

SOUTH AFRICA / JUDGMENT

Jacobs v King Price Insurance Co Ltd (A153/2024) [2024] ZAGPPHC 1296 (28 November 2024)

[2024] ZAGPPHC 1296

COURT

North Gauteng High Court, Pretoria

BEFORE

G Botha, MMD Lenyai

CASE / FILE NUMBER

A153/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

Number: A 153/2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO THE JUDGES: NO

(3)

REVISED: NO

DATE:

27 November 2024

In

the matters between:-

DANIEL

JACOBS

Appellant

And

KING

PRICE INSURANCE CO LTD

Respondent

JUDGMENT

BOTHA,AJ

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1.1 This is an appeal against the judgment of the Regional Court for the Regional Division of the Gauteng, held in Pretoria

1.2 After closure of the Appellant's case (Plaintiff in the court a quo) the Respondent (Defendant in the court a quo) successfully applied for an order of Absolution of the Instance.

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Background

2.1 It is common cause that the parties concluded a written insurance agreement where the Respondent, inter alia, undertook to insure a vehicle belonging to the Appellant, namely a BMW 2 series against risks stated in the agreement, included comprehensive loss caused to the vehicle.

2.2 Under the insurance policy the BMW was insured for the retail value of the vehicle.

2.3 Under Section B of the policy document- "Theft and write-off cover", the policy stated that when the cost of repairing the vehicle is more than 65% of its retail value, the car will be written off.

2.4 The Appellant alleged in his amended POC that the retail value of the vehicle is R 330 000.00 and that the fair and reasonable repair cost of the vehicle to be R 329 955.19. This amount being more than 65% of the retail value of the vehicle, the vehicle is to be written off and the amount of damages payable to him is R 328 000.00 after the excess of R 2000.00 is deducted. [1]

2.5 The averments were specifically denied and challenged by the Respondent and the Appellant was put to the proof thereof.[2]

2.6 It is common cause that the Respondent rejected the claim and that an appeal was lodged with the Ombudsman for Short Term Insurance. This appeal was unsuccessful hence the institution of action in the Regional Court.

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3.1 The Appellant then sued for damages emanating from an insured event under the policy which caused damage to the vehicle's engine.

3.2 The issues of liability and Quantum were not separated and the trial proceeded on both the issues . This meant that the Appellant was saddled with the onus to prove both liability and the monetary amount of damages he claimed he suffered as a result of the insurable incident that happened .

3.3 In order to prove his case, the Appellant himself, a Mr Jenkinson and a Mr Opperman testified.

3.4 The Appellant testified how the incident causing the damage occurred. According to him, the vehicle ingested water into the engine during a sudden rainstorm and the engine cut out and did not restart.

3.5 Mr Jenkinson testified as an expert certified automotive engineer. Notice i.t.o the Magistrate Court Act, Rule 24(9) (a) and (b) were given.[3] He examined the engine of the insured vehicle (BMW) and one of his findings was that a hydro lock occurred in the engine as a result of the engine ingesting water.[4]

3.6 Mr Opperman testified as an expert. Notice i.t.o. Rule 24 (9) (a) and

(b) were given.[5] According to his viva voce evidence he is an "estimator" at BMW. The work of an estimator is to estimate the cost of repairs to a vehicle that was in an accident or any other damage to a vehicle.[6] He prepared a quotation on request of the Appellant for the fair and reasonable costs of repairs to the vehicle.[7] During his testimony he was referred to a report of an expert discovered by the Respondent. Respondent's counsel objected to that

line of questioning stating that it was hearsay. Counsel for the Appellant responded saying that he was merely testing the opposing

expert's opinion and that the witness is entitled to comment. The Magistrate allowed the testimony on that basis.[8] Mr Opperman accepted the retail value of the vehicle as was stated by Mr Du Plessis[9] More on this later.

3.7 The Appellant closed its case after the testimony of Opperman. The Respondent then applied successfully for an order of Absolution from the instance which is now the subject of this appeal.

Absolution from the instance

4.1 Absolution from the instance is one of the judgments a Magistrate can issue i.t.o. sec 48 of the Magistrates Court Act. Such an order can be given at the closure of a Plaintiffs case or at the end of the case.

4.2 The principles to be applied in respect of Absolution from the instance is well established in the South African Law.

4.3 In *Myburg v Kelly*[10] it is held that a court "must bring to bear upon the evidence not his own but the judgment of a reasonable man. Renouncing for the time being any tendency to exercise a judgment of his own, he is bound to speculate on the conclusion at which the reasonable man of his conception not should, but might, or could, arrive. This is the process of reasoning which, however difficult its exercise, the law enjoins upon the judicial officer."

4.4 In *Ruto Flour Mills (Pty) Ltd v Adelson (2)*[11] the following was held:"At the close of the case for the plaintiff, therefore, the question which arises for the consideration

of the court is: 'Is there enough evidence upon which a reasonable man might find for the plaintiff? If the defendant does not call any evidence but closes his case immediately, the question for the Court would then be: 'Is there such evidence upon which the Court ought to give judgment in favour of the plaintiff?'

See also: Olympia Passenger Service (Pty) Ltd v O' Conner[12]

Marine and Trade Insurance Co Ltd v Van der Schyff[13]

Alli v De Lira [14]

4.5 The test was again formulated in Claude Neon Lights (SA) Ltd v Daniel[15] "...but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."

4.6 It is thus clear what the principles governing the issue of Absolution are. It is a discretion to be exercised by the Court. When exercising the discretion, the aspects of fairness, interest of justice etc should always be kept in mind.

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Pleadings

5.1 A cardinal principle of law is stated in the maxim: "onus probandi actori incumbit" He who alleges must prove.

5.2 Also:" ei incumbit probation qui dicit, non qou regat" The onus of proof rests on the party making the assertion, not on the party denying it.

5.3 As stated above, the Appellant alleged that the incident that occurred during the rainstorm causing damage to the insured vehicle and:

5.3.1 The vehicle was insured for its retail value;

5.3.2 The retail value is R 330 000.00;

5.3.3 The damage amounted to R 329 955.19; and

5.3.4 The costs of repair exceeded 65% of the retail value and therefore the vehicle had to be written off i.t.o the agreement and the amount thus to be paid to the Appellant is R 328 000.00[16]

5.4 The Respondent specifically pleaded a denial of the fair and reasonable repair costs as well as the retail value. The Respondent stated pertinently that the Appellant must prove these allegations. [17]

5.5 There can be no denying that the retail value can only be proven by way of an expert's testimony who is qualified in that specific field. At this stage we must be reminded again that the issues were not separated and therefore over and above the liability of the Respondent to compensate, the Appellant must also prove the amount he should be compensated for.

5.6 The Appellant, in his notice of appeal, attempted to classify his claim as one of Specific performance, and that the monetary claim was "Indemnification" and not damages. [18]

This argument is contrived. Specific performance must be claimed in the POC. The first time specific performance was mentioned in the whole case is in the Notice of Appeal. The mere fact that the word "indemnify" or "indemnification" is used in the POC does not label the claim as one of indemnification. The word "indemnify" in par 12.2 of the POC is used as a verb and the word "indemnification" in par 12.3 should be seen in that context. The amount of "indemnification" must still be proven.

6

Mr Opperman

6.1 He was called by the Appellant as an expert witness . I am not really sure if he was called in order to assist the court with the retail value of the vehicle as his summary i.t.o Rule 24 merely stated what is the fair and reasonable costs of repair.[19]

6.2 From his testimony it is clear that he is an "estimator" and he prepared a quotation for a new and complete engine.[20]

6.3 He latched on to the retail value of the vehicle as was contained in the expert notice and summary of an expert of the Respondent, a Mr Du Plessis. Objection was made by as to the admissibility of this evidence but the Magistrate allowed it on the basis that Opperman is commenting on the opinion of an opposing expert.[21]

6.4 Under cross examination the following came to the fore:

6.4.1 He saw the audit text report of Du Plessis for the first time in court and he did not verify it; [22]

6.4.2 No notice was given that Oppennan will be testifying with regard to retail value. He did not know what the retail value of the vehicle is-past or present;[23]

6.4.3 He gave his quote in 2023. The damage and replacement values it not as it was in 2020 and therefore his quotation is wrong.[24]

6.4.5 He works as a panel beater and has no knowledge regarding assessing damage to the internals of an engine, in other words: he is no expert on the subject and therefore he could not even know if the retail value as was stated in the report of Du Plessis is realistic.[25]

6.4.6 As a matter of fact he never laid eyes on the damaged engine[26]

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7.1 In order to pass muster that the retail value is proven, the Appellant argued that Opperman accepted the value given by Du Plessis as correct despite the fact that Opperman was not a competent witness to do so.

7.2 To further complicate the matter, the report of Du Plessis was never introduced into evidence as Du Plessis was not called to testify and confirm his report.

7.3 The evidentiary value of discovered documents that are not introduced into evidence is limited as they are not admissible as evidence unless the author of the document is called to testify. In *Rautini v Passenger Rail Agency of South Africa*[27] the SCA ruled that discovering of documents i.t.o. the rules of court does not make their contents admissible evidence. (Unless the documents can be admitted under a common law exception of the Hearsay Rule)

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Conclusion

8.1 For the reasons above this court can not find fault with the reasoning of the Regional Magistrate in the court a quo.

8.2 This court also has no grounds or reason to find that the Magistrate exercised his discretion arbitrarily when granting absolution from the instance.

9

Order

I propose the following order is made:

- a) The appeal is dismissed.
- b) The Appellant to pay the costs of the appeal on High Court scale B.

G Botha

Acting Judge of the Gauteng Division

of the High Court

Pretoria

I agree and it is so ordered.

MMD Lenyai,

Judge of the Gauteng Division

Date of hearing: 7 November 2024

Date of judgment: 28 November 2024

For the Appellant:

Adv JS Griessel I

nstructed by:

Thomas Minnie Attorneys

For the Respondent:

Adv C Richard

Instructed by :

Weavind & Weravind Attorneys

- [1] Amended POC CXL 6-11
- [2] Plea para 5.2 CL 6-31
- [3] CL 6-159; 6-165
- [4] Conclusions CL 6-175
- [5] CL 6-278
- [6] CL 6-184 110- 15
- [7] Annex "F" POC CL 6-23
- [8] CL 7-19719-17
- [9] CL 7-197 119-25
- [10] 1942 EDL 202,206
- [11] 1958 4 SA 307 (T) 308 (A)
- [12] 1954 3 SA 906 (N) 909 F
- [13] 1972 1 SA 26 (A) 37-38
- [14] 1973 4 SA 635 (T) 636 (A)
- [15] 1976 4 SA 403 (A) on 409 G-H
- [16] Amended POC para's 5 and 6 CL 6-10 and 6-11
- [17] Plea par 5.2 CL 6-31
- [18] CL 01-3 paras 1.1-1.2
- [19] CL 6- 278
- [20] CL 7-186, 7-187
- [21] CL 7-197 line 9-18
- [22] CL 7-204; CL 7-205
- [23] CL 7-206

[24] CL 7-207

[25] CL 7-208

[26] CL 7-209

[27] Case No 853/2020 [2021] ZASCA 158 (8 November 2021)

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