

SOUTH AFRICA / JUDGMENT

Flanegan v Absa Versekeringsmaatskappy (Edms) Bpk and Another (559/2008) [2010] ZAFSHC 125 (16 September 2010) [2010] ZAFSHC 125

COURT

Free State High Court, Bloemfontein

BEFORE

Mocumie

CASE / FILE NUMBER

559/2008

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 559/2008

In the case between:

DAVID FLANEGANPlaintiff

and

ABSA VERSEKERINGSMAATSKAPPY (EDMS) BPK1st Defendant

ABSA MAKELAARS2nd Defendant

JUDGEMENT:

MOCUMIE, J

HEARD ON: 10, 11 AUGUST 2010

DELIVERED ON: 16 SEPTEMBER 2010

MOCUMIE J

- [1] The plaintiff has instituted an action for the recovery of R181 844,00 plus VAT on the said amount; interest on the amount *a tempore morae*; that the unsuccessful defendant be ordered to pay the successful defendant's costs and or alternative relief.

- [2] The plaintiff is Mr David Flanagan an adult farmer residing at the farm Grassmere in the district of Excelsior, Free State Province. The first defendant is Absa Insurance Company with registration no 1992/001737/06 a company duly registered in terms of the Laws of the Republic of South Africa with its place of business situated at 21 Cross Street Johannesburg. The second defendant is Absa Brokers with registration no 1992/0013737/06 a company duly registered in terms of the laws of the Republic of South Africa with its place of business situated at ACNA Building, Archbell Street, Bethlehem, Free State.
- [3] Per agreement between the parties and in terms of Rule 33(4) of the Superior Courts Rules of Practice which agreement was made an order of this Court the merits were separated from the quantum. The latter to be adjudicated upon at a later stage.
- [4] The plaintiff led evidence of both Mr David Flanagan, the plaintiff, and Ms Teresa Flanagan, the plaintiff's daughter. The defendant led evidence of Ms Chantelle van der Berg.
- [5] The plaintiff testified that in November 2008 he contacted the second defendant telephonically and asked for a quotation on his crops on his farm. He gave the second defendant's representative Ms Chantelle van der Berg ("Van der Berg") all the necessary information including his names and his address. Van der Berg sent him a form handed in as annexure "A". Upon receipt of annexure "A" he noticed that Van der Berg had completed annexure "A" already and had written 1.2 tons to be insured instead of 2.0 tons he had requested. He called her back immediately and brought this error on her part to her attention. She told him to write in the correct tons he wanted to be insured ex facie annexure "A" and sign such amendment and he did so. His daughter who works with him on the farm, then faxed the amended and signed annexure "A" to Van der Berg.
- [6] He testified further that Ms Flanagan then called Van der Berg to confirm receipt of annexure "A". Van der Berg confirmed receipt of annexure "A" and then worked out a new premium on 2.0 tons. Van der Berg gave her the premium which she inserted in her own handwriting on the face of annexure "A" as R14 996.00 per month. Ms Flanagan informed him that Van der Berg confirmed that the amended policy was immediately in force and effective.
- [7] On 4 January 2008 hail damaged 86% of his sunflower and he suffered damages. He instituted a claim. The first defendant paid out an amount of R266 825,66 in respect of 1.2 tons and repudiated the claim for the balance of the policy of R181 440,00 in a letter dated 30 January 2008.
- [8] During cross examination he denied that he asked to increase the premium proposed and chose not to take the renewed policy because he could not afford it. He however admitted that it was his daughter that spoke to Van der Berg on the day when she, Van der Berg, confirmed that the new policy would be in operation immediately not him as it is reflected in his pleadings.

- [9] Ms Teresa Flanagan testified. She is the plaintiff's daughter and works with him on the farm. She corroborated the plaintiff in that: 9.1 she spoke to Van der Berg who gave her a new premium which she inscribed on the face of annexure "A"; 9.2 she called Van der Berg to confirm that she had received annexure "A"; 9.3 Van der Berg confirmed that the amended policy in respect of 2.0 tons of crop was immediately in operation and effective.
- [10] During cross examination she could not remember whether Van der Berg confirmed the amended policy on the same day that the plaintiff inserted the amendment or not.
- [11] Ms Chantelle van der Berg, testified. During November 2007 she was working for Mr Nico Odendaal ("Odendaal") at Absa Bank Insurance Brokers as his personal assistant. She is currently employed as a manager at O' Hagan Pub in Welkom.
- [12] She testified that indeed the plaintiff called her during November 2007 asking for a quotation. She related a completely different version to that of the plaintiff and his daughter.
- [13] She testified that the plaintiff gave her all his personal details; the name of the farm; and the tons of crop which he wanted insured. She wrote down all the details and forwarded same to the broker, and he made out a quotation as set out in annexure "A" for 1.2 tons/ha. She then faxed annexure "A" to the plaintiff on 21 November 2007.
- [14] She testified further that on 22 November 2007 she received a fax of annexure "A" from the plaintiff. Ex facie the plaintiff had inscribed the following words: "Please increase my yeald(sic) from 1.2t/ha to 2.0 t/ha and debit my co-op a/c." [Signed by D A Flanagan]
- [15] She then called one Hanelie at Acua to discuss this new proposal and seek guidance on what steps to take as Odendaal was not in the office at that time of the day. Hanelie explained to her that in that case she had to give the plaintiff an extra policy to cover the 1.8 extra tons. She thereafter forwarded the information provided by the plaintiff to Odendaal wherever he was. He gave her a new premium based on the new information.
- [16] Thereafter she called the plaintiff but however spoke to Ms Flanagan and explained to her what was suggested in the circumstances i.e. that she had to give the plaintiff a separate quote from the one she had already given to cover the extra 1.8 tons/ha. She gave Ms Flanagan the new premium which the plaintiff ought to pay under the increased cover of 2.0 tons/ha. Ms Flanagan told her that she will relay the message to the plaintiff and they will revert to her. During the course of the same day the plaintiff, in person, reverted to her and declined the increased premium.
- [17] During cross examination she denied that she ever said to the plaintiff and Ms Flanagan that the amended cover was immediately in operation and effective from the day that she received annexure "A".

- [18] She however conceded that: 18.1 there were no records of what transpired on the day in question between her and the Flanegans; 18.2 that the new premium she gave to Ms Flanagan was for 2.0 tons and not 1.8 tons; 18.3 that Ms Flanagan would not have been able to guess the amount of R 14 996, 00 as she was not aware with insurance quotations.
- [19] She nevertheless maintained that the plaintiff called her back rejecting the new premium contrary to the plaintiff and Ms Flanagan's testimony that it was Ms Flanagan that called her back. She also that she did not accept the proposed amendment as she had no authority or powers to approve a policy on behalf of the second defendant.
- [20] The plaintiff's case is that the second defendant had accepted his mandate; the amendment from 1.2 tons to 2.0 tons, telephonically through Van der Berg and was liable to all the damages he had suffered per 2.0 tons/hectare of his crops not 1.2 tons as the defendant claimed.
- [21] The second defendant's case is that although the plaintiff made an inscription on annexure "A" that inscription did not amount to a mandate but a proposal which Ms Van der Berg could not have accepted on behalf of the second defendant as she had no authority to do so. Secondly that the inscription as it read indicated that the plaintiff was making a new proposal which implied that the second defendant had to make out a new policy on 1.8 extra tons. Thirdly that the plaintiff had originally given Van der Berg instructions to insure 1.2 tons and she complied with those instructions. Fourthly that the plaintiff reneged on the second proposal when he was informed of the premium which he deemed high and not affordable.
- [22] I could not find any of the witnesses to be outright unreliable in their testimony. Consequently there are two conflicting and irreconcilable versions to be found in this set of facts. The proper approach to the resolution of factual disputes in a civil case is to be found in *National Employers' General Insurance Co Ltd v Jagers* 984 (4) SA 437 (E) at 440D – H where the court stated: "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable,..." See also *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie and Others* 2003 (1) SA 11 (SCA) in paras [5] – [7] at 14 – 15, *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA).
- [23] In my view both the plaintiff and Ms Flanagan were honest and reliable witnesses. They corroborated each other on material aspects of this case that the plaintiff gave Van der Berg clear instructions to insure 2.0 tons and she failed to comply with such mandate. Whether the Flanegans spoke to Van der Berg on 21 or 22 November 2007 does not detract from the fact that all three, the Flanegans and Van der Berg were *ad idem* that the plaintiff inscribed

his instructions and signature ex facie annexure A reflecting 2.0 tons not 1.2 tons; that Van der

Berg gave the Flanegans the plaintiff a premium payable on quotation for 2.0 tons and not 1.8 tons. Both the plaintiff and Ms Flanagan were consistent in their testimony despite rigorous cross-examination.

- [24] In my view it is inherently improbable that the plaintiff would propose and insist on 2.0 tons and then change his mind upon being told about a higher new premium. The plaintiff and Ms Flanagan did not give an impression that they could not have afforded the amount. The difference of R5 999,00 between R8 998,00 and R14 996,00 for such a large ton is minimal. In any event they were not seriously taken to task on this issue.
- [25] Van der Berg's version is improbable to the extent that it differs from that of the plaintiff and Ms Flanagan. If she was advised to make out a completely new policy to cover the extra 1.8 tons why did she give Ms Flanagan the premium for 2.0 tons and not the extra 1.8 tons? How could Odendaal make out a quotation for 2.0 tons instead of 1.8 tons when she gave him the plaintiff's correct mandate of 2.0 tons? What is revealing in all this is that contrary to business practice there are no records or notes or even evidence to show that a separate and distinct cover was ever contemplated and discussed with the plaintiff. What compounds the matter further is that no other person allegedly involved in this transaction was called to corroborate what Van der Berg remembers without reference to any notes or a file. Recollection can indeed be fallible and in business the failure to confirm an event promptly and on paper can be fatal as it has proved in this case.
- [26] What is more revealing is that Van der Berg, on her own version, did not revert to the plaintiff upon receipt of annexure "A" to inform him that as far as she could establish it was impossible to make one cover of 2.0 tons or at least that since he did not accept the reviewed premium the original cover will be in operation.
- [27] In my view, on a conspectus of all the evidence, this discussion between Van der Berg and the Flanegans never took place. Van der Berg's version is far fetched and does not tally with the events as they unfolded as relayed by both the plaintiff and Ms Flanagan. The plaintiff was confident in that he gave the second defendant a mandate to cover 2.0 tons that is why immediately upon suffering damages he put in a claim for 2.0 tons and after being informed that the first defendant had repudiated part of his claim he challenged the repudiation. In all probabilities what happened is that after the last conversation Van der Berg had with Ms Flanagan who could hear and understand her clearly she, Van der Berg, simply put the proposal aside and did not bring it up to date on the second defendant's system.

[28] In assessing the probabilities comprehensively and in retrospect the conclusion seem inescapable that of the two versions before the court as to whether the second defendant was given a mandate to put into operation a policy for 2.0 tons/ha and failed to carry out that mandate, the plaintiff's is the more probable. That being so the plaintiff has succeeded in discharging the onus on it. It follows further that the claim must succeed.

[29] The last issue that was raised was whether the first defendant should pay the costs of this application. Rule 10(4)(b)(ii) of the Superior Court Practice Rules provides as follows: “ (4) (b)

if judgment is given in favour of any defendant or if any defendant is absolved from the instance, the court may order:

(i) (Not relevant) (ii) the unsuccessful defendants to pay the costs of the successful defendant jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful defendants pays more than his pro rata share of the costs of the successful defendant, he shall be entitled to recover from the other unsuccessful defendants their pro rata share of such excess, and the court may further order that, if the successful defendant is unable to recover the whole or any part of his costs from the unsuccessful defendants, he shall be entitled to recover from the plaintiff such part of his costs as he cannot recover from the unsuccessful defendants;”

[30] In this case I have no reason to order that the first defendant should pay the costs of this application when it had no direct and substantial interest which required it to be joined from the beginning. It is the plaintiff that decided to keep the first defendant in the pleadings because it was not sure who to claim against even after the pre-trial conference showed clearly that the plaintiff could not prove any wrong doing on the part of the first defendant. I consequently find that no costs order can be made against the first defendant.

[31] In the circumstances I make the following order: ORDER:

1. Payment of the amount of R181 844,00 by the second defendant;
2. VAT on the amount of R181 844,00;
3. Interest on the aforementioned amount a tempore morae;
4. The second defendant to pay the costs of this matter.

B. C. MOCUMIE, J On behalf of the plaintiff: Adv. S. J. Reinders Instructed by: Van Wyk & Preller Ing. BLOEMFONTEIN On behalf of the defendants: Adv. P.C.F. van Rooyen SC Instructed by: Naudes BLOEMFONTEIN BC/eb

MOCUMIE J

- [1] The plaintiff has instituted an action for the recovery of R181 844,00 plus VAT on the said amount; interest on the amount *a tempore morae*; that the unsuccessful defendant be ordered to pay the successful defendant's costs and or alternative relief.
- [2] The plaintiff is Mr David Flanagan an adult farmer residing at the farm Grassmere in the district of Excelsior, Free State Province. The first defendant is Absa Insurance Company with registration no 1992/001737/06 a company duly registered in terms of the Laws of the Republic of South Africa with its place of business situated at 21 Cross Street Johannesburg. The second defendant is Absa Brokers with registration no 1992/0013737/06 a company duly registered in terms of the laws of the Republic of South Africa with its place of business situated at ACNA Building, Archbell Street, Bethlehem, Free State.
- [3] Per agreement between the parties and in terms of Rule 33(4) of the Superior Courts Rules of Practice which agreement was made an order of this Court the merits were separated from the quantum. The latter to be adjudicated upon at a later stage.
- [4] The plaintiff led evidence of both Mr David Flanagan, the plaintiff, and Ms Teresa Flanagan, the plaintiff's daughter. The defendant led evidence of Ms Chantelle van der Berg.
- [5] The plaintiff testified that in November 2008 he contacted the second defendant telephonically and asked for a quotation on his crops on his farm. He gave the second defendant's representative Ms Chantelle van der Berg ("Van der Berg") all the necessary information including his names and his address. Van der Berg sent him a form handed in as annexure "A". Upon receipt of annexure "A" he noticed that Van der Berg had completed annexure "A" already and had written 1.2 tons to be insured instead of 2.0 tons he had requested. He called her back immediately and brought this error on her part to her attention. She told him to write in the correct tons he wanted to be insured *ex facie* annexure "A" and sign such amendment and he did so. His daughter who works with him on the farm, then faxed the amended and signed annexure "A" to Van der Berg.
- [6] He testified further that Ms Flanagan then called Van der Berg to confirm receipt of annexure "A". Van der Berg confirmed receipt of annexure "A" and then worked out a new premium on 2.0 tons. Van der Berg gave her the premium which she inserted in her own handwriting on the face of annexure "A" as R14 996.00 per month. Ms Flanagan informed him that Van der Berg confirmed that the amended policy was immediately in force and effective.
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[8] During cross examination he denied that he asked to increase the premium proposed and chose not to take the renewed policy because he could not afford it. He however admitted that it was his daughter that spoke to Van der Berg on the day when she, Van der Berg, confirmed that the new policy would be in operation immediately not him as it is reflected in his pleadings.

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9.1 she spoke to Van der Berg who gave her a new premium which she inscribed on the face of annexure "A";

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[10] During cross examination she could not remember whether Van der Berg confirmed the amended policy on the same day that the plaintiff inserted the amendment or not.

[11] Ms Chantelle van der Berg, testified. During November 2007 she was working for Mr Nico Odendaal ("Odendaal") at Absa Bank Insurance Brokers as his personal assistant. She is currently employed as a manager at O' Hagan Pub in Welkom.

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[Signed by D A Flanagan]

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Flanagan the new premium which the plaintiff ought to pay under the increased cover of 2.0 tons/ha. Ms Flanagan told her that she will relay the message to the plaintiff and they will revert to her. During the course of the same day the plaintiff, in person, reverted to her and declined the increased premium.

[17] During cross examination she denied that she ever said to the plaintiff and Ms Flanagan that the amended cover was immediately in operation and effective from the day that she received annexure “A”.

[18] She however conceded that:

18.1 there were no records of what transpired on the day in question between her and the Flanegans;

18.2 that the new premium she gave to Ms Flanagan was for 2.0 tons and not 1.8 tons;

18.3 that Ms Flanagan would not have been able to guess the amount of R 14 996, 00 as she was not affaïre with insurance quotations.

[19] She nevertheless maintained that the plaintiff called her back rejecting the new premium contrary to the plaintiff and Ms Flanagan’s testimony that it was Ms Flanagan that called her back. She also that she did not accept the proposed amendment as she had no authority or powers to approve a policy on behalf of the second defendant.

[20] The plaintiff’s case is that the second defendant had accepted his mandate; the amendment from 1.2 tons to 2.0 tons, telephonically through Van der Berg and was liable to all the damages he had suffered per 2.0 tons/hectare of his crops not 1.2 tons as the defendant claimed.

[21] The second defendant’s case is that although the plaintiff made an inscription on annexure “A” that inscription did not amount to a mandate but a proposal which Ms Van der Berg could not have accepted on behalf of the second defendant as she had no authority to do so. Secondly that the inscription as it read indicated that the plaintiff was making a new proposal which implied that the second defendant had to make out a new policy on 1.8 extra tons. Thirdly that the plaintiff had originally given Van der Berg instructions to insure 1.2 tons and she complied with those instructions. Fourthly that the plaintiff reneged on the second proposal when he was informed of the premium which he deemed high and not affordable.

[22] I could not find any of the witnesses to be outright unreliable in their testimony. Consequently there are two conflicting and irreconcilable versions to be found in this set of facts. The proper approach to the resolution of factual disputes in a civil case is to be found in *National Employers’ General Insurance Co Ltd v Jagers* 984 (4) SA 437 (E) at 440D – H where the court stated:

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable...”

See also Stellenbosch Farmers’ Winery Group Ltd and Another v Martell et cie and Others 2003 (1) SA 11 (SCA) in paras [5] – [7] at 14 – 15, Dreyer and Another NNO v AXZS Industries (Pty) Ltd 2006 (5) SA 548 (SCA).

[23] In my view both the plaintiff and Ms Flanagan were honest and reliable witnesses. They corroborated each other on material aspects of this case that the plaintiff gave Van der Berg clear instructions to insure 2.0 tons and she failed to comply with such mandate. Whether the Flanegans spoke to Van der Berg on 21 or 22 November 2007 does not detract from the fact that all three, the Flanegans and Van der Berg were ad idem that the plaintiff inscribed his instructions and signature ex facie annexure A reflecting 2.0 tons not 1.2 tons; that Van der

Berg gave the Flanegans the plaintiff a premium payable on quotation for 2.0 tons and not 1.8 tons. Both the plaintiff and Ms Flanagan were consistent in their testimony despite rigorous cross-examination.

[24] In my view it is inherently improbable that the plaintiff would propose and insist on 2.0 tons and then change his mind upon being told about a higher new premium. The plaintiff and Ms Flanagan did not give an impression that they could not have afforded the amount. The difference of R5 999,00 between R8 998,00 and R14 996,00 for such a large ton is minimal. In any event they were not seriously taken to task on this issue.

[25] Van der Berg’s version is improbable to the extent that it differs from that of the plaintiff and Ms Flanagan. If she was advised to make out a completely new policy to cover the extra 1.8 tons why did she give Ms Flanagan the premium for 2.0 tons and not the extra 1.8 tons? How could Odendaal make out a quotation for 2.0 tons instead of 1.8 tons when she gave him the plaintiff’s correct mandate of 2.0 tons? What is revealing in all this is that contrary to business practice there are no records or notes or even evidence to show that a separate and distinct cover was ever contemplated and discussed with the plaintiff. What compounds the matter further is that no other person allegedly involved in this transaction was called to corroborate what Van der Berg remembers without reference to any notes or a file. Recollection can indeed be fallible and in business the failure to confirm an event promptly and on paper can be fatal as it has proved in this case.

- [26] What is more revealing is that Van der Berg, on her own version, did not revert to the plaintiff upon receipt of annexure "A" to inform him that as far as she could establish it was impossible to make one cover of 2.0 tons or at least that since he did not accept the reviewed premium the original cover will be in operation.
- [27] In my view, on a conspectus of all the evidence, this discussion between Van der Berg and the Flanegans never took place. Van der Berg's version is far fetched and does not tally with the events as they unfolded as relayed by both the plaintiff and Ms Flanagan. The plaintiff was confident in that he gave the second defendant a mandate to cover 2.0 tons that is why immediately upon suffering damages he put in a claim for 2.0 tons and after being informed that the first defendant had repudiated part of his claim he challenged the repudiation. In all probabilities what happened is that after the last conversation Van der Berg had with Ms Flanagan who could hear and understand her clearly she, Van der Berg, simply put the proposal aside and did not bring it up to date on the second defendant's system.
- [28] In assessing the probabilities comprehensively and in retrospect the conclusion seems inescapable that of the two versions before the court as to whether the second defendant was given a mandate to put into operation a policy for 2.0 tons/ha and failed to carry out that mandate, the plaintiff's is the more probable. That being so the plaintiff has succeeded in discharging the onus on it. It follows further that the claim must succeed.
- [29] The last issue that was raised was whether the first defendant should pay the costs of this application. Rule 10(4)(b)(ii) of the Superior Court Practice Rules provides as follows:

"(4) (b)

if judgment is given in favour of any defendant or if any defendant is absolved from the instance, the court may order:

(i) (Not relevant)

(ii) the unsuccessful defendants to pay the costs of the successful defendant jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful defendants pays more than his pro rata share of the costs of the successful defendant, he shall be entitled to recover from the other unsuccessful defendants their pro rata share of such excess, and the court may further order that, if the successful defendant is unable to recover the whole or any part of his costs from the unsuccessful defendants, he shall be entitled to recover from the plaintiff such part of his costs as he cannot recover from the unsuccessful defendants;"

- [30] In this case I have no reason to order that the first defendant should pay the costs of this application when it had no direct and substantial interest which required it to be joined from the beginning. It is the plaintiff that decided to keep the first defendant in the pleadings because it was not sure who to claim against even after the pre-trial conference showed clearly that the plaintiff could not prove any wrong doing on the part of the first defendant. I consequently find that no costs order can be made against the first defendant.

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

ORDER:

1. Payment of the amount of R181 844,00 by the second defendant;
2. VAT on the amount of R181 844,00;
3. Interest on the aforementioned amount a tempore morae;
4. The second defendant to pay the costs of this matter.

B. C. MOCUMIE, J

On behalf of the plaintiff: Adv. S. J. Reinders

Instructed by:

Van Wyk & Preller Ing.

BLOEMFONTEIN

On behalf of the defendants: Adv. P.C.F. van Rooyen SC

Naudes

BC/eb

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