

SOUTH AFRICA / JUDGMENT

Anderson Shipping (Pty) Ltd v Guardian National Insurance Company Ltd; In re: McCarthy Rental Ltd.; Anderson Shipping (Pty) Ltd.; Guardian National Insurance Company Ltd. (244/86) [1987] ZASCA 57; [1987] 2 All SA 307 (A) (27 May 1987)
[1987] ZASCA 57

COURT

Supreme Court of Appeal

BEFORE

Corbett, Botha, Smalberger, Nicholas, Kumleben

CASE / FILE NUMBER

244/86

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244/86/AV

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between: ANDERSON SHIPPING (PTY) LIMITED Appellant and GUARDIAN NATIONAL INSURANCE COMPANY LIMITED Respondent

In re: MCCARTHY RENTAL LIMITED Plaintiff and ANDERSON SHIPPING (PTY) LIMITED Defendant

and GUARDIAN NATIONAL INSURANCE COMPANY LIMITED Third Party

CORAM: CORBETT, BOTHA, SMALBERGER, JJA, NICHOLAS et KUMLEBEN, AJJA

HEARD: 19 May 1987.

DELIVERED: 27 May 1987

JUDGMENT

NICHOLAS, AJA 2 NICHOLAS, AJA Anderson Shipping (Proprietary) Limited ("Anderson") carries on the business of a general and heavy haulage contractor, for which purpose it operates a large fleet of vehicles. Under a policy issued by Guardian National Insurance Co Ltd ("the Guardian") and entitled "The Unicover Insurance Contract", Anderson was insured against a large number of perils. In section 14 comprehensive cover was provided in respect of Anderson's transport fleet, of which particulars were set out in a schedule. It was provided inter alia that the Guardian would indemnify the insured in the event of an accident caused by or in connection with an insured vehicle against all sums including claimant's costs

and

3

and expenses which the insured should become legally liable to pay in respect of death of or bodily injury to any person, and damage to property. The policy was issued by the Guardian in the first instance on 1 September 1982 and under it the insurance was for periods of one month at a time. With effect from 1 March 1983 a new policy was issued in substantially the same terms. On 22 March 1983, during the currency of the policy, one of the insured vehicles (registration number DBJ 409 T), which was being driven by S.A.Motjedi in the course of his employment with Anderson, was involved in a collision with a vehicle belonging to McCarthy Rental Limited ("McCarthy"). In consequence, the latter issued a summons against Anderson

out 4 out of the Transvaal Provincial Division of the Supreme Court (Case No 14412/84) in which it claimed R24985-00 as damages. Acting in terms of Rule 13 of the Uniform Rules of Court, Anderson then served on the Guardian a third party notice, claiming to be indemnified against McCarthy's claim in terms of the insurance policy.

In its plea to this notice, the Guardian alleged that it "was entitled to repudiate liability in respect of Anderson's claim for indemnification relating to the collision, and/or to cancel the Agreement of Insurance, which it in fact has done". The grounds for the repudiation and cancellation were set out in paragraph 4 of the plea:

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"4. The Third Party pleads that the Defendant breached Condition 1 of the Special Conditions of Section 14 of the said Insurance Policy, alternatively the Third Party was induced to enter into the said Agreement of Insurance by the Defendant wrongfully concealing from it the following fact or facts:

4.1 That the Defendant had in its employ a driver who had previously been found guilty of driving under the influence of liquor; and/or 4.2 That the Defendant employed drivers without satisfying itself as to the criminal record of the drivers, alternatively the various endorsements on the drivers' licences.

The said fact and/or facts were relevant and material to the insurance risk."

In further particulars to para 4.1 of the plea, the Guardian alleged that the driver of Anderson's vehicle (Sekwiti Adolf Motjedi) had been found guilty of a contravention of s140(1)

(a) of the Natal Road Traffic Ordinance, No 21 of 1966 - i.e.

driving

6

driving under the influence of intoxicating liquor

- and that his driver's licence had as a result been suspended for 6 months. Anderson asked with reference to para 4.2 of the plea -

"In what manner is it alleged, that the Defendant should have satisfied itself re-garding criminal records of drivers or en-dorsements on their drivers' licences?"

and the Guardian replied -

"By asking them to produce their driver's licence for inspection before employing them."

Asked on what grounds were the facts alleged relevant

and material to the insurance risk, the Guardian replied:

"It is the experience of insurers that drivers with a criminal record, thus en-dorsed drivers' licences, are more likely

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to cause accidents than are those whose licences have not been endorsed, and thus the risk of damage is materially increased."

In the minutes of the pre-trial conference between the legal representatives of Anderson and the Guardian, it was recorded that Anderson and the Guardian had agreed, with the concurrence of McCarthy, that the only issue to be determined, at the trial was whether Anderson was entitled to indemnification from the Guardian: if it was, the Guardian would pay McCarthy the

full amount of its claim with costs; if it was not, Anderson would make such payment.

The trial judge found against Anderson and dismissed the third party notice with costs. Leave having been granted by the Court a quo Anderson now appeals to this Court against

8

against the whole of the judgment.

On behalf of the Guardian, evidence was given by Mr. J. C. Douglas, its technical claims consultant. He referred to clause 1 of the "Special Conditions" under s 14 of the policy, which reads:

"1. If any driver's licence in favour of the Insured or his authorised driver be en-dorsed suspended or cancelled or if he or they shall be charged or convicted of negligent reckless or improper driving notification shall be sent in writing to the company immediately the Insured has knowledge of such fact."

He produced, with consent, a photocopy of the driver's

licence of Sekwitt Adolf Motjedi which had been issued on 22 February 1973. It was a licence to drive "Extra Heavy motor vehicles, Code 11". It bore an endorsement recor-

ding

9 ding that the holder had on 26 March 1981 been convicted at Mooi River on a charge of contravening s. 140(1)(a) of the Natal Roads Ordinance, and had been sentenced to 4 months' imprisonment, and that his driver's licence had been suspen-ded for 6 months. Douglas said that he would expect that a carrier em-ploying a driver would check on his driving experience; that he had a valid licence; that he was allowed legally to drive the vehicle; that there were no endorsements on his licence; and that it would also check on his past accident history. If the carrier did not do this, he would expect that the insurer should be informed.

The only witness called to give evidence for Anderson was Mr. L G Roos.

He 10 He was from January 1981 Anderson's "bedryfsbestuurder". One of his duties was the hiring of drivers, of whom about 48 were employed at any one time. Motjedi was taken into Anderson's employment on 24 October 1982. Roos had no pre-sent recollection of the case, but he would have followed his usual practice when employing new drivers. The appli-cant would be asked for his driver's licence and for his public driving permit, and for particulars as to his pre-vious experience and former employers. Then he would be referred to a mechanic who was qualified to drive heavy vehicles, for testing on the road. If the report on this test was favourable and there was a vacancy, the applicant would be taken into employment. At first he would be used

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on local trips, but later he would be upgraded and allot-ted his own vehicle for long journeys. It occasionally happened that an applicant for employ-ment as a driver would say that his identity book containing his driver's licence had been lost or damaged. In such a case Roos would rely solely on the public driving permit, which could not legally be obtained unless the applicant was in-possession of a valid driver's licence.

Roos said that if he had been shown Motjedi's driver's licence, he would have seen the endorsement and would not have employed Motjedi. His inference was that he did not see

the driver's licence, and that he relied solely on Motjedi's public driving permit, on which there was no endorsement.

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12

In answer to a question in cross-examination by counsel for the Guardian, he said that he did not then know that a person could hold a public driving permit when he had a previous conviction such as Motjedi's. The first defence raised by the Guardian was based on an alleged breach of clause 1 of the "Special Conditions" contained in part 14 of the insurance policy. Counsel for the Guardian did not in his argument on appeal urge this defence, and it is clear that it could not be sustained. Under clause 1, the insured's duty to give notice to the company arose only when the insured had knowledge of the fact of an endorsement etc. of a driver's licence. It was proved by the evidence of Roos that neither Anderson nor

Roos had that knowledge at any relevant time. The second and third defences were based on alleged non-disclosure.

The leading South African case on non-disclosure in relation to contracts of insurance is *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985(1) SA 419 (A). JOUBERT JA said in the majority judgment (at 432 E-F):

"There is a duty on both insured and insurer to disclose to each other prior to conclusion of the contract of insurance every fact relative and material to the risk (periculum or risicum) or the assessment of the premium. This duty of disclosure relates to material facts of which the parties had actual knowledge or constructive knowledge prior to conclusion of the contract of insurance. Breach of this duty of disclosure amounts to mala fides or fraud, entitling the aggrieved party to avoid the

contract of insurance." It is common cause that the insurer who seeks to avoid liability under a policy by reason of non-disclosure, bears the onus of establishing all the ingredients of that defence.

As to the facts, it was established that:

1. Anderson took into its employment a driver who had been convicted of driving under the influence of intoxicating liquor; and 2. Anderson's system was defective in that applicants for positions as drivers were not in every case required to produce their driver's licences for inspection.

It was common cause that the facts were at no time disclosed to the Guardian. In judging the question of materiality (namely, whether or not the undisclosed information or facts are reasonably relative to the risk or the assessment of the premiums), the Court does so objectively from the point of view of the average prudent person or reasonable man. See the *Oudtshoorn Municipality* case at 435 F-I.

So judged, it is clear in my opinion that the undisclosed facts were material. Douglas's evidence relating to materiality was not challenged, and Roos himself said that if he had seen the endorsement on Motjedi's licence, he would not have employed him. It is irrelevant that Roos

thought

16

thought that the fact that Motjedi had a public driving per-mit indicated that he was in possession of a driver's licence and that such licence was free of endorsement. In terms of

the respective provincial Road Traffic Ordinances no person shall drive a motor vehicle on a public road except under the authority of a driver's licence. And if an insured does not inspect the driver's licences of all drivers it con-templates employing, that is, a fact which is material to be known to the insurer. The only question for decision is therefore whether Anderson had knowledge, actual or constructive, of the facts.

Being a corporation, Anderson does not have a mind,

and hence cannot itself have knowledge. The knowledge of a

company can only be the knowledge of the "directors and

managers who represent the directing mind and will of the

company 17 company, and control what it does" (H L Bolton (Engineering) Co Ltd v Graham & Sons Ltd (1957) 1 QB 159 at 172 per DENNING

Supermarkets LJ; see also Tesco Ltd v Nattaras [1971] UKHL 1; 1972 AC 153 (H L) at 170-

171; Levy v Central Mining & Investment Corporation Ltd 1955

(1) SA 141 (A) at 149-150; R v Kritzinger 1971(2) SA 57 (A) at 59-60; and the further cases cited in The Law of South Africa vol 4, s. 165). Subordinates, who merely carry out orders from above, do not speak and act as the company, and do not represent the "directing mind and will of the company".

(See Tesco Ltd v Nattaras at 171 F). Their knowledge is

not per se the knowledge of the company.

In the present case, the Guardian did not attempt to

identify the persons who represent "the directing mind and

will 18 will" of Anderson. It did not establish that Roos was such a person. Although he was styled "bedryfsbestuurder", it was not shown that he was anything other than one of the people in the company who, in DENNING L J's words in the H L Bolton case (supra), "are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will."

There was, therefore, no evidence that Anderson had actual knowledge of the facts relied on, and the question then is whether it was proved that it had constructive knowledge.

The Court did not, in the Oudtshoorn Municipality case, consider the question of the ambit of "constructive knowledge"

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19

in a case of non-disclosure.

Spencer Bower on Actionable Non-Disclosure deals generally with the matter at pp 20-21. He says that "actual" knowledge is actual and personal knowledge; "constructive" knowledge (sometimes termed "imputed" or "presumed" knowledge) is knowledge deemed in law to have existed, without proof as a fact. He says:

"38. Presumptive knowledge consists of five

species, which may be stated broadly and summarily as follows:

- (i) Facts of public notoriety, and rules and principles of general application in ordinary life, are presumed without proof to be within the knowledge of both parties: (ii) The law presumes, without proof, knowledge of all facts which, in the course

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20

of his business, the party ought to be acquainted with: (iii) From the proved actual knowledge of a fact by an agent, if he be 'an agent to know', the law infers, without proof, a knowledge of that fact on the part of his principal: (iv) From the proved actual knowledge by a

party of a fact, the law infers, without proof, a knowledge by that party of any further fact to which the actual knowledge of the first fact would naturally have led, or which such enquiries as were reasonable under the circumstances would have elicited:

- (v) By virtue of certain enactments, the

legislature imputes knowledge of certain facts to the persons, and under the conditions, prescribed.

These several species form the subject of

separate and successive treatment in the

next five sub-sections."

More specifically, the rule of marine insurance law as developed in the English common law and embodied in ss 1

of 21 of s. 18 of the English Marine Insurance Act, 1906 (which was quoted in full in the Oudtshoorn Municipality case (supra) at 433 G-I) is that "the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him." Leading text book writers suggest that this rule would have general application (see, for example, Hardy Ivamy, General Principles of Insurance Law, 4th ed., p 133; Colinviaux, Law of Insurance, 5th ed., p 95), although this was questioned by MACNAIR J in Australia and

and Eagle Ltd New Zealand Bank v Colonial Wharves; Boag (Third Party)

(1960) 2 Lloyd's Rep 241 (Q B Com. Ct) at 252. In the title

on Insurance which he contributed to Halsbury's Laws of

England, 4th ed., Vol 25, Hardy Ivamy makes the submission

(at

22

(at 206 s. 373) that a proposer for insurance is bound to disclose "not merely what he actually knows but also what was ascertainable by him by means of such enquiries as reasonable business prudence required him to make." It is unnecessary to decide whether this rule forms part of South African insurance law, and I shall assume for the purposes of the present judgment that it does. It would of course be for the insurance company, which relies on non-disclosure to avoid liability under an insurance, to prove that the insurer ought, in the ordinary course of business, to have known the circumstances concerned; or to show that such circumstances would have been ascertained by means of such enquiries as reasonable business prudence required the

insured

23

insured to make.

No attempt was made by the Guardian to show that Anderson ought to have had actual knowledge, in the way discussed, that Motjedi's licence bore the endorsement which it did, or that the system which was in operation for employing drivers was defective. It was argued on behalf of the Guardian however that Anderson could have ascertained these facts if it had made reasonable enquiries.

In this regard the A. and N.Z. Bank case (supra) is apposite. The Bank had claimed to recover from the defendant wharfingers the value of bales of wool delivered by the wharfingers in breach of undertakings given to the Bank not to deliver without the Bank's authority or production of the

Bank's

24

Bank's delivery orders. Mr Boag, the third party, was a representative Lloyd's underwriter, a subscriber to two all-risks non-marine policies issued in favour of the wharfingers. The Bank's claim was settled, and it became common ground between the wharfingers and the third party that the admitted misdeliveries were made by the wharfingers in breach of their obligations toward the Bank. The contest at the trial was confined to the question whether the wharfingers were entitled to recover from the third party under the policies.

One of the defences raised by the third party was that of non-disclosure, namely, that the defendants failed to disclose material facts within the knowledge of the defen-

dants

25

dants or of their servants or which the defendants ought to have known, namely, that the defendants' system of operations was such that the goods held by the defendants to the order of one person (in particular the Bank) could be and were habitually released by the defendants without the knowledge consent or order of that person to another person, whereby the same were converted and/or lost and/or whereby the risk of loss was materially increased. MACNAIR J said at 251-2 that he was for the moment pre-pared to assume, without finally accepting, that the law as stated in

s. 18 of the Marine Insurance Act, 1906, applied -to non-marine insurance.

At 252 the learned judge referred to the submission

"... that

26

"...that the board of the defendants' company ought to have known the material facts, because they would have known them if they had made such enquiries as to their system as a reasonable, prudent board of such company in the ordinary course of business would have made...."

and said that in his judgment the submission failed both in law and on the facts. He continued:

"I have been referred to no authority to

the defendant suggest that the board of company pro-

posing to insure owe any duty to carry out

a detailed investigation as to the manner

in which the company's operations are per-

formed, and I know of no principle in law

which leads to that result. If a company

is proposing to insure wages in transit,

I cannot believe that they owe a duty to the insurers to find out exactly how the weekly wages are in fact carried from the bank to their premises, though clearly they

27

they must not deliberately close their eyes to defects in the system and must disclose any suspicions or misgivings they have. To impose such an obligation upon the proposer is tantamount to holding that insurers only insure persons who conduct their business prudently, whereas it is a commonplace that one of the purposes of insurance is to cover yourself against your own negligence or the negligence of your servants. As to the facts, it seems to me that any reasonable inquiries the board could be expected to make would only have revealed, as was proved to be the fact, that the system in operation for many years had in fact worked satisfactorily in the sense that no difficulty had arisen and no claim had been made."

That case is directly in point and I am in respectful agreement with McNAIR J's observations. Anderson gave to Roosthe duty and function of employing drivers, and the evidence does not suggest that it had any reason to suspect that the system

28

system in operation was not working satisfactorily, or that an investigation was called for. Then it was argued that Anderson had constructive knowledge because Roos's knowledge was to be imputed to the company. The applicable rule was summarized by TROLLIP J

(SA) Ltd in Connock's Motor Co v Sentraal Westelike Ko-operatiewe Maatskappy Bpk 1964(2)

SA 47 (T) at 53. There may be imputed to a company -

"the knowledge of any of its agents or servants possessed and acquired by him in the course of his employment under such circumstances and being of such a nature that it was his duty to communicate it to the proper authority in the company (Barborton Town Council v Ocean Accident & Guarantee Corporation Ltd 1945 TPD 306) unless that agent or servant is perpetrating a fraud on the company in relation to the matters of which he so possesses or acquires knowledge ..."

29

In the present case Roos did not know of Motjedi's conviction. He did know that his practice when employing drivers was not to require in every case that the driver's licence be produced. That knowledge was of course possessed and acquired by him in the course of his employment. I do not think however that Roos had any duty to communicate this knowledge to his employer. Roos was an agent to employ drivers. There is nothing in the evidence to suggest that it was his duty to receive information or to communicate it to the company. (Cf. the A. and N.Z. Bank case (supra) at 253-4).

My conclusion is that the Guardian failed to establish that Anderson had knowledge, either actual or constructive,

30

of the relevant facts, and consequently that it failed to establish the defence of non-disclosure. It follows that the appeal must be upheld.

The appeal is allowed with costs. The order of the Court a quo is set aside and there is substituted the fol-

lowing:

"(a) The third party is ordered to indemnify the defendant against all sums including the plaintiff's costs and expenses which the defendant is liable to pay to the plaintiff in respect of Case No 14412/84.

(b) The third party is ordered to pay the defendant's costs arising out of the third party notice, and the costs of trial."

CORBETT, JA

BOTHA, JA Concur SMALBERGER, JA

KUMLEBEN, AJA

H C NICHOLAS, AJA

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