of the consequences of presenting inadequate records - see e g Ensign - Bickford (South Africa) (Pty) Ltd

and Others v AECI Explosives and Chemical Ltd 1998 ([2) SA 1085 (SCA) at 1091 D - E. A case with a long record which had been set down for two days was postponed, with the appellants being ordered to pay wasted costs on the attorney and client scale (at 1087 E). They may have been lucky, as the court indicated that a similar failure in the future might lead to an appellant being debarred from proceeding with his appeal (at 1091 E). Philotex (Pty) Ltd and Others v Snyman and Others 1998 (2) SA 138 (SCA) at 186 J - 187 D was an instance of a long record without a proper index. A warning was issued that such a record might be rejected altogether, or should it mistakenly be accepted, that the attorney might be ordered to pay costs de bonis propriis. In Danies v Sheriff Magistrate's Court, Wynberg and Another 1998 (3) 34 (SCA) a series of flagrant breaches of the rules led to condonation being refused, irrespective of the prospects of success. The appellant's attorney was ordered to pay certain of the costs de bonis. These are just some of the more recent cases. Progressively this court is being driven to

action and not mere warning. A practitioner who does not do his work properly

should realize that, apart from other consequences, he may find himself having to account to a client with a meritorious appeal that has been thrown away. There is good reason why there should be a limit to this court's patience. Its members attempt to decide appeals correctly and speedily; only frequently to be frustrated, impeded, delayed or prevented from doing so because of grossly deficient records. This has the consequence that the appeals of parties who have prepared their records properly are delayed. They also have rights. Another area of complaint to which attention has again been drawn recently in Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty)Ltd and Another 1998 (3) SA 938 (SCA) at 955 B-F, is main heads of argument which are neither "main" nor "heads" nor "argument". The preparation of heads requires thought and application, not merely the switching on of an electronic device. A significant percentage of heads are of little or no help, some are actually an impediment, and most are much too

long. What I have said about heads is a general observation and is not directed

at the heads in this case.

The absence of prospects of success is reason enough to refuse condonation, but to it should be added the gross non-compliances with the requirements relating to the filing of proper records.

Both petitions for condonation are refused with costs. The appellant is ordered to pay the costs of appeal.

W P SCHUTZ JUDGE
OF APPEAL

CONCUR
HEFER JA
VIVIER JA
HOEXTER JA
HOWIE JA