

SOUTH AFRICA / JUDGMENT

Absa Idirect Limited v Valoyi (A703/14) [2017] ZAGPPHC 601 (22 August 2017)

[2017] ZAGPPHC 601

COURT

North Gauteng High Court, Pretoria

BEFORE

J W Louw, V V Tlhapi

CASE / FILE NUMBER

A703/14

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REPUBLIC

OF SOUTH AFRICA

IN

THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

APPEAL

CASE NO: A703/14

DATE:

22/08/2017

REPORTABLE:

YES

OF

INTEREST TO OTHER JUDGES: YES

In

the matter between:

ASSA

IDIRECT

LIMITED

Appellant

and

CREATEN

VALOYI

Respondent

JUDGMENT

J W LOUW, J

[1] This is an appeal against the judgment and order of the court a quo (Kubushi J) in which the court upheld the claim of the respondent for payment by the appellant of

the amount of R297 990 for which the appellant had insured his BMW 525i motor vehicle in terms of an insurance contract. Leave to appeal as granted by the court a quo to the full court.

[2] The full court which heard the appeal was comprised of A A Louw J, Tlhapi J and J W Louw J. After the hearing of the appeal,

judgment

was reserved and it was agreed that A A Louw J would be the scribe of the judgment. He unfortunately thereafter passed away under tragic circumstances before writing the judgment.

[3] Sections 14(4), (5) and (6) of the Superior Courts Act 10 Of 2013 provide the following:

(4) (a) Save as otherwise provided for in this Act or any other law, the decision of the majority of the judges of a full court[1] of a Division is the decision of the court.

(b) Where the majority of the judges of any such court are not in agreement, the hearing must be adjourned and commenced de nova before a court consisting of three other judges.

(5) If, at any stage during the hearing of any matter by a full court, any judge of such court is absent or unable to perform his or her functions, or if a vacancy among the members of the court arises, that hearing must-

(a) if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such remaining judges; or

(b) if the remaining judges do not constitute such a majority, or if only one judge remains, be commenced de nova, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges or of the one remaining judge as the decision of the court.

(6) The provisions of subsection (4) apply, with the changes required by the context, whenever in the circumstances set out in subsection (5) a hearing proceeds before two or more judges.

[4] According to the wording of ss (5), the absence or inability of the judge relates to "any stage during the hearing" of any matter by a full court in the circumstances mentioned. The "hearing" must then "proceed" before the remaining judges if the remaining judges constitute a majority of the judges before whom the matter

commenced. Sections 17(1), (2) and (3) of the repealed Supreme Court Act 59 of 1959 were worded in similar terms. [2]A similar situation arose in this Division in the matter of Automated Business Systems (Pty) Ltd v Commissioner for Inland Revenue,[3] where one of the judges of a full court became incapacitated through illness and where the court said the following at 655I-656A with reference to section 17(2):

"A narrow and literal construction of the word "hearing" could, possibly, mean that the subsection does not apply to a situation such as the present where the Judge has become incapacitated after conclusion of argument and after judgment has been reserved. Such a construction would, in my view, be patently absurd. It would mean that the hearing could proceed if the incapacitation occurs at the beginning of the hearing but not after argument has been concluded. I can see no reason for drawing such a distinction and the Legislature could not have intended such a consequence. This judgment is accordingly the judgment of the majority of the Full Court."

- [5] The reasoning of the court in Automated Business Systems applies equally to a construction of s 14(5) of the Superior Courts Act. I conclude, therefore, that where one of the members of a full court is absent or becomes unable to perform his or her functions after conclusion of the argument but before the judgment has been signed by him or her, ss 14(5) of the Superior Courts Act must be interpreted to include such situation, and that the remaining members of the court must then proceed to write and deliver the judgment. What follows is the judgment by the majority members of the full court.
- [6] It was common cause that the appellant repudiated the respondent's claim. The appellant alleged in its plea that the respondent had breached the terms of the insurance contract by failing to disclose to the appellant that his previous insurance policy had been cancelled by his previous insurer as a result of the respondent being found to be an unacceptably high risk, and that he misrepresented to the appellant that his previous insurance policy did not come into being as a result of his high insurance risk profile. The appellant further pleaded that such non-disclosure and misrepresentation were material, that it had a direct bearing on the risk assessment conducted by the appellant and that, had the plaintiff disclosed the fact that his previous insurer had cancelled his policy due to him being an unacceptable risk, the appellant would not have entered into a contract of insurance with the respondent on the terms which it did.
- [7] The respondent testified that he had previously insured his BMW 330i with Auto & General Insurance Company, that the vehicle was hijacked and that his claim for the loss of the vehicle was paid by Auto & General but that they thereafter refused to insure the BMW 525i which he had bought to replace the hijacked vehicle. The respondent then approached the appellant to insure this vehicle. The appellant agreed to insure the vehicle on the basis of a telephone conversation which the respondent had with a sales agent of the Telesure, one Tsolo. Telesure is an umbrella company which deals telephonically with applications for insurance on behalf of various insurance companies, including Auto & General. The respondent was referred to the transcript of the conversation during his evidence in chief.

The relevant part thereof reads as follows:

"And has an insurer ever canceled your policy? (Agent)

Ja ok, let me tell you what happened, I, I had an incident like on the 17th of May (Client)

Yes (Agent)

Uhm, where there was shooting in my house and they pinned the BMW (Client) Ja (Agent)

Right , uhm, so I was insured with Uhm Auto & General (Client) Ja (Agent)

They are paying out my claim now, but they cannot give me another quotation for the BMW th ey said the cars that I am driving are high risk, so I don't know what

that means (Client) OK (Agent)

So for more information you can just speak to them (Client)

They, they never, ok, they didn't cancel your insurance due to claims rate they just find out that the car is a high risk Agent)

No, they paid out the claim (Client) Ja (Agent)

And then after that uhm I have requested a quotation and then they gave me a quotation and the one manager called me and say they cannot insure my car cause it 's a high risk (Client)"

[Emphasis added]

[8] The respondent was also referred during his evidence in chief to the transcription of his earlier telephonic discussion with a representative of Auto & General. The representative is referred to in the transcript as a claims specialist. The first part of the transcript deals with an inquiry by the respondent about when payment would be made in respect of his claim for the hijacked vehicle. The respondent then complained about him being refused insurance for his new vehicle by someone in the call centre of Telesure to whom he had spoken. The relevant part of the transcript then proceeds as follows (the claims specialist, to whom the respondent referred as the manager, is referred to as S and the respondent, being the client, as C) :

"C

- And for me to be denied insurance like that cause when I speak to you, I said if, if I had a wish, I was, I was gonna keep my car and pay insurance.

S

- Mmm ... mmm OK, OK it 's the same scenario if a person ... uhm - is a business owner then drives it from client to client and due to the ... the area that he is driving in his being in a lot of accidents so the risk is becoming too high or a person who stays in a coast (sic) and because of ... (Cell phone ringtone...)

C

- So .. Now I

S

- If it's circumstances out of his control he didn't ask for it didn't wish for it but still we as the insurance company have the right to decide are you going to be high risk or not, so - we looked at your age, we looked at the type of vehicle that you are, are driving and we made it efficient (sic) that the, the person itself not the circumstances but you, as your age and the vehicle that you are driving is too high a risk we can't take it we are not willing to take that risk.

C

- So even if I sell it and move ... Move where I'm staying

S

- I'ts what ?

C

- I 'm moving where I 'm staying now

S

- I'ts not about your area also Sir, yes it is about your security system. Just know what the criteria is, it's not always just due to the physical area that you stay in, it 's also to do with the person that drives the vehicle, the area there's a lot of stuff which is NCB dependant - everything they have at on NCB the end of the day to be acceptable for us to ensure your vehicle. But there's a lot of other insurance companies Mr. Valoyi

C -Can you, can I get NCB letter just to say that because, should I should I want to choose why you guys have ... Can I be like, can I choose the letter that, that is the reason, not because I'm the bad person or anything but because the cars that I'm driving?

S

- Mmm Sir, no they can phone us, they can phone us and ask him that so...

C

- I t 's noted as unacceptable risk

S

- It 's noted as unacceptable risk

C

- Is it?

S

- So you, you, you know what did u have to do and that 's only my opinion. When you get new insurance by say for argument sake for instance Outsurance, tell them listen my insurance company cancelled my policy again due to the fact that uhm ... the type of vehicle and my age - is too high risk for them to carry - my insurance was not cancelled due to fraud - there's a difference between fraud due (sic) on to higher risk or uhm ... The, the use of the vehicle it 's the same scenario you told Nico's that you first wanted to get a quote for the Jag through Outsurance and they gave you exactly the same answer.

C

- I get you

S

- On too[4] high risk and you didn't say that to us."

[9] The basis on which the appellant repudiated the respondent's claim is pleaded as follows in the appellant's plea:

"5.3 In terms of clause 3[5], the plaintiff had a duty to disclose to the defendant any relevant information or material facts when proposing for insurance.

5.4 The plaintiff had a further duty not to misrepresent any material fact or to supply the plaintiff with any incorrect information when applying for insurance.

5.5 The plaintiff breached the terms of the contract in that the plaintiff failed to disclose to the defendant that his previous insurance policy was cancelled as a result of the previous insurance company finding that the plaintiff had and an unacceptably high-risk.

5.6 The plaintiff breached the terms of the contract in that the plaintiff misrepresented to the defendant that his previous insurance

policy did not come into being as a result of high insurance risk profile.

5.7 The non-disclosure as well as the misrepresentation by the plaintiff to the defendant was material in that it had a direct bearing on the risk assessment conducted by the defendant.

5.8 Had the plaintiff disclosed the fact that his previous insurer had cancelled the policy due to an unacceptable risk, the defendant would not have entered into a contract of insurance with the plaintiff on the terms he did."

[10] It is clear from a reading of the transcript that Auto & General did not, despite what was said to the respondent, cancel the respondent's previous insurance policy. They in fact paid the respondent for the loss of his hijacked BMW 330i vehicle. They were, however, not prepared to insure the BMW 525 which the respondent wanted to purchase to replace the hijacked vehicle on the ground that they regarded the respondent as an unacceptable risk due to his age and the type of vehicle. The statement by the Auto & General representative that the

respondent should tell any new insurance company which he approaches that his previous insurer, i.e. Auto & General, had cancelled his policy due to the type of vehicle and his age being too high a risk for them to carry, was clearly a factually incorrect statement. There had been no cancellation of the policy. I will refer again to this issue below when dealing with the evidence of the witnesses who testified on behalf of the appellant.

- [11] The respondent was extensively cross-examined about whether he told the appellant's representative during their telephonic discussion that his previous insurer had cancelled his policy as was conveyed to him by the Auto & General representative. The respondent's repeated answer was that the Auto & General representative indicated that his policy was cancelled but that he did not understand that as they were at the time busy paying him out for the claim in respect of the BMW 330i. According to his understanding, there had been no cancellation. That is why he indicated to the appellant's representative that the appellant should contact his previous insurer. What he explained to the appellant's representative, was that his previous insurer paid out his claim in respect of the hijacked BMW, but that they were not prepared to insure the BMW 525 because they regarded it as too high a risk. It was accepted by appellant's counsel during argument that the words "Ja ok" which he used during his conversation with the appellant's representative were not to be understood to mean that he did tell the appellant's representative that his previous policy had been canceled by Auto & General.
- [12] The appellant called a Ms. Maphalaga, a claims manager employed by Outsurance, as a witness. She testified that she would not have regarded the respondent, being over the age of 25, as a high risk, but that she would have regarded the BMW 525 vehicle as a high-risk. In re-examination, she said that Outsurance would insure a person who tells them that the cars that he drives are high-risk, but that they would possibly "pump up" the premiums for the vehicle.
- [13] The next witness called by the appellant was Mr. L Meyer, who was at the relevant time employed by Telesure as a customer relations

specialist. He testified that if a person under the age of 21 seeks insurance with them on a high value or high performance vehicle, they would refuse cover. He was then asked whether Telesure would find that a 3 series or a 5 series BMW with a driver of approximately 27 or 28 years of age (the respondent was 28 years old at the time he applied to the appellant for insurance cover) would be an acceptable risk. His answer was that they would accept the risk. He was then asked why did Telesure "cancel Mr. Valoyi as an unacceptable risk". He said that after the respondent submitted the claim in respect of the hijacked vehicle, an investigator was appointed who found what he believed to be irregularities in the manner in which the respondent raised money to purchase the vehicle. The intention of the claims department at the time was to reject the claim. The respondent, however, lodged a complaint with his department regarding slow and poor service from the claims department. His role was then to instruct the claims department to expedite the investigations, which they did, and they still wanted to reject the claim. After further complaints by the respondent, the matter was referred to the claims board, which deals with

disputed matters internally. The board reviewed the findings of the claims department and found that it was not really a valid reason to reject the claim, but recommended that, due to the investigation and the findings of the investigation, the respondent had possibly acted in a dishonest manner to purchase the vehicle and it was therefore felt

that they would not want to insure him further due to the moral risk which he posed. The claims department was then instructed to settle the claim, but to "cancel the policy against him".

[14] It is clear from Mr. Meyer's evidence that the respondent was not given the true reason why Telesure was not prepared to insure his new vehicle. The reason for their refusal was that they decided that the respondent was a "moral risk" and that they were therefore no longer prepared to insure him further. The reason was not, as he was told, that they were not prepared to insure him because they regarded his age and the BMW 525 as too high a risk.

[15] The information which he provided to the appellant's representative that his previous insurer had declined to ensure the BMW 525 because they regarded the type of vehicle as a high-risk, was therefore not a misrepresentation. That is what he was told by Telesure. He was, of course, also told that his age had also been a consideration for them not being prepared to insure the BMW 525. Although he did not tell the appellant's representative about that, his failure to mention that was not pleaded as a factor on which the appellant relied when it repudiated the contract. The appellant was in any event aware of the respondent's age when it agreed to insure the vehicle. One of the first questions which the respondent was asked by the appellant's representative during the conversation was his ID number. That would have told the appellant what the respondent's age was.

[16] Mr. Meyer was asked by the court, having regard to the decision of the board that the respondent's claim should be paid out and that Telesure would no longer do business with the respondent, at what point the cancellation of the contract takes place as there was nothing further to insure once the claim had been paid out. His evidence was the following:

"That is correct, but then also, I mean, that would naturally imply that the contract seized (sic) to exist. But that is a specific contract. Then, we will give you notice that we are now also cancelling that contract, due to, we do not wish to accept any risk further, as you as the person, are deemed to be an unacceptable risk. That is also to protect us in future, should this person come back, or when the person buys a new vehicle, so we can also know that, that is the decision.

You give notice to say that: 'We will no longer be doing business with you?'

That is correct.

That is what you call cancellation? --- Yes."

The appellant was not able to produce any letter which was written to the respondent in this regard.

[17] It is clear from the evidence of Mr. Meyer that the respondent's contract with Auto & General ceased to exist on payment of the insured amount to the respondent. There was therefore nothing to cancel. The fact that Telesure regards a notice to a client that Auto & General is no longer prepared to do business with him or her as a cancellation, is clearly incorrect and irrelevant. The court a quo in my view correctly held that what Mr. Meyer described as cancellation cannot be regarded as a cancellation. It found that

the policy came to an end after the claim was paid and that a new agreement would have to be concluded to cover a new vehicle. I respectfully agree with that finding.

[18] The next witness called by the appellant was Ms. T Bhengu who is employed by the appellant and who was employed by the appellant as a loss adjuster at the time when the respondent's claim was repudiated by the appellant. The duty of a loss adjuster is to validate

insurance claims. She was responsible for handling the respondent's claim. She contacted Telesure, who informed her that the respondent's

policies with them had been cancelled due to "unacceptable risk". She then had regard to the transcript of the conversation between the respondent and the appellant's representative and concluded that the respondent had not disclosed the cancellation. The respondent's claim was rejected because of this and the finding by Telesure that he was a moral risk. She did not request to be provided with the transcript of the telephonic conversation between the respondent and the Telesure representative before deciding to reject the respondent's claim. She further said that the respondent had misled the sales consultant by telling her that Telesure refused to give him cover on his new vehicle and did not disclose that Telesure "cancelled him on unacceptable risk". But that was not what the respondent was told by the Telesure agent. He was told that his policy was cancelled due to the fact that the type of vehicle and his age were too high a risk for them to carry.

[19] Ms. Bhengu testified under cross-examination that where a client insures a vehicle which gets stolen and is not recovered, that the policy will automatically be cancelled because "the risk we were insuring is no longer available". It was not necessary, she said, to have to make a decision. She was then asked whether, if the client wants to be insured again for another vehicle, he would have to get a new quotation. She explained that it would depend on the time between when the initial contract was cancelled and the time the client comes back for quote. If it was still within the time when a policy could be reinstated, that could be done, but if the timeframe had lapsed a new policy would have to be issued. The fact that a policy could be reinstated within a certain period of time does, of course, not mean that it had not lapsed. The fact that a policy may in certain circumstances be reinstated in fact confirms that such policy had lapsed.

[20] The court a quo in its judgment posed the question whether the respondent failed to disclose what was in his knowledge at the time he concluded the agreement with the appellant. The court found that what would have been within the knowledge of the respondent, and what he should have disclosed to the appellant, was that, because of his age

and the type of motor vehicles he drove, which were classified as high-risk or unacceptably high risk, Auto & General had refused to insure his BMW 525 motor vehicle. The court further found, on the basis of the two telephone conversations, that high risk and unacceptable risk meant the same thing to the respondent. The court was satisfied that there were no material facts relevant to the insurance agreement which were known to the respondent at the time of the conclusion of the contract which he did not disclose to the appellant, neither did he misrepresent any fact to the appellant. I am in respectful agreement with these findings.

[21] It follows that the appeal must fail. The order which I make is that the appeal is dismissed with costs.

J W LOUW

JUDGE OF THE HIGH COURT

I concur

V V TLHAPI

JUDGE OF THE HIGH COURT

Appearances:

For the appellant: Adv. M Desai

Instructed by: Ramsay Webber Inc., Johannesburg

For the respondent: Adv. B P Geach SC

Instructed by: Mashamba Inc., Pretoria

[1] A full court is defined in s 1 of the Act to mean a court consisting of three judges.

[2] Section 17(2) referred to the situation where "any judge of such court dies or retires or is otherwise incapable of acting or is absent". The situation where a judge dies or retires would have been covered by the wording "incapable of acting or is absent". The difference in wording between the repealed Act and the current Act is therefore not of any consequence.

[3] 1986 (2) SA 645 (T)

[4] This should probably have read "owing to".

[5] This is a reference to clause 3 of the written insurance contract subsequently issued by the appellant.

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