

SOUTH AFRICA / JUDGMENT

CMH Car Hire (Pty) Ltd t/a First Car Rental v Banda (A5079/2012) [2016] ZAGPJHC 368 (1 June 2016) [2016] ZAGPJHC 368

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten, MHE Ismail, RE Monama

CASE / FILE NUMBER

A5079/2012

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: A5079/2012

Not reportable

Not of interest to other judges

Revised.

1 June 2016

In the matter between

CMH CAR HIRE (PTY) LTD t/a FIRST CAR RENTAL APPELLANT

and

MARY THERESA MAMPAKI BANDA RESPONDENT

JUDGMENT

VAN OOSTEN J:

- [1] The issue in this appeal concerns the respondent's liability in respect of damages caused to a vehicle hired from the appellant, resulting from an accident while she was driving the vehicle. The respondent relied on an exclusion of liability contained in a waiver of liability clause in the rental agreement, which eventually crystallised as the only issue the court *a quo* (Makume J) was required to determine. Having heard the evidence of the respondent

and argument the learned judge held that the waiver in favour of the respondent was operative and dismissed the appellant's claim for payment of the damages with costs. The appeal before this court is against the whole of the judgment of the court a quo and is with its leave.

- [2] The facts of this matter are not in dispute. On 15 December 2011 the parties concluded a written rental agreement in terms of which the respondent hired a Chevrolet vehicle from the appellant for a period of some three days. In terms of the rental agreement the respondent opted for a collision damage waiver in terms of which her liability in respect of loss of and damages caused to the vehicle was excluded limited to the amount of the waiver, unless any of the exclusions referred to in clause 5.3, applied. The exclusion relevant for present purposes is set out in clause 5.3.5 of the rental agreement, and reads as follows:

‘Where the damage or loss is sustained in an accident not caused by physical contact with another vehicle, person animal nor object;’ (underlining added)

The vehicle was damaged beyond repair in an accident while the respondent was driving. The respondent's uncontested testimony was that she was driving towards Fouriesburg, when an animal, ‘a calf or the size of a calf came towards the road’. She swerved and successfully avoided coming into physical contact with the animal. She however, in the evading manoeuvre, lost control of the vehicle and it crashed into a cliff at the roadside. The vehicle was damaged beyond economical repair and the appellant instituted action against the respondent for payment of the resultant damages, in the sum of R317 340-00, interest thereon and costs. The respondent defended the action and in essence pleaded that the accident was caused due to physical contact with ‘an object’ which, in further particulars furnished pursuant to a pre-trial conference, was amplified in stating that there was no contact with an animal.

- [3] The court a quo, having dealt with the common cause facts, considered the question whether the vehicle had in fact made physical contact with an object and whether the cliff into which the vehicle crashed could be interpreted to constitute an object for the purpose of clause 5.3.3. It is clear from the reasoning of the learned judge that the issue was decided in the context of clause 5.3.3 providing that the respondent's liability was excluded in the event of the damage to the vehicle having been caused by an object. The premise in fact is incorrect both on the wording of clause 5.3.5 and if regard is had to the amended particulars of claim in which the wording of clause 5.3.5 was correctly pleaded.
- [4] The wording of clause 5.3.5 leaves one in no doubt. The issue is whether the accident was caused by an object in respect of which the respondent bore the onus of proof. It is common cause that the accident was not caused by an object and the respondent's reliance on clause 5.3.5, accordingly, was misconceived and ought to have been disallowed. All the other elements of the appellant's claim having been admitted it was entitled to judgment in its favour.

The appeal must accordingly succeed.

[5] In the result the following order is made:

1. The appeal is upheld, with costs.
2. The order of the court a quo is set aside and replaced with the following:

‘Judgment is entered for the plaintiff against the defendant for:

1. Payment of the sum of R317 340-00.
2. Interest on the amount in paragraph 1 above at the rate of 15,5% pa from the date of summons, being 10 August 2012, to date of final payment.
3. Costs of suit.’

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

I agree.

MHE ISMAIL

RE MONAMA

COUNSEL FOR APPELLANT

ADV CJ BRESLER

APPELLANT’S ATTORNEYS

MOONEY FORD ATTORNEYS

ATTORNEY FOR RESPONDENT

MR LUSENGA

RESPONDENT’S ATTORNEYS

BM KOLISI INC

DATE OF HEARING

1 JUNE 2016

DATE OF JUDGMENT

1 JUNE 2016

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