

SOUTH AFRICA / JUDGMENT

Coughlan obo Witbooi v Leandra Transport CC (4280/2007) [2010] ZAWCHC 210 (25 October 2010)

[2010] ZAWCHC 210

COURT

Western Cape High Court, Cape Town

BEFORE

Traverso

CASE / FILE NUMBER

4280/2007

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IN

THE HIGH COURT OF SOUTH AFRICA

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CAPE HIGH COURT, CAPE TOWN

CASE

NO:4280/2007

In

the matter between:

ADVOCATE

W. COUGHLAN obo

M.H.

WITBOOI

.....Plaintiff

and

LEANDRA

TRANSPORT CCDefendant

and

SANTAM

LIMITED

.....Third

Party

JUDGMENT

: 25 OCTOBER 2010

CASE NO:4280/2007

In the matter between:

ADVOCATE W. COUGHLAN obo

M.H. WITBOOIPlaintiff

and

LEANDRA TRANSPORT CCDefendant

SANTAM LIMITEDThird Party

JUDGMENT

: 25 OCTOBER 2010

TRAVERSO, DJP :

- [1] This claim arises from the tragic incident when a school bus ran out of control down Kloofnek Road on the slopes of Table Mountain. Several children died and/or were seriously injured.
- [2] The defendant in this matter is a member of the Southern African Bus Operators Association and as such was afforded insurance cover by the third party ("Santam"),
- [3] In essence this case is confined to the interpretation of the contract of insurance in determining whether Santam is liable to compensate

the defendant for an indemnity on the basis of a general policy exception contained in the insurance policy. Santam rejected the

defendants claim for an indemnity on the basis that the bus was not roadworthy at the time of the accident. It relied on the following

exception:

"3. Roadworthy

The insurer shall not be liable for any accident injury loss damage or liability whilst the vehicle is being used in a condition which does not comply with the provisions and regulations of the National Road Traffic Act 93 of 1996, the National Road Traffic Regulations 2000 and/or any other applicable or subsequent legislation and/or regulations providing for the use of motor vehicles on a public roadway in South Africa or any similar legislation which applies to the countries specified as the territorial limits in the schedule."

Read with the following clause:

"6. Prevention of loss

The insured shall take all reasonable steps and precautions to prevent accidents or losses arising. If any vehicle which is the subject of a claim in terms of this policy is in an unroadworthy condition at the time of the occurrence giving rise to a claim it will be deemed that this condition has not been complied with and no benefit will be payable."

[4] It is well-established that the ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. Smalberger, JA commented on the rules of interpretation of insurance contracts as follows in *Fedgen Insurance Limited v. Leyds*, 1995(3) SA 33 (AD) at 38 A-E:

"The ordinary rules 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 the words used their plain, ordinary and popular meaning unless the context indicates otherwise (*Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464-5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (*Auto Protection Insurance Co Ltd v Hanmer-Strudwick* 1964(1) SA 349 (A) at 354 C-D); for it is the insurer's duty to make clear what particular risks it wishes to exclude (*French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd* 1931 AD 60 at 65; *Auto Protection Insurance Co Ltd v Hanmer-Strudwick* (supra at

354 D-E). 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 (*Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961(1) SA 103 (A) at 108 C)."

(See too *African Products (Pty) Ltd v. AIG South Africa Limited*. 2009(3) SA 473 (SCA) at 478 D-F.)

[5] In applying these principles to the contract under consideration the following aspects of the policy exception are vital:

(a) The exclusion applies in the event of the vehicle being used whilst in a condition which does not comply with the provisions and regulations of the National Road Traffic Act, the Regulations and any other applicable or subsequent legislation and/or

Regulations providing for the use of motor vehicles on a public roadway in South Africa.

(b) General policy condition number 6 excludes liability in the event of a vehicle being in an unroadworthy condition at the time of the occurrence giving rise to a claim.

- [6] On behalf of the defendant it was argued that the foregoing clauses are vague and that therefore the contra preferentem rule should be applied when interpreting this agreement.
- [7] A Court will always give effect to the clear terms restricting the insurer's liability in the contract. It must however be borne in mind that an insurance contract is a contract to indemnify a person against loss and if vague language is used in a condition or exception of risk the Court must give reasonable meaning to such vague language, bearing in mind the object of the agreement. (See *Scottish Union & National Insurance Company Limited v. Native Recruiting Corporation Limited*. 1934 (AD) 458 at 464.)
- [8] Generally speaking, policy exclusions which merely prescribe the "roadworthiness" of vehicles, do not necessarily mean that the vehicles have to comply with statutory provisions governing roadworthiness. In this regard see *Botha's Trucking v. Global Insurance Company Limited*. 1999(3) SA 378 (T). In that matter the relevant policy exception simply provided that:

"If the insured vehicle at the time of any accident giving rise to a claim in terms of this policy is found to be in a state or condition which is deemed not roadworthy then all benefit under this policy shall be forfeited."

- [10] In that case Fabricius, AJ stressed once again that any clause in an insurance contract which places a limitation upon the obligation to indemnify must be interpreted restrictively and that the onus rests on the insurer invoking the condition to prove the breach upon which he relies. He also accepted the long established principle that it is the duty of the insurer to make clear what particular risks he wishes to exclude. Applying these principles he had the following to say about the exclusionary clause at 383 D:

"The word 'deemed' in clause 4 can in that context only mean 'regarded' or 'accepted'. The word 'deemed' in this context can certainly not mean that the vehicle can be deemed not to be roadworthy although it is in fact roadworthy. See *Ter Beek v United Resources CC and Another* 1997 (3) SA 315 (C) at 3301-331 E.

Accordingly, can the relevant vehicle be regarded as not roadworthy? There is in my view no reason why the term 'roadworthy' should be interpreted in vacuo or within the ambit of the Road Traffic Act of 1989. Had the insurer intended this conclusion, it could easily have done so.

'Roadworthy' in the present context can in my view only mean 'fit for the road' or 'worthy for the road'. It means, in other words, that it must be in a suitable condition for using on the road."

- [11] However, in the matter presently under consideration the insurer specifically stipulated that it would not be liable if the vehicle is used whilst it does not comply with the prescripts of the Act, Regulations or other similar legislation. The term "roadworthy" will therefore, in my view, have to be interpreted within the ambit of the Road Traffic Act and other legislation referred to in clause 3.

- [12] It was common cause between the experts that the vehicle did not comply with the aforesaid prescripts in certain respects, and Mr. Swan, who testified as an expert for the defendant, conceded that the vehicle was, having regard to the relevant provisions of the Act and other legislation, not roadworthy. So for example certain washers and spacers were missing on the rear axle, the brake lining in one of the brake assemblies had worn down to the point that there was metal to metal contact between the holding bolts and the brake drum; there was a rod missing from the rear airbag suspension system, which could potentially have compromised the stability of the vehicle.
- [13] The statutory scheme referred to in clause 3 consists not only of the Act and the Regulations but of any other applicable legislation and/or Regulations providing for the use of motor vehicles. The clause therefore introduces an objective standard with which vehicles insured thereunder had to comply. Regulation 147, and more particularly sub-Regulations (1) and (6) makes it plain, that compliance with the roadworthiness criteria applies at all times, not merely at the time of the application for, and issuing of, a roadworthy certificate.
- [14] Once an objective, external standard has been introduced to a policy exclusion, non-compliance therewith will be sufficient to trigger the exclusion, even if such non-compliance did not cause the loss or damage complained of.
- [15] In this regard see *Mutual & Federal Insurance Limited v. Gouveia*, 2003(4) SA 53 SCA; and *Santam Beperk v. De Wet Boerderv & Transport*. 2007(3) SA 358 C.
- [16] In *Gouveia* (supra) an exclusionary clause which provided that if damage occurred while the vehicle was driven by a person who did not have a valid licence the insurer would not be liable was considered. In the *Gouveia* matter an unlicensed driver was hijacked and accordingly it was contended that the fact that the driver was unlicensed, had no causal connection to the damage arising out of the hijacking and therefore the exclusionary clause did not find application. On appeal,

Mthiyane, JA (Harms et Farlam, JJA concurring) said the following at 57 E - H:

"[10] There can be no question that, if the ordinary meaning of the words in the exception clause is given effect to, the plaintiff and Cumbe fell squarely within the terms of the exception clause. Reading causation into the exception clause is not justified by its wording. I agree with the submission that such an approach may have the effect that even in the case of an accident involving an unlicensed driver the insurer would still not be able to rely on the exception clause, because it would have to prove, not only the absence of the licence, but also that the lack thereof caused the accident. The practical effect would be that the company would be exempted only if the unlicensed driver's lack of skill in driving the vehicle caused the accident That would mean that not only causation but also negligence on such a driver's part is required and that, clearly, is not the intention conveyed in the clause. It is true that the exception clause in casu must be restrictively interpreted but equally true is the fact that the ordinary meaning of the words must be given effect to."

[17] In *De Wet Boerdery & Transport* (supra), a similar exclusionary clause was considered. In that case the driver had not been issued with a professional driver's licence as required by Section 32(1) of the National Road Traffic Act, No. 93 of 1996. It was however common cause that he had previously been issued with such a licence but that it had expired due to the effluxion of time, and that he was at the time of the damage the holder of a so-called Code 14 driver's licence. The Court of first instance (Allie, J)

accordingly found:

"Mr. Makhubedu was undoubtedly in contravention of s 32 at the time of the collision. He was however for all intents and purposes licensed to drive the insured vehicle at the time of the collision."

She accordingly found that, because the driver was competent to drive a vehicle, and applying the contra proferentem rule, he did not fall within the ambit of the exclusionary rule.

On appeal, the Full Bench (per Thring, J, Cleaver et Dlodlo, JJ concurring) said the following in this regard:

"Weliswaar het die bestuurder op die getuienis aan al die vereistes voldoen vir die uitreik aan horn van 'n nuwe PBP, en sou die uitreiking daarvan 'n formaliteit gewees het. Dit maak horn egter nie 'n persoon wat 'gelisensieer' is om sodanige voertuig te bestuur nie'. Op die gewone betekenis van die woord 'gelisensieer' kon hy dit eers geword bet nadat die PBP aan horn uitgereik was, want tot dan kan nie gese word dat 'n lisensie of verlof aan horn toegeken is of dat vergunning aan horn gegee is om die betrokke voertuie op 'n openbare pad te bestuur nie (HAT omskrywing van 'lisensieer' en 'lisensie'): hy het dus nie aan die vereiste van spesifieke uitsondering 1(c)(ii) voldoen nie, naamlik, dat hy 'gelisensieer' moet wees om die betrokke voertuie te bestuur.

Myns insiens is die tersaaklike woorde wat die partye in die polis gebruik het duidelik en ondubbelsinnig. Daar is geen rede waarom hulle nie hulle gewone, alledaagse betekenis in die polis moet dra nie, of waarom hulpmiddels soos die contra proferentem-reel ingespan moet word, wat slegs in geval van dubbelsinnigheid of onduidelikheid van toepassing is.

Die intellektuele sprong wat die Hof a quo van die woord 'gelisensieer' na die begrip 'competent' gemaak het is dus na my oordeel een wat nie behoorlik gemaak kon word nie. Dit volg dat die geleerde Verhoorregter myns insiens gefouteer het toe sy dit gemaak het"

[18] In my view the same approach should be adopted in interpreting the clause under consideration.

[19] Mr. De Vries argued that the clause is vague because a literal interpretation may lead to absurd results. Therefore he argued that

the Court should interpret the clause strictly and in the result in favour of the defendant because it is common cause that the vehicle had been issued, some months prior to the collision, with a roadworthy clearance certificate. There are two aspects which

militate against this argument. The clause makes clear provision that Santam will not be liable if the vehicle is not roadworthy at the time when the loss or damage occurs. If the insurer wanted to stipulate that the exclusion would only take effect if the vehicle has not been issued with a roadworthy certificate, it could have done so. Instead it provided for an objective fact to be the determining factor. The Court is therefore obliged to interpret the clause in terms of the accepted cannons of interpretation and give the words their literal meaning. I therefore find that Santam has discharged the onus to show that by virtue of the exclusionary clause it is not liable to indemnify the defendant

[20] In the circumstances I make the following order:

"The defendant's claim against the Third Party is dismissed with costs."

traverso, djp

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