

SOUTH AFRICA / JUDGMENT

Govender v New National Assurance Company Ltd (1737/2008) [2013]

ZAKZDHC 34 (5 July 2013)

[2013] ZAKZDHC 34

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Radebe

CASE / FILE NUMBER

1737/2008

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IN THE KWAZULU- NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 1737/2008

In the matter between

STANLEY GOVENDER PLAINTIFF

AND

NEW NATIONAL ASSURANCE COMPANY LTD DEFENDANT

JUDGEMENT

DATE: 5 July 2013

RADEBE J

INTRODUCTION

[1.] The Plaintiff brought action against the Defendant for the payment of a sum of R71 250.00 in respect of the loss suffered by him as a result of the theft by hi-jacking of his motor vehicle, to wit, a Volvo, 1997 model. The cause of action arose on 28 June 2007 when the vehicle was allegedly hi-jacked at Chatsworth, Durban, and has to date not been recovered. As at that date, the vehicle was insured by the Defendant for the sum of R75 000.00, being the maximum limit of indemnity under the insurance agreement

[2.] After the said hijacking the Plaintiff lodged a claim with the Defendant on 12 July 2007, for the insured amount of R75 000 less 5% which represents the excess of R3 750 deductible, hence a net value of R71 250. The claim was repudiated by the Defendant, on the basis, inter alia, that the insurance policy was in the given circumstances of the hi-jacking, not 'in force' to the extent that it is contended that such hi-jacking did not take place; and, that the Plaintiff failed to comply with his obligations under the policy, in that he did not comply with condition 4 of the insurance which stipulates that:

"The insured must display the necessary caution and take all reasonable precautions to prevent or minimise any possible loss, damages, death, injuries or liabilities.¹

and was therefore in breach of the said condition by failing: to ensure that at all material times the insured vehicle's tracking device was duly maintained alternatively timeously activated;

Alternatively ... the Plaintiff was in breach of the aforementioned condition in that he failed to ensure that at all material times the place where the vehicle was parked was reasonably secure."

[3.] At the commencement of the trial the issues were separated by consent. Therefore the matter proceeded on the issue of liability only. To prove its case the Plaintiff led the evidence of two witnesses, viz., himself and once Sanesh Singh who is a representative of Netstar Tracking. To dispute Plaintiffs claim the Defendant led the evidence of three witnesses: D.G. Botha who is an insurance assessor and investigator; Harry Roberts, a polygraph examiner and S. Frank, who was a manager of the Ridge Shopping Mall from which the vehicle was stolen.

[4.] It is common cause from the pleadings and evidence that:

4.1. the Plaintiff is the registered owner of the motor vehicle;

4.2. the Defendant is the insurer, and that the insurance schedule includes the motor vehicle having comprehensive cover as appears in the policy schedule compiled by the Defendant.²

4.3. the Plaintiff lodged the claim with Defendant for the loss through hi-jacking and the Defendant repudiated the claim.

[5.] The issues for decision by this Court are two-fold, but mutually exclusive namely;

5.1. whether the hijacking did in fact occur. If so then:

5.2. whether the Plaintiff did or did not take reasonable precautions to prevent the theft and therefore the loss.

SUMMARY OF EVIDENCE

[6.] SANESH SINGH, as Plaintiff's witness, testified that he is employed by Nestar and that he occupies a position of an operations supervisor, He confirmed that Plaintiff was the owner of the vehicle and that at the time of the incident the vehicle had a functional tracking device. On 28 June 2007 at 20h19 he received a report of the hijacking and immediately dispatched ground and air search, However Netstar was unable to recover the vehicle, and could not recovered it despite

it remaining on a 24-hour monitoring system. Further, he testified that the first hour of loss is critical in that it gives Netstar a greater chance of recovering the motor vehicle. The incident in question was reported outside the critical hour. Further, he told the Court that the statistics of recovering within the critical hour is at 70% - 80% success rate. After the critical hour it becomes difficult to recover a stolen vehicle.

[7.] STANLEY GOVENDER, the Plaintiff, testified that he is the registered owner of the vehicle. The vehicle was insured with the Defendant since 2002 and was fitted with a Netstar tracker, had a gear lock and an alarm immobilizer.

He had installed the tracking device on his own accord as an additional security measure. According to him the vehicle was hijacked on 26 June 2007.³ On that day no one at his home could cook and he was alone. He decided to go to the KFC at the Ridge Shopping Complex at Shallcross

to buy himself a burger, He arrived there at about 18h45, parked his vehicle at an open parking lot, engaged a gear lock which is concealed with a key at the bottom and engaged the immobiliser, thus locking the car when he got off. The parking lot is fenced, with two entrances and two exits. He proceeded to the KFC where he purchased a take-away burger. He confirm that the time of the purchase, according to the KFC receipt was 18:34. ⁴ He then proceeded back to his vehicle with an aim to sit and eat his burger. When he approached his vehicle he pressed the immobiliser. It was then that a male person who had been at the KFC approached him from the back. He took from him 2 rings, a watch and a sum of R2 400 plus some change. The attacker warned him not to shout. The Plaintiff then handed over his burger. He testified that: "They took his car as well. The accomplice drove his car, a red Mazda or Tracer or something like that."⁵

[8.] The Plaintiff, as a road runner, ran to the Chatsworth Police Station to report the incident. The police station is less than two (2) kilometres away. He made a report after having to wait in the queue as Chatsworth is a very busy police station. He made this report to "a guy" and the police phoned Netstar, He confirmed that the report he made at Chatsworth Police Station is the one contained in the Affidavit, written by him and which was attested to at 20h00 on 28 June 2007, It reads as follows:

*"on 2007/06/28 whilst parked at the Ridge Shopping Centre in Shallcross I was robbed of motor vehicle, driver's licence and personal belongings by two Black males. Case No./06/2007."*⁶

[9.] He further testified that he also lodged a claim with the Defendant on 4/7/2007 and he confirmed the claim details contained in the Motor Claim Form document.⁷ In paragraph 11 of the claim form, the Plaintiff gives details of how the hijacking took place on 28 June 2007 at about 19h00. He states that he had parked on the boundary of the parking lot so that he could have his burger in private. As he approached his vehicle two Black males approached him as he was about to enter the vehicle. Both had big knives and one of them pressed at the back of his spine whilst telling him not to shout, scream or cry and threatening to kill him as demanded him to hand over his valuable. Thereafter they pushed him aside and one of the 'robbers' drove off in his vehicle whilst the other drove off in a red Mazda or Tracer. After reporting the incident at the police

station, he then contacted Netstar, reporting the incident. The Chatsworth police notified 10111 of the hijacking.

[10.] The Plaintiff was cross-examined extensively on inter alia about who of his family were in Johannesburg and who had remained behind; the reason why he had to get a burger for himself; why he had selected to go to the KFC situated 2 km away at Shallcross and not to the KFC closer home and which was 100 m away from his home; and the reason he chose to walk 2km from Shallcross to the police station after being hijacked instead of going back into the KFC or shopping centre to report. It was established under cross-examination that the parking bay chosen by the Plaintiff was furthest from the KFC; the number of the Black men who were inside the KFC; and the number that hijacked him; the contradictions between the evidence he gave in court and the evidence according to his statement in paragraph 11 of the Claim Form on page 21; his exact position vis-a-vis the vehicle when the hijacking took place; the position of the knife put against his neck or in the back of his spine; the identification of the hijackers; how he or the hijackers left the parking lot; and generally, the time factors in regard to the purchase of the burger, the hijacking* the reporting to the police and ultimately to Netstar.

[11.] DEAN GEORGE BOTHA testified as a defence witness. He had compiled a report after having been instructed to do so in his capacity a private assessor and investigator. On 9 July 2007 he interviewed the Plaintiff at his work offices in Winder Street Durban. He referred to the Plaintiff's claim statement contained in paragraph 11 of the claim form (see para 9 supra). The Plaintiff had informed him that: (1) the reason why he (the Plaintiff) had parked near the fence of the parking lot was that he did not want his vehicle searched; (2) a Black male approached him and a second black male came from the red Tracer; (3) the two Black males had put him into his vehicle in the passenger side and they drove off with him, dropping him off at the entrance of the parking lot where it meets the road. (4) that the reason why he was alone, and having to purchase a burger was that his family were fasting.

[12.] Further, Mr Botha testified that after having viewed the surveillance camera footage and having noticed certain disparities in regard to the time factors stated by the Plaintiff, he sought to set up a second interview with the Plaintiff, and to possibly view the footage with him. However, the Plaintiff could not avail himself. According to the footage of 28 June 2007 viewed, Botha testified that he saw the Plaintiff depicted as entering the KFC at approximately 18h20-18h30. He compared this time factor to the till slip which was supplied to him by the Plaintiff, showing a time factor of 18h34. In the footage, it was clear that KFC was not very busy at that time as there were only the Plaintiff and couple of a boy and a friend. The Plaintiff, who looked nervous and fidgety bought a burger and left the KFC. Nobody was seen following him.

[13.] Mr Botha testified under cross-examination and stated that he had compiled the Photo Album.⁸ He had compared this to Plaintiff's insurance claim statement and to the notes of his interviewing of the Plaintiff.⁹ He had realised that there were material contradictions, leading him to conclude that he did not recommend that the Defendant should

accept liability for the Plaintiff's loss.

[14.] MR HENRY ROBERTS was called as the second defence witness. He testified that he is a polygraph examiner with a company called

Polygraph and Truth Verification Services, He conducted an interview with the Plaintiff on 24 October 2007 and prepared a typed report, 10 page 2 only thereof being used to refresh his memory.¹¹ When he compared the Plaintiffs responses to his questions during the pre-examination interview, to the statement that the Plaintiff had submitted when he lodged his claim to the Defendant, he concluded that there were material discrepancies, inter alia as follows:

- (a) the Plaintiff had “mentioned being confronted by one man armed with a knife at that time.”¹²
- (b) the Plaintiff had “stated that he was asked by this individual to get into the vehicle and, of course, fearing for his life he did as instructed, the one man then drove his vehicle with him in the passenger seat outside of the parking area and on exiting the parking ...he stopped and ordered Mr Govender to leave the vehicle, He then did as he was told and Mr Govender’s vehicle, the Volvo, then drove off being followed by Mazda... which had the second person in it.”¹³

(There are of course other features of the Plaintiffs responses that were of concern to this witness)¹⁴

[15.] Mr Roberts was extensively cross examined on probabilities in relation to time, distances, sitting positions, his interview notes that were written on short hand¹⁵ part of which were read into the record.

[16.] MR SUBRAGASEN FRANK was called as the last witness for the defence. He testified that he is a Central Manager of the Ridge Shopping Mall depicted in photo D of Exhibit B. He confirmed that there are at least 16 surveillance cameras, the chief of which he marked as situated in points like X1, X2 & X3 in photo's D & E of Exhibit B of the record. He had verified that all the cameras were in good working order during the period in question. He could no longer find the footage for the 28th June 2007, which he had been requested to find. This request was made to him about four weeks prior to the trial. According to him, the Shopping Centre is not crime -infested. Each footage lasts of 30 days whereafter it is automatically deleted if it had not been saved.

EVALUATION

[17.] The Plaintiff, bears the onus of proof, the test of which is to prove on a balance of probabilities that the hijacking did in fact take place. If the Court finds that the hijacking did indeed take place, then the second issue, viz, whether the Plaintiff complied with the requirements of Clause 4 of the conditions of the insurance policy has to be deliberated on. If the Court finds against of the Plaintiff in respect of whether the hijacking took place or not, then the second issue falls away.

[18.] The Plaintiff contradicted himself from the very start of his evidence before Court. In comparing his previous statements which he had made when submitting his claim; when he was interviewed by BOTHA as well as when he was interviewed by ROBERTS, there are material inconsistencies. To pick but a few the following aspects are looked at.

18.1. The Plaintiff initially testified that everyone else of his family, including his wife, had gone visiting in Johannesburg. It later turned out under cross-examination that his son and daughter-in-law were around but that he, Plaintiff could not readily get into the house as his keys had been stolen with the vehicle whereas his son had gone out to fetch the daughter-in-law.

18.2. Despite being afforded an opportunity to rectify the contradiction after a transcription of the record was furnished to him, the Plaintiff did not cease that opportunity.

18.3. The Plaintiff had given versions to BOTHA and to ROBERTS which differ materially to the version given to Court in regard to:

18.3.1. his testimony that he parked on the far side of the parking lot next to a red Mazda or Tracer, from which one of hijackers later emerged from and drove it off, following his vehicle which had by then been hijacked. The reason advanced to the Court was that he so parked in order to enjoy his burger in private. However, according to what BOTHA'S testimony would be, the reason given to him was that the Plaintiff had parked there because he did not want his vehicle scratched. When confronted with this version the Plaintiff did a somersault by saying indeed that was one of the reasons he had parked near the fence.

18.3.2.2. If it is true that the Plaintiff wanted privacy while he enjoyed his burger, this Court finds it strange, and indeed improbable, that he would leave all the other empty bays and go and park right next to a Mazda from which a 'robber' would later emerge.

18.4. The Plaintiff failed to explain the contradiction between his evidence in chief regarding him seeing one Black man inside the KFC, and his evidence as contained in paragraph 11 of the insurance claim wherein he stated that "they* followed him. To come out of the corner, the Plaintiff fabricated a version that these hijackers must have phoned each other, alerting

each to the movement of the victim. That leaves more than one version to be deducted: either there was one inside the KFC, one outside and one waiting in the Mazda; or, alternatively two in the KFC and one in the Mazda; or alternatively no one waiting in the Mazda. Plaintiff failed to explain these inconsistencies, which remain glaring. The only reasonable inference, looking at the evidence as a whole, is that no one followed the Plaintiff to his vehicle.

18.5. The Plaintiff testified that he was confronted by one Black man who had a knife. Similarly he had started to BOTHA and to ROBERTS that he was confronted by one man armed with a knife. However, in his statement contained in Exhibit A, page 21 he stated that two Black males approached him and both had long knives. This particularity is lacking in his very first statement which he made to the police when the event was supposedly fresh in his mind.¹⁶

Again, this points to a fabrication of the events and of what exactly took place on 28 June 2007 when the hijacking allegedly took place.

18.6. Plaintiff gave contradicting versions about the hijacking itself. He testified that as he was half way towards his vehicle he was confronted by the hijacker(s). A second version is that it happened in the car. He testified as follows in this respect:

"I came out of Kentucky, halfway to the car this guy sticks a knife into me and says, listen, don't shout, I will Kill you, I want your money and I want your jewellery"*17

This evidence differs to the evidence he gave earlier on when he testified as follows:

*"As I approached the car I disarmed the car and when I got to the car, before I can get to it, that guy that was in the Kentucky approached me from the rear and he stuck a knife into my back and he said do not shout, do not make any noise we (my emphasis) will kill you if you shout, all we need is your money and your jewellery. I said be my guest (singular), take it. and my burger"*18

In his statement to the Defendant, he stated:

"As I approached my vehicle with my burger two black males approached me as I was about to enter my vehicle. Both had long big knives. One pressed at the back of my spine whilst telling me not to shout, scream or cry, but to hand over my money cards, watch and ring or else they would kill me".

Clearly there are discrepancies as to where exactly the vehicle was hijacked if at all. In all three instances quoted above, the Plaintiff does not even mentioned that the so-called hijackers demanded his vehicle, and if so, at what point such demand was made. The items demanded seem to have been money and jewellery. On his own accord he gave them his burger (see footnote 18). When prompted by the Court to itemised what was taken from him, he then mentioned the vehicle

81.7. The Plaintiff testified that upon arrival at the Centre, he parked his vehicle, engaged the gear lock and the alarm immobiliser. In engaging the gear lock

*"you put the key in the bottom and just turn it. It is concealed, you can't even see the gear lock on top. You put the key in the botton, turn it and it locks."*19

Yet in his claim statement to the Defendant he states that after robbing him of his possessions 'the robbers' pushed him aside and one Black male drove in his vehicle. The Plaintiff omitted to explain how this Black male managed to unlock the concealed gear lock. Even if the Court were to accept one of his versions, namely that he was pushed into the passenger seat and that the hijackers drove off with him, there would still be a question as to how and when the gear lock was then unlocked to enable the vehicle to be driven.

[19.] There are so many other discrepancies, inconsistencies, improbabilities and contradictions in the Plaintiff's evidence as a whole that this Court can safely reject his evidence as unreliable, false and as a fraudulent misrepresentation of the truth Plaintiff is not a credible witness. The unreliability of his evidence is so great that it cannot be cured even by the minor criticisms and inadequacies that may be levelled against any of the defence witnesses. His version(s) of events are rejected with the contempt they deserve.

[20.] In the premises, I come to the conclusion that no hijacking of the Plaintiff's motor vehicle took place. There is therefore no need to deal with the second alternative issue, hence no need to deliberate on the time factor discrepancies in detail.

[21.] In the result, I make the following order:

1. The Plaintiffs claim is dismissed.
2. The Plaintiff is ordered to pay the Defendant costs on a High Court scale.

RADEBE, J

DATE: 4 JULY 2013

DATE OF HEARING : 16 May 2011 DATE OF JUDGEMENT : 5 July 2013 COUNSEL FOR
APPLICANT : MR S. MORGAN INSTRUCTED BY : GOVENDER, PATHER & MORGAN COUNSEL
FOR THE RESPONDENT : MR BOULLE INSTRUCTED BY : HASSAN PARSEE & POVAUNGAM

DATE OF HEARING : 16 May 2011

DATE OF JUDGEMENT : 5 July 2013

COUNSEL FOR APPLICANT : MR S. MORGAN

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1Index to Pleadings, page 35, clause 4.

2Index to Pleading, Annexure B, page 12.

3Record, Vol.1 page 12, line 1.

4Exhibit A. Plaintiffs Bundle, page 23.

5Record, Vol.1 page 14 lines 10-25; page 15 line 1-3

6Exhibit A- Plaintiffs Bundle, page 22

7Plaintiffs Bundle, pages 19-21

8. Exhibit B of the record

9. Exhibit C of the record,
 10. Exhibit E of the Record
 11. Record Vol. 2 page 97, line 5-25.
 - 12Record Vol. 2 page 100, lines 8-9
 - 13Record Vol.2 page 100 lines 10-20
 - 14Record Vol 2 page 1QU lines 1-25; p. 102 line 1-5
 15. Exhibit F of the Record
 - 16^Exhibit A, page 22
 17. Record* Vol. 1 page 23, lines 7-9
 18. Record* Vol. 1 page 14, lines 4-10
 19. Record, Vo.1 page 13, lines 3-6
-

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