

SOUTH AFRICA / JUDGMENT

# Hall v Hollard Insurance Company Ltd [2007] ZAGPHC 385; 00/06/01 (10 September 2007) [2007] ZAGPHC 385

COURT

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

6900/06

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NOT

REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND

LOCAL DIVISION)

JOHANNESBURG

CASE

NO:6900/06

DATE:

2007/09/10

In

the matter between

J

J HALL

and

HOLLARD

INSURANCE COMPANY

LIMITED.....

Defendant

**JUDGMENT**

WILLIS. J: The plaintiff claims from the defendant, in terms of an insurance policy concluded between the plaintiff and the defendant in January 2006, in respect of which the plaintiff insured a Mercedes Benz SL65. The vehicle is a "luxury" one. The "consideration"

therefore was around R1 750 million. The parties agreed that the plaintiffs loss, if proven, was around R1 400 million and that

interest on the proven loss would run from 31 March 2006.

The defendant raised a number of issues in its plea and essentially put the plaintiff to the proof of his case. The defendant also relied on a so-called "exclusion clause". The defendant accepted, during a pre-trial conference, that the onus in respect of proving that that exclusion clause operated in terms of the contract lay upon it. This fact (namely the acceptance of the onus in respect of the "exclusion clause") was confirmed by the defendant at the beginning of the trial and during the course of argument.

By the close of evidence the following facts were common cause or at least not in dispute:-

i. The plaintiff took delivery of the vehicle with the intention that he acquire ownership on 11 January 2006.

ii. That on either 11 or 12 January 2006 (depending on which version one accepted) the plaintiff insured the vehicle with the defendant

through Sela Brokers CC, and that at the time of the incident giving rise to the claim there was formal written contract of insurance in existence between the parties in which contract is the so-called "exclusion clause".

iii. That on Saturday morning 21 January 2006 the plaintiff took the vehicle back to Gillard Motors from whom he had purchased the

vehicle.

iv. The vehicle was stolen during the night of 21 January 2006.

v. At the time of the theft the vehicle had not yet formally been registered into the name of the plaintiff as owner, nor having the registration number HOT ONE GP.

vi. The plaintiff lodged a claim with Sela Brokers on the

morning of Monday 23 January 2006. vii. On that very morning, after the plaintiff had spoken to Mr Lilly of Sela Brokers CC to report the theft, Sela Brokers CC (per Leslie Gray) sent a letter to La Garde International reporting the incident and in that report the following appears:-

"Please be advised that the theft took place on Saturday 21 January from Gillard Auto in Fourways, where the car was being registered and the alarm fixed before delivery to our client." At the close of evidence the plaintiff had established his insurable interest and also established the theft which was a risk in respect of which the plaintiff had insured the vehicle.

In the defendant's plea the following defences which are relevant to the determination of the issues are raised:-

"8.3.3 The plaintiff failed to comply with the terms and conditions set out in clause 11 of the policy, inter alia by failing to advise the defendant immediately in writing of the material change in risk when the plaintiff returned the Mercedes to PE Motors for resale.

8.3.4 The plaintiff failed to comply with the terms and conditions set out in clause 26 of the policy, inter alia in that the vehicle was not, at the time of the alleged theft, used for private and professional purposes but was instead used for and in connection with the motor trade.

8.3.5 The plaintiff, in substantiation of his claim advised La Garde International Consultants that the Mercedes was returned to PE Motors to resolve a problem with airbag warning lights and an alarm whereas in fact and in truth the Mercedes was returned to PE Motors for the purposes of resale." PE Motors is the same entity as "Gillard Motors". As has been mentioned earlier the defendant relied on an "exclusion clause". This clause In the relevant contract of insurance reads as follows:-

"The following uses are not covered at all regardless of the class of use shown on the schedule. Hiring carnage or passengers for hire or carriage for fare paying passengers, driving instruction for reward, racing, speed or other contents, rallies, trials, use on any racing circuit whether an organised event or not, or use for any purposes in connection with the motor trade, save where the vehicle is in the custody or control of a member of the motor trade for the purpose of the vehicle's overall upkeep, maintenance or repair."

Essentially, the case turned on a reason why the vehicle was at Gillard Motors at the time of the theft. As mentioned earlier the defendant accepted that it bore the onus in respect of proving that the "exclusion clause" applied.

The plaintiff gave evidence. It is clear that he is a wealthy man who is, in his own words, "passionate" about luxury vehicles and has, over a number of years bought and sold numerous luxury vehicles through Gillard Motors. He said that he took delivery of the vehicle on 11 January 2006, and that on that very day he arranged with Sela Brokers for the vehicle to be insured. It should be mentioned that an e-mail sent from Sela Brokers CC to him on his son's e-mail address confirms that the vehicle was insured with effect from that date

As mentioned earlier it is common cause that the vehicle had not yet been registered into his name and neither had the vehicle acquired

his preferred registration, namely HOT ONE GP, which was on another vehicle in is stable of vehicles.

The plaintiff said that his weekend residence on a golfing estate is just around the corner from Gillard Motors, and that having taken the vehicle to his weekend residence on the Friday, he dropped it off at Gillard Motors on the Saturday morning and was given a courtesy vehicle. He said that the reason why he had returned it was that he wanted Gillard Motors to attend to the registration both into his name and with the preferred personalised number plate. He also said that there was a problem with the airbag light and that the alarm sometimes would trigger inexplicably, and he wanted this to be attended to.

He said that he had had a discussion with Mr Gillard about the price which he had paid. He said that he had looked up the list price and that this was slightly less than the price that he had paid but Mr Gillard assured him that he would be able to obtain an even better price than that which he had paid should he wish to sell the vehicle.

Mr van Rensburg did the investigation for La Garde International CC. His fees were paid by the defendant. Mr van Rensburg held a formal interview with the plaintiff at his business premises on 2 February 2006 and requested Mr Hall to make a statement. In that statement he said the following:-

"I took the SL65 back to decide whether to keep or resell the car. Mr Gillard told me that he had someone interested in the ... I handed the car back " Elsewhere the plaintiff used the term to "get the roadworthy". He was criticised for this but in my view there is no merit in this particular criticism. The words "getting the roadworthy" are often used coextensively with attending to the formalities relating to registration as most often attendance to roadworthyng a vehicle is a necessary precondition in order for the change of registration. The plaintiff was adamant that at the time when he returned the vehicle to Gillard Motors on 21 January 2006 he had made no decision as to whether or not to sell the vehicle.

Mr Snyckers for the defendant made a number of criticisms of the evidence of the plaintiff. I accept that certain criticisms can

validly be directed against the manner in which the plaintiff gave evidence. Nevertheless he is strengthened in respect of the following

- i. It is common cause that he had only had the vehicle for approximately ten days before he returned it to Gillard Motors.
- ii. The vehicle had not yet had the registration altered, and that would have had to have been attended to at about the time that he relies.
- iii. There is no dispute that the plaintiff spent his weekends at a golfing estate near Gillard Motors, and that it would have made sense and been convenient for him to have handed his vehicle over on the Saturday in order for the formalities relating to registration to be attended to.
- iv. The minor problems or "glitches" relating to the alarm and the airbag light have the ring of truth. These are the kind of minor problems that typically arise when one has acquired a new vehicle.

Mr Snyckers criticised the plaintiff for not always giving the same reasons for why he took the vehicle back to Gillard Motors. I think it is important to realise and to understand that people very often do things for mixed reasons. For example a man may well have gone to see a film at a cinema:-

- i. Because his wife thought it was a good idea;
- ii. Because his children thought it was a good idea;
- iii. Because both his wife and children thought it was a good idea;
- iv. Because there had been an excellent review of the film;
- v. Because a friend recommended the film to him;
- vi. Because he liked the lead actor;
- vii. Because he liked the lead actress;
- viii. Etcetera.

The fact that a person might variously give some of these reasons but not all of them, either in combination or completely together, does not justify the conclusion that that person was-

- (a) A liar; or
- (b) Did not in fact see the film in question.

I am sure, for example, that most people would on different occasions give different reasons for why they married their spouses. For example a man might well say variously that the reason why he married his wife was that he loved her and also the following.-

- i. He admired her mind;
  - ii. He liked her sense of humour;
  - iii. He enjoyed her smile;
  - iv. He thought that she was kind and gentle;
  - v. He thought that she would be a good mother for his children;
  - vi. He thought that she would be excellent at handling finances whereas he was not competent in this field,
  - vii. He thought she was the most beautiful woman in the world.
- The fact that a man does not necessarily always and everywhere repeat this litany of reasons why he married his spouse does not justify the conclusions that:-

- (a) He is a liar;
- (b) That he does not love his wife;

(c) That he did not marry her.

It is only when reasons are mutually exclusive or in conflict with one another that one can begin to draw such inferences. It seems clear to me, and in this regard I have little difficulty in accepting the overall thrust of the plaintiffs evidence, that he returned the vehicle to Gillard Motors for mixed reasons:-

- i. He wanted to have the registration attended to;
- ii. He was irritated by the problems with the alarm system and the airbag, and wanted these to be attended to.
- iii. He wanted reassurance on the question of the value that was to be placed on the vehicle.
- iv. He had not yet made up his mind whether to sell it, although obviously such a consideration may well have been at the back of his mind.

On the plaintiff's evidence the dominant, main, principal reason for taking the vehicle to Gillard Motors was clearly not for it to be resold at that time.

Mr Lilly, who was the broker at Sela Brokers CC with whom the plaintiff arranged the insurance, confirmed that the plaintiff had phoned him on the Monday 23 January 2006 to report the theft of the vehicle but had said to him that the reason why he had returned the vehicle was in order for it to be resold- This, in the opinion of Mr Lilly, created a major problem by reason of the exclusion clause, and he says that he immediately informed the plaintiff accordingly. Mr Lilly said that he was at all times acting in the interests of the plaintiff.

On 16 February 2006, before Mr van Rensburg's report had been completed, Ms Carol Waugh, the claim's manager at Hollard, sent a letter to Mr Lilly for approval. It was a draft letter addressed to the plaintiff Mr Hall, and it purported to notify him that the claim in respect of the insurance had been repudiated because the plaintiff had failed to notify it of "any material change in risk".

Mr Lilly's evidence was that he immediately advised Hollard that this was not the reason which they should give to the plaintiff for repudiating the claim, and that the defendant should rely on the exclusion clause referred to earlier in this judgment. The letter was duly revised and on the same day the plaintiff received another letter in which he was advised that the reason for the repudiation of the claim was that the vehicle was in the possession of a motor dealer for purposes of resale.

The evidence was that there are substantial connections between Seta Brokers CC and the defendant, and also that, overwhelmingly, the business of Sela Brokers CC is dependant upon, and done with the defendant.

Certain criticisms can be levelled at the evidence of Mr Lilly. I do not intend to deal with them all. In my view it is sufficient simply to allude to the fact that if he was acting at all times in the interests of the plaintiff, it is extraordinary that he should have advised the defendant not to send out the letter which they had first prepared for dispatch to the plaintiff, ii is even more

extraordinary in the light of the fact that, according to him, the question of whether the vehicle had been returned to Gillard Motors loomed large from the very moment that the plaintiff reported the theft to him on Monday 23 January 2006, and that the letter which was sent to La Garde International on that very morning by Leslie Gray from Sela Brokers CC in which it records the reason as being "the car being registered and the alarm being fixed before delivery to our client". Mr Lilly said that that information would not have been obtained from him. Everyone agreed that, if that information was not obtained by Ms Gray from Mr Lilly, it must have been obtained from the plaintiff. This aspect was confirmed by Ms Gray, although the plaintiff denied it.

I should observe that the plaintiff would have had to have been extraordinary adroit within a few minutes to alter his reason when he spoke to Ms Gray, when she telephoned him according to her evidence, on that very morning. Be this as it may, in the light of the aforementioned criticisms of Mr Lilly, and the inherent probabilities to which I have alluded, which favour the plaintiff, I cannot prefer the evidence of Mr Lilly over that of the plaintiff in regard to this question of whether the plaintiff said that the reason why the vehicle had been returned to Gillard Motors was in order for it to be resold.

Mr van Rensburg prepared a report. It is dated 22 February 2006. In that report he records the following:-

"2.3 On the same day (i.e. Monday 23 January 2006) I also telephoned the owner of the vehicle Mr Hall, and he informed me that he took the vehicle back to Gillard Auto because he experienced problems with the vehicle and he wanted to sort them out. He went on to explain that there was a problem with the airbag warning lights and the alarm." He later records that:-

"2.32 During the interview with Mr Gillard I asked him why Mr Hall returned the vehicle to him so soon after he purchased it and he informed me that Mr Hall returned the vehicle for him to resell at R1 850 million as Mr Hall regularly speculated with vehicles. He also stated that Mr Hall is a very regular client."

"2.33 I asked him if there was any problems or malfunctions with the vehicle and he responded that there was nothing wrong with the vehicle at any time."

"2.34 After establishing that the vehicle was on the showroom floor to be sold again I asked

Mr Gillard if he had anyone that came in to look at the vehicle since it was returned and he stated that he had one client that looked at the vehicle but that this person never opened a door or took the vehicle for a test drive".

"2.55 I referred him (i.e. the plaintiff) to my previous telephone conversation with him where he stated that he took the vehicle back to Gillard Auto because of faults on the vehicle, and he replied that there was a problem with airbag warning light that was illuminated. This time he did not mention that there was an alarm fault on the vehicle as previously stated,"

"3.3 When I first contacted Mr Hall he tried to conceal the fact that he took the vehicle to Gillard Auto for them to sell the vehicle on his behalf and stated that he took it back to Gillard Auto for repairs. In the interview with Mr Gillard he adamantly stated that the vehicle had no faults and that it was brought back by Mr Hall to be sold on his behalf.

When I later met with Mr Hall he confirmed that he took the vehicle back to be sold on again."

Mr Gillard did not give evidence in the trial. The hearsay statements of Mr Gillard recorded in the report of Mr van Rensburg were

nevertheless admitted in evidence as was a formal written statement which Mr Gillard made very soon after the theft (which is not

relevant to the question of whether the vehicle was returned for resale or not), as well as a record of an interview which Mr Snyckers

had with Mr Gillard in preparation for the trial. In that interview with Mr Snyckers Mr Gillard vigorously denied that the vehicle had been brought back for resale, that it had been brought back "for roadworthy to be done". He also conceded and said very fairly "I can promise you that now, it is a motor vehicle that on the floor, if I had a buyer from the motorcar I promise you I will pick up the telephone to Mr Hall. I have got a buyer for the car, do you want to sell it. We are talking to a person here who has got a shit load of money".

It is difficult to know what to make of the evidence of Mr van Rensburg regarding his recollections of statements made to him both by Mr Gillard and the plaintiff but more particularly relevant to the issue in question, the statements allegedly made by Mr Gillard to him. As I have noted earlier, it was the defendant who paid the fees of Mr van Rensburg, and this immediately casts a question over the objectivity of Mr van Rensburg. Certainly he was not a witness whom one could find was obviously being untruthful. He may well have reconstructed the evidence slightly in the light of the fact that, for example, Mr Gillard was, in my opinion, quite frank with Mr Snyckers on the question of if somebody had seen the vehicle and was interested in buying it, he would obviously have phoned the plaintiff in order to find out if he was interested. An auto dealer is hardly likely to turn up an opportunity to make a quick turn on the sale of a vehicle.

Counsel for both the plaintiff and the defendant were *ad idem* that with regard to the hearsay evidence of Mr Gillard the following two questions arise:-

- i. Did Mr Gillard say what Mr van Rensburg says he said?
- ii. If so, was it true?

In regard to both these questions I do not know what to make of Mr van Rensburg's evidence in regard to the hearsay evidence of Mr Gillard. Accordingly the defendant has failed to discharge the onus of proving that the exclusion clause operated, and accordingly the plaintiff must succeed.

## Judgment

is given for the plaintiff as follows:-

1. The defendant is to pay the plaintiff the sum of R1 400 million as and for damages;
2. The defendant is to pay the plaintiff interest of the aforesaid sum from 31 March 2006 to date of payment;
3. The defendant is to pay the plaintiff's cost of suit. Counsel for the plaintiff: ADVA R G Mundell

Attorneys for the plaintiff: Schwarz-North Inc. Counsel for the defendant: ADV F Snyckers

Attorneys for the defendant: Deneys Reitz Inc. Date of hearing: 5, 6, 7 September 2007 Date of judgment: 10 September 2007

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