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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
DATE: 15/11/2005
CASE NO: A1644/2004

UNREPORTABLE
In the matter between:

MUTUAL & FEDERAL INSURANCE CO LTD APPELLANT

And

J A F DA COSTA RESPONDENT

JUDGMENT

DE VOS, J

In this matter the respondent had successfully sued the defendant for payment in the amount of R48 050.00 together with interest and costs. The respondent's action constituted a claim for indemnification in respect of damages to a vehicle insured by the respondent in terms of an insurance policy with the appellant.

In the pleadings the appellant: –

1. denied that a vehicle as described in the certificate of insurance was damaged as alleged;

2. denied that if such vehicle was damaged the respondent had suffered "legally recognised loss as a result thereof";

3. contended that it was entitled to avoid the agreement because the respondent had failed to inform the appellant of the fact that the vehicle was not a 1991 model 230E Mercedes Benz but a combination of a 1988 200 Mercedes Benz body and a 1990 230E Mercedes Benz engine and that the vehicle was not registered in the respondent's name. The appellant alleged that the respondent had knowledge of these facts and had failed to disclose same to the appellant.

In the court *a quo* the learned magistrate found that: –

1. The vehicle was in fact a built-up one;

2. That there was no evidence that the respondent had been aware of the aforesaid and had knowingly represented the particular facts to the appellant;

3. That there was no evidence that the respondent withheld any facts or did not disclose any true position (to his knowledge) to the appellant;

4. That on a balance of probabilities the vehicle in question had been in a collision;

5. That the vehicle was identified and had become the subject of the respondent's claim;

6. That the incorrect information concerning the vehicle was not material to the defendant's risk;

7. That the respondent has suffered damages in the amount of R48 050.00.

The appellant attacked the findings of the magistrate on the following grounds: –

1. That the magistrate erred in finding that the vehicle had been in a collision. It was argued on behalf of the appellant that the collision had not been proved. In view of the fact that the respondent only testified that he had heard from one José Ferreira that the car had been in a collision and as Mr Ferreira was not called as a witness, although he was available, the accident had not been proved. The argument

> is that the time, place and manner in which the damage arose must be proved to put the respondent within the four corners of the policy. This is so, because the policy excludes its own operation in general terms such as in clause 13.4 namely, damages caused during political unrest. The policy is generally also only applicable within a certain territory. The effect is that the whole promise to pay is qualified or limited. Therefore the insured must prove that he still falls within the remainder of the promise before he can make out a *prima facie* case.

It is true that the evidence as to the collision was based on hearsay evidence emanating from Mr Ferreira. If regard is had, however, to the way in which their trial proceeded and the attack on the evidence presented by the respondent, I am of the view that the respondent did succeed in proving *prima facie* that the vehicle was in an accident under circumstances which calls upon the policy to pay. If regard is had to the expert evidence as to the damages of the vehicle it is clear that the damages were not due to any kind of unrest. There was also no suggestion of anything of this kind during cross-examination. A court case is not a game and trial through ambush is not acceptable. If the appellant seriously doubted the fact that the vehicle was in an accident,

making the appellant liable to the pay the damages if so proved, then that should have been canvassed during cross-examination. This was not done. I am of the view that the magistrate was entitled to find that the accident was proved on a balance of probabilities.

The respondent described the vehicle in the insurance policy as a 1991 230E Mercedes Benz. However, it was found by the magistrate that the respondent's vehicle was a combination of a 1988 200 and a 1990 230E Mercedes Benz and not a 1991 230E Mercedes Benz. It was submitted therefore that since only the car specified in the schedule is insured the vehicle under question was not insured. Reliance, for this submission, was made upon the matter of *Labuschagne v Fedgen Insurance Co Ltd* 1994 2 SA 228 (W). I agree, however, with the submission on behalf of the respondent that this matter is not applicable in the current case. It is clearly distinguishable both on the facts and on the law. The case is based on and is applicable to instances where a warranty has been furnished by the insured. Such a warranty is often contained in insurance proposal forms and in some insurance contracts. In the present instance, however, there was no such warranty, neither was any warranty (in whatsoever form) pleaded and neither was any warranty or even the breach thereof relied on by the appellant. The appellant also never sought to rely on any evidence on this issue, nor, save for

argument, based any defence thereon. Accordingly the issue of a warranty and the breach thereof never formed part of the present case and the case law on which the appellant seeks to rely is therefore not applicable. In The Law of South Africa: *Joubert* (RED), vol 12, 1st reissue at par 194 the position has been summarised by the learned authors as follows:

> "It has been said that the duty in question is a duty to disclose, and you cannot disclose what you do not know [and that the obligation to disclose therefore, necessarily depends on knowledge you possess]. This *dictum* implies that a duty imposed on a party to an insurance contract is simply to disclose facts already within that party's knowledge and that it does not include an obligation to collect information so as to become able to disclose it."

After reference to the English law, the learned authors concluded:

> "South African case law appears to favour the view that the duty to disclose is simply a duty to disclose material facts within one's actual knowledge."

See: *Fine v The General Accident, Fire and Life Assurance Co Ltd* 1915 AD 213; *Pereira v Marine and Trade Insurance Co Ltd* 1975 4 SA 745 (A) and *Fransba Vervoer (Edms) Bpk v Incorporated General Insurance Ltd* 1976 4 SA 970 (W).

Lastly, it was argued that the respondent did not present any evidence about the extent of the damage to the vehicle, nor the fair and reasonable cost of repairs to substantiate the allegation that the vehicle had been damaged beyond economic repair. It was also argued that in view of the admission made by Mr Scrimgeour that his book value was based on a 1991 230E Mercedes Benz and in view of the fact that this was an incorrect starting point that his valuation of the vehicle is "in pieces" the respondent simply did not manage to prove the amount of damages. It is true that damages must be proved by the party claiming it but in *Bowman v Stanford* 1950 2 SA 210 (D) 222 SELKE J said the following:

> "But to make such *dicta* into inflexible rules applicable in every instance without regard to the circumstances of the parties in respect of the availability of the evidence, or to the precise nature of the claim, or the particular injury or loss claimed for, would, it seems to me, result not infrequently in

> injustice. There must be many types of claim due to breaches of contract which do not admit, for various reasons, of strict or detailed proof in terms of so much money. For example, loss of business, especially in relation to the future."

This fairly robust approach is well supported by authority. See *Dykes v Gavanne Investment (Pty) Ltd* 1962 1 SA 16 (T); *Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays* 1971 3 SA 286 (T). As *GRINDLEY FERRIS* AJ in *Stolte v Tietze* 1928 SWA 51 at 52 said:

> "If there is evidence that some damages have been sustained, but it is difficult or almost impossible to arrive at an exact estimate thereof, the Court must endeavour, with such material as is available, to arrive at some amount, which in the opinion of the Court will meet the justice of the case."

I am of the view that this approach is the correct one and should be applied in the current matter. It is clear that the magistrate calculated the damages based on the amounts set out in the respondent's heads of argument in the court *a quo* in paragraphs 4.17 to 4.18. It seems to me that there is not much criticism to be levelled at this approach. To my

mind the magistrate correctly found that the respondent has proved his case. In the premises the appeal cannot succeed and is dismissed with costs.

A DE VOS
JUDGE OF THE HIGH COURT

I agree

M F LEGODI
JUDGE OF THE HIGH COURT

A1644/2004

Heard on: 8 August 2005
For the Appellant: Adv J D Maritz
Instructed by: Savage Jooste & Adams Incorporated
For the Respondent: Adv N Davis
Instructed by: D Olivera Serrao Attorneys
Date of Judgment: 15 November 2005