REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 34321/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

CMH CAR HIRE (PTY) LIMITED t/a FIRST CAR RENTAL Plaintiff

And

BANDA, MARY TERESA MAMPAKI Defendant

J U D G M E N T

MAKUME, J:

INTRODUCTION

[1] On the 15th day of December 2011 the Defendant hired Plaintiff's motor vehicle namely a Honda CRV Auto bearing registration letter and number [ND 6…….] (the motor vehicle). In terms of the rental agreement to which was attached terms and conditions the defendant was to return the motor vehicle to the plaintiff on or before the 18th day of December 2011.

[2] Whilst the Defendant was driving in the Free State Province heading to Fouriesburg she was involved in an accident which resulted in the Plaintiff's motor vehicle being damaged beyond economical repair.

[3] In this action the Plaintiff's claim against the Defendant is for payment of the sum of R317 340,00 being the replacement value of the motor vehicle.

THE RENTAL AGREEMENT

[4] Attached to the Rental Agreement are Terms and Conditions thereto, clauses 2 and 5 are of relevance in this judgment and I deem it appropriate to quote same in full:

> "*2. RISK, DELIVERY AND RETURN*
>
> *2.1 The VEHICLE will be at YOUR sole risk from the date and time of delivery of the VEHICLE until the VEHICLE is returned to US. YOU undertake to return the VEHICLE in the same condition that YOU received it, fair wear and tear excepted.*"
>
> "*5. LIABILITY WAIVER*

5.1 YOU may purchase in advance a collision damages waiver (CDW) and/or theft loss waiver (TLW) or a super waiver ('SCDW/STLW'), or such LIABILITY WAIVERS may be included in the OFFICIAL RATES recorded in clause 4.1.1.

5.2 In such event, YOUR liability in terms of clause 2.1 will not exceed the amount stated in the AGREEMENT as the 'Renter's Responsibility', unless one or more of the exclusions in clause 5.3 is applicable.

5.3 CDW and TLW do not cover loss of, or damage to the VEHICLE in the following circumstances, and YOU will be liable for all such loss or damage:

5.3.1 where YOU or the DRIVER are in breach of this AGREEMENT;

5.3.2 where damage is caused to tyres, rims, hubcaps, windscreens or the undercarriage, if no collision of the VEHICLE has occurred;

5.3.3 where damage is caused by water;

5.3.4 where damage or loss is caused by DRIVER negligence;

5.3.5 where damage or loss is sustained in an accident not caused by physical contact with another vehicle, person, animal or object;"

COMMON CAUSE ISSUES

[5] It is not disputed that the Plaintiff is the owner of the motor vehicle and that it was damaged beyond economical repair whilst being driven by the Defendant.

[6] It is further common cause that the Plaintiff has suffered loss in the sum of R317 340,00.

IN ISSUE – THE DISPUTE

[7] What is in issue in this matter is the proper interpretation of clause 5.3.5 under Liability Waiver. This issue is central to the resolution of the dispute and for a better understanding of the issue I deal with the evidence of the Defendant first.

THE EVIDENCE AND THE PLEADINGS

[8] The Plaintiff presented no evidence and closed its case. In the particulars of claim the Plaintiff alleges the following:

Ad Paragraph 9

The Defendant returned the vehicle to the Plaintiff in an accident damaged condition.

Ad Paragraph 10

The damage was occasioned to the vehicle in circumstances where there was no physical contact with another vehicle, person animal or object, alternatively as a result of driver negligence.

Ad Paragraph 11

As a consequence of the aforegoing the waivers opted for by the Defendant do not apply and the Defendant is accordingly liable for the full extent of the Plaintiff's damages.

[9] In her plea the Defendant denies contents of paragraphs 10 and 11 and says that the damage to the vehicle was caused due to physical contact with an object.

[10] The evidence of the Defendant is briefly that she was driving along a tarred road in the Free State when suddenly an animal in this instance a calf ran into her line of travel she swerved the motor vehicle to the left in an attempt to avoid colliding with the animal and it was when she was swerving back into the road that she lost control of the vehicle and in the process hit a cliff on the side of the road. The motor vehicle was damaged in that process.

[11] She was cross-examined in detail about the agreement and how the accident happened. She testified that she had as a passenger her child and that if she had not swerved the motor vehicle she would have hit the animal and as she says this may have caused her and the child serious injuries or even death.

[12] She testified further that when she hired the plaintiff's motor vehicle she indicated to them that she wants insurance to cover accident damage and as far as she understood when she took delivery of the motor vehicle she was fully covered for this type of accident that she became involved in. She denied that she drove negligently or at a high speed. The animal suddenly appeared in front of her and the only way to avoid colliding with it was to swerve away from it.

[13] The Plaintiff did not present any evidence to prove that the Defendant was negligent despite having so pleaded albeit in the alternative. There was nothing to gainsay the Defendant's version as to how the accident happened. During cross-examination the Defendant reiterated the same version of events which version was not discredited by any inconsistencies or ambiguities. The cross-examination did not damage her credibility nor did it raise any serious concerns about the reliability of her evidence.

[14] The Defendant was not represented during the trial and was thus not able to present argument and make submissions. She instead repeated in argument her evidence-in-chief. However, in her plea which was drafted by her attorney she said that the damage to the vehicle was caused when the vehicle made physical contact with an object which could only mean the cliff or the hillside. In her mind this is sufficient to make the act fall within the insured event.

[15] I asked counsel for the Plaintiff why this Court should not find that the hillside or the cliff that made contact with the motor vehicle is an object as stated in clause 5.3.5. I did not get any suggestion that the hillside was not an object. What I was told is that if the motor vehicle had made contact with another motor vehicle or the animal itself then that will be an object. The Terms and Conditions of the Rental Agreement do not define what an object is. I was also not referred to any authorities on this aspect and that being the case I have to rely on comparative rulings in this regard.

[16] The question to be answered is the following: is a hillside or the side of the road an object or not? In paragraph 10 of the amended particulars of claim the Plaintiff says that the damage to its vehicle was occasioned in circumstances where there was no physical contact with another vehicle, person, animal or object alternatively as a result of driver negligence.

[17] In dealing with the alternative ground of exclusion it is so that the Plaintiff placed no evidence before this Court to prove that the Defendant drove the motor vehicle negligently as set out in clause 5.3.4 of the exclusion clause.

[18] The only evidence presented is that of the Defendant who testified that faced with a sudden emergency she swerved in order to avoid hitting a cow and being more concerned in saving her life as well as that of her minor child who was sleeping in the motor vehicle. She lost control of the motor vehicle and hit the embankment or cliff or side of the road. That evidence remains

unchallenged and in my view does not prove any negligence on the part of the driver.

[19] I now deal with the vexed question which is what was the intention of the parties in using the words "*object*" without defining or specifying what objects would qualify to indemnity the Defendant in terms of clause 5.

[20] In clause 1.1.7 of the Terms and Conditions to the Rental Agreement it is said that:

> "*A liability waiver is not an insurance policy but provides a basis on which your liability in terms of this agreement may be reduced.*"

Notwithstanding this statement in both the rental agreement as well as the Terms and Conditions document the language used is that normally that which is found in short-term insurance policy documents. For example the rental agreement refers to type of cover chosen and accepted by the Defendant and in clause 5.4 of the Terms and Conditions the following is said:

> "*5.4 YOU may not decline the LIABILITY WAIVERS offered by US unless:*
>
> *5.4.1 there is a valid corporate account opened in YOUR name; and*
>
> *5.4.2 YOU have signed OUR 'Self Insurance Agreement'; and*
>
> *5.4.3 YOU have provided US with written proof from YOUR insurers that all vehicles rented are comprehensively insured.*"

[21] In my view despite the Terms and Conditions of the rental agreement seeking to define the LIABILITY WAIVER clause not as an insurance clause it unfortunately invites being interpreted as an insurance policy in order to clearly understand what the intention of the parties was. I say this because the Defendant in her evidence testified that according to her when she accepted the type of cover in the rental agreement she says it was meant to cover the type of accident she became involved in.

[22] The Plaintiff argues that what the motor vehicle made physical contact with is excluded in clause 5.3.5 in other words the insured motor vehicle did not make physical contact with an object. I posed a question to Plaintiff's counsel what then did the insured motor vehicle make contact with for it to sustain such serious damage. I could not get a clear intelligible answer instead it was argued that if the motor vehicle had made contact with the cow or with another motor vehicle then the damage sustained would have been covered. In my view this explanation is not only absurd but flies in the face of what was intended by the parties. This rental agreement sought to indemnify the Defendant for damages occasioned to the motor vehicle under circumstances where she was not the cause of the accident irrespective of what the motor vehicle made contact with.

[23] Clause 5 of the Rental Agreement is a typical short-term insurance contract. The principles governing the interpretation of an insurance policy were set out by the Supreme Court of Appeal in *Fedgen Insurance Limited v Leyds* 1995 (3) SA 33 (A) as follows:

> "*The ordinary rule relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is in the first instance, to be gathered from the language used which, if clear must be given effect to. This involves giving words used their plain, ordinary and popular meaning unless the context indicates otherwise. Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted for it is the insurer's duty to make clear what particular risks it wishes to exclude. A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the contra proferentem rule which requires a written document to be construed against the person who drew it up would operate against Fedgen as drafter of the policy.*"

[24] In the matter of *Van Zyl NO v Kiln Non-Marine Syndicate No 510 of Lloyds of London* 2003 (2) SA 440 (SCA) the court quoted with approval from the judgment by King J in *Barnard v Protea Assurance Co Ltd t/a Protea Assurance* 1998 (3) SA 1063 (C) to the following effect:

> "*Now it is accepted principle in interpreting insurance contracts that it is the duty of the insurers to make it clear what particular risks he wishes to exclude. The principle is stated by May in the following terms:*
>
> > *'No rule in the interpretation of a policy is more fully established or more imperative or controlling, than that which declares that in all cases it must be liberally construed in favour of the insured so as not to defeat without a plain necessity his claim to an indemnity which in making the insurance it was his object to secure.'*"

At page 1068D the learned judge continues as follows:

> "*From this it would follow that if a term in a policy (term in the sense of designation) is capable of both a broader and narrower meaning it is that which is favourable to the insured in other words to the upholding of the policy which must be employed.*"

[25] The terms and conditions of the Rental Agreement do not define or explain what "*object*" was intended in clause 5.3.5. The *Concise English Oxford Dictionary* 12th edition defines the word "*object*" in the following words:

> "*a material thing that can be seen or touched.*"

The *World Book Dictionary* also defines or describes "*object*" as something that can be seen or touched. It is clear that a hillside or the cliff that the motor vehicle made contact with is an object as defined in the *World Dictionaries*.

[26] A restrictive interpretation of clause 5.3.5 would confine the indemnity afforded the driver to instances where the collision is with moving or movable objects because the words vehicle, person and animal are all movable or moving objects. If that is the case then there should have been no need to add the words or "*object*" to this sentence and in my view by including the word "*object*" the author intended to include also immovable obstacles like a cliff, a hillside or a tree or even where the motor vehicle would overturn and roll on the hard surface of the road and become damaged. In those instances the driver would be indemnified unless there is proof that he or she was negligent.

[27] In the present matter the Defendant was not negligent when she collided with the hillside of the road. The hillside is an object that is referred in clause 5.3.5 and the Defendant is indemnified in full for the damages occasioned to the motor vehicle.

[28] In view of my finding the following *dictum* in the matter of *Metcash Trading Limited v Credit Guarantee Insurance Corporation of Africa Ltd* 2004 (2) All SA 484 (SCA) paragraph [10] at 488b-f is apposite:

> "*According to our law a policy of insurance must be construed like any other written contract so as to give effect to the intention of the parties as expressed in the terms of the policy considered as a whole. The terms are to be understood in their plain, ordinary and popular sense unless it is evident from the context that the parties intended to have a different meaning, or unless they have by known usage of trade, or the like, acquired a peculiar sense distinct from their popular meaning.*
>
> *If the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract then the court may modify the words just so much as to avoid that absurdity or inconsistency, but no more. It must also be borne in mind that very few words bear a single meaning and the ordinary meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their interrelation and the nature of the transaction as it appears from the entire contract.*"

[29] I have considered the word "*object*" in relation to the context in which it is used with its interrelation to the contract as a whole, including the nature and purpose of the contract. It follows accordingly that the ordinary and single meaning of the word "*object*" covers the incident in which the Defendant was involved in and I accordingly make the following order.

ORDER

[30] The Plaintiff's claim is dismissed with costs on a party and party scale.

DATED at JOHANNESBURG this day of SEPTEMBER 2015.

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M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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