

SOUTH AFRICA / JUDGMENT

Nell v Franzall Insurance Brokers CC (821/11) [2015] ZANWHC 61 (17 September 2015) [2015] ZANWHC 61

COURT

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

821/11

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

WEST DIVISION, MAHIKENG)

CASE

NO.: 821/11

In

the matter between:

JACOBUS
WILLEM ADRIAAN NELL
PLAINTIFF
and
FRANZALL
INSURANCE BROKERS
CC
DEFENDANT

JUDGMENT

Landman J:

Introduction

- [1] Mr Jacobus Willem Adrian Nell, the plaintiff, sues Franzall Insurance Brokers CC, the defendant, for damages suffered. The parties agreed and I ordered that the merits be separated from the quantum. This judgment concerns the question of the liability of the defendant for the plaintiff's loss.

The pleadings and issues

- [2] It is common cause that the plaintiff instructed the defendant to arrange for insurance cover for a new Mazda Bakkie that he was in the process of purchasing from Joss Motors. The defendant accepted the instruction. The defendant agrees that it was a term of the contract between the plaintiff and the defendant, that the defendant would at all times act with that degree of skill and care as could reasonably be expected from a short term insurance broker fulfilling the obligations which the defendant was required to fulfil.
- [3] It is common cause that the defendant provided the plaintiff with documentation which contained some errors but nevertheless informed the plaintiff, Joss Motors and Absa, the financier, that the Bakkie was insured as from 10 December 2008. The defendant did not inform the plaintiff that it was a requirement that he fit a tracker to the vehicle, in conformity with the policy, in order to enjoy cover.
- [4] The defendant has raised several defences to the plaintiff's claim. The first is that at the time the plaintiff requested the defendant to add the new Mazda vehicle, which he intended purchasing, to his insurance portfolio and to remove an existing vehicle, the plaintiff informed the defendant that he would be transferring the tracking device in the old Mazda into the new Mazda which he intended purchasing.
- [5] The second defence is that: '... on an assumption that the plaintiff, who was at all relevant times a duly admitted attorney of this Honourable court viz, could be taken at his word and on the assumption that the plaintiff who in the past knew of the requirements of a tracking device especially when the value of a motor exceeded a certain prescribed minimum value and in the knowledge that the plaintiff knew, as the defendant had advised the plaintiff's representative (on 23 April 2008), that a tracking device had to be fitted within a period of 7 days, the defendant had no reason to inform the insurer that no vehicle tracking device was installed in the motor vehicle or that no vehicle tracking device would be installed in the motor vehicle'.
- [6] The third defence, which overlaps with the previous defences, is that the plaintiff at all relevant times knew alternatively could reasonably have known that a vehicle tracking device had to be installed to ensure that theft and/or robbery and/or hijacking cover would exist.
- [7] The fourth defence is that on or about 22 April 2008 the defendant established that notwithstanding indications to the contrary by Quicksure Insurance the plaintiff's new Mazda had in fact not been added to the plaintiff's insurance portfolio. The defendant

thereupon instructed the insurer to immediately place the motor vehicle on cover (as it should have been since December 2007) and thereupon authored and issued, inter alia, a new schedule. It was at all material times the practice and policy of the insurer to grant the insured's whose vehicles were insured with the insurer a grace period of 14 days within which to install a tracking device if the relevant vehicle did not have one. In the event of an insured vehicle being stolen or robbed or hijacked during the grace period the insurer would still indemnify the insured albeit on the basis that an increased excess would apply.

- [8] The defendant informed the plaintiff's representative that as the vehicle had only been added to the plaintiff's insurance portfolio on or about 22 April 2008 the plaintiff still had 7 days within which to install a tracking device. The insurer repudiated the plaintiff's claim on the basis that no vehicle tracking device was installed at the stage of the theft. The defendant, however, denies that the insurer's approach is correct on the basis of the practice and policy of the insurer as set out above. The theft occurred within a period of 14 days after the motor vehicle was added to the insurance policy.
- [9] The fifth defence is that the plaintiff had a 'top-up' Policy (policy number 75836762) through ABSA, which if pursued by the plaintiff would have 'responded' to the plaintiff's claim for the loss of his vehicle.

The evidence

- [10] The plaintiff testified and then closed his case. The defendant closed its case without calling a witness.
- [11] The plaintiff is an attorney who has an extensive criminal practice. He is often only in the office outside court hours. In February 2007 he transferred his short term insurance business to the defendant. He required the defendant to look after his interests and insure his and his wife's household goods and vehicles. He kept his business with Quicksure Insurance (Quicksure).
- [12] When he transferred his business to the defendant, his Mazda Bakkie (the old Mazda) was insured with Quicksure as was a Volkswagen Polo. Each vehicle was fitted with a tracking device.
- [13] In December of 2007, the plaintiff traded in his old Mazda in order to purchase a new Mazda Drifter Bakkie (the new Mazda) from Joss Motors. The vehicle was financed by Absa Bank. The vehicle was required to be insured and the plaintiff instructed a representative of the defendant to have the new Mazda added to his existing policy. The defendant provided him with a document to prove to Joss Motors that the new Mazda was insured. The document states erroneously that a new Ford was insured with effect from 10 December 2007. The VIN number is correct save that it erroneously contains an extra digit.
- [14] The plaintiff believed that the new Mazda was insured and acted on it and collected his new Mazda which he registered in January

2008. In March 2008 the defendant provided him with a schedule to his policy. The plaintiff noticed several errors. One was that the old Mazda was still insured but the new Mazda was not reflected on the schedule. The plaintiff's secretary emailed and instructed a representative of the defendant to have the omission rectified. The plaintiff had no inkling that the error was more serious than a mistake on the schedule.

[15] 22 April 2008 saw a flurry of activity. The defendant emailed Quicksure as follows:

'Op 06/12/2007 is daar n faks aan julle gestuur om hierdie voertuig te skrap en 'n Ford Bantam moes bygevoeg word kan jy asb kyk wat aangaan en my baie dringend laat weet.'

[16] Later that day the defendant emailed the plaintiff's secretary as follows:

'Kan jy asb bevestig of die voertuig opsporing in het.

Adrian moet die bakkie vir voertuig inspeksie vat by een van die volgende plekke: PG OF GLASSFIT OF CHOP-CHOP.'

[17] The next day a representative of the defendant inquired from the plaintiff whether the vehicle was fitted with a tracking device. The email reads:

'Sal jy net seker maak, as daar wel n opsporing is voorsien my van 'n sertifikaat, indien nie het Adriaan 7 dae om een in te sit.'

[18] The plaintiff had the vehicle inspected by Chop Chop on 24 April 2008 and he made arrangements with a client, who installed such tracking devices, to bring the vehicle in to be fitted before the expiry of the time limit conveyed to him by the defendant.

[19] The plaintiff's new Mazda, Polo and household goods were stolen early in the morning of 27 April 2008. The tracking device had not yet been fitted. The new Mazda was not recovered. With the assistance of a representative of the defendant the plaintiff lodged a claim with Quicksure and Absa with whom he had a 'top-up policy'.

[20] On 7 July 2008 Quicksure repudiated the claim saying:

'Ons gee u hiermee kennis dat u bogenoemde eis om skadeloosstelling, voortspruitend uit 'n voorval wat na bewering 27 APRIL 2008 plaasgeving het, van die hand gewys is as gevolg van die feit dat die voorval nie gedek is in terme van die polis nie.

Daar is nie voldoen aan die minimum sekuriteitsvereistes nie.

Daar is geen opsporingseenheid in die motor gewees tydens verlies nie.

Verder is daar ook ten tye van die motor se byvoeging bevestig dat daar wel so 'n eenheid in die motor was.

Ons maak geen erkenning met betrekking tot u beweerde eis nie.'

(My emphasis.)

[21] On 2 September 2009 Absa also repudiated the claim on the following basis:

‘We are in receipt of your claim details relating to the incident that occurred on 27/04/2008.

After careful consideration we regretfully advise that we are unable to entertain your claim due to the following;

During the processing of your claim, we established that the claim has been rejected by Quiksure due to “the vehicle not being fitted with a tracking device”.

We refer you to Extended Cover policy:

General Exceptions

We shall not be held liable for:

“Any losses or claim arising where there is misrepresentation, non-disclosure or misdescription of any fact or circumstance, whether

in connection with:

-Your underlying policy

-Your underlying policy claim”

Please note that the above mentioned reasons for rejection may not necessarily be exhaustive.’

[22] The plaintiff attempted to obtain satisfaction through the office of the Ombudsman but met with no success.

[23] Finally the plaintiff sued the defendant.

Inferences

[24] The most plausible inference that can be drawn is that from the facts outlined above:

- (a) the defendant neglected to insure the new Mazda even though it confirmed in writing that the new vehicle was insured as from 10 December 2007;
- (b) the defendant became aware by 22 April 2008 that a necessary condition for insuring the new Mazda was that it must be fitted with a tracking device;
- (c) the defendant informed Quiksure that the new Mazda was fitted with a tracking device;
- (d) the defendant initiated an addition to the policy i.e. the insurance of the new Mazda with inception 22 April 2008 although it wrongly informed Quiksure that the new addition was a Bantam Bakkie;
- (e) the defendant requested the plaintiff to have the device fitted within 7 days – a period of its own making;
- (f) all this was done to cover up its failure to insure the new Mazda during December 2007.

Evaluation

[25] I turn to the defendant's defences.

[26] The defence of prescription was abandoned.

[27] The first defence is that the plaintiff told the defendant that he would be transferring the tracking device in the old Mazda into the new Mazda motor vehicle which he intended purchasing. This was not put to the plaintiff under cross-examination. I am entitled to infer that this defence was a fabrication.

[28] The second defence (I summarize) is that the plaintiff knew of the requirements of a tracking device and as the defendant had advised the plaintiff's representative (on 23 April 2008), that a tracking device had to be fitted within a period of 7 days, the defendant had no reason to inform the insurer that no vehicle tracking device was installed in the motor vehicle or that no vehicle tracking device would be installed in the motor vehicle. This defence was not argued but it must be considered. It is a defence in two parts. The first part and the third defence, is that there was no duty to inform the plaintiff that in December 2007 that his insurance cover would only be operative if he installed a tracking device and by a certain time and that until he did so he would pay a penalty if the vehicle was stolen. There is no merit in this because the defendant accepted the instruction to insure the vehicle which required it to inform the plaintiff of this vital and material information even if the plaintiff knew or should have known of the requirement for a tracking device. The insurance cover hinged upon the fitment of the tracking device. See *Lenaerts v JSH Motors (Pty) Ltd and Another* 2001 (4) SA 1100 (W) at 1109H-J where the court said:

'I consider that in our law, as in English law, the duty to exercise reasonable care and skill in appropriate cases extends to the duty to take reasonable steps to elicit and convey material information both from and to the insured. This includes information about terms of the policy which, if contravened, might leave the insured without cover. It is part and parcel of the broker's general duty to use reasonable care to see that the insured is covered.'

Invalid repudiation

[29] The second leg relates to the period during which the defendant had been more than three months in breach of its obligation to arrange the insurance cover for the new Mazda. It is convenient to also deal with the fourth defence of an invalid repudiation. Which is the only point that Mr Woodrow, who appeared for the defendant, argued.

[30] Mr Woodrow submitted that the plaintiff had not proved that he had no claim against Quicksure. It was submitted that the plaintiff did not prove that Quicksure was entitled to validly repudiate the claim. The contention has two legs.

[31] The first leg of the contention is that the plaintiff had not shown that the policy, which was said to be confined to the schedules, required the new Mazda to be fitted with a tracking device. This contention is at odds with the plea which avers that the policy contained such a

clause. The most that can be said in favour of this defence is that the schedules provide for an entry relating to a tracking device. Alongside this entry is a note that a tracking device has not been 'defined'. The meaning of this remark is obscure. But the schedules are only part of the policy. Other sections of the policy are to be found in the bundles of documents. The full policy, as it existed, at the material time has not been discovered which inevitably raises the question of how the defendant was able to service the plaintiff in the absence of a complete policy.

[32] Clause 2 of 'Quicksure Persoonlike Polis – Waarborge en Endossemente' dated 1 Augustus 2006 states:

'Voertuie wat by die polis gevoeg word waar goedgekeurde opsporingseenheide 'n vereiste is, het 14 dae om aan die vereiste te voldoen. Indien die voertuig gedurende die tyd gesteel word is 'n addisionele bybetaling van 15% van die eise koste van toepassing, op voorwaarde dat die Versekerde bewys kan lewer dat 'n afspraak gemaak was om die eenheid te installeer. Indien nie - is daar geen dekking van krag nie.'

[33] I have no doubt that the policy required the new Mazda to be fitted with a tracking device. This disposes of the first leg of the offence.

[34] This brings me to Mr Woodrow's alternative contention. It is that the policy (as I have found) contains clause 2 and that in terms of that clause the plaintiff was entitled to have the tracker fitted within 14 days of inception of the policy although there would be a penalty.

[35] This might have damaged the plaintiff's case but for the following:

(a) the defendant was aware on 22 April 2008 that it had not arranged cover for the Mazda (although it believed a Ford Bantam was required to be insured) and the defendant established that the plaintiff did not have a tracker fitted to the new Mazda and that it was essential for this to be done to insure the vehicle. However, the defendant did not inform that plaintiff that:

(i) it had not insured the new Mazda;

(ii) it planned to immediately arrange insurance cover by adding the vehicle to the plaintiff's policy;

(iii) the cover would not be completely effective until the plaintiff fitted the tracking device.

(b) instead the defendant sought to rectify its breach by surreptitiously and belatedly adding the new Mazda to the policy with effect from 22 April 2008.

(c) the plaintiff was not aware that he had 14 days and not 7 days within which to fit a tracker and the defendant did not inform him of this fact or right.

- (d) the plaintiff would still have been faced with the misrepresentation that Quicksure attributed to him, namely that the new Mazda was fitted with a tracking device.
- (e) the defendant did not inform the plaintiff that it, the defendant, was the source of the misrepresentation to Quicksure that the new Mazda was fitted with a tracking device.
- (f) there is no evidence that the defendant did anything to disabuse Quicksure of its perception that the plaintiff misrepresented the existence of the tracker to it.

[36] I find that Quicksure was entitled to validly repudiate the claim of the plaintiff. Apart from the inherent weaknesses in the defences raised by the defendant considered above they do not address the cornerstone of the plaintiff's case, namely that the defendant was in breach of its obligation to insure the new Mazda when instructed to do so in December 2007. The plaintiff's loss flows from the breach of this obligation.

[37] The fifth defence that the plaintiff had a 'top-up' Policy with ABSA is dependent on the plaintiff having a valid claim against Quicksure. As I have found that Quicksure was entitled to repudiate the claim this defence is without merit.

[38] I conclude that the defendant is liable for the loss suffered by the plaintiff as a result of its breach of contract. I do not find it necessary to consider whether the defendant is also liable for the plaintiff's loss in terms of the law of delict.

Costs

[39] Costs should follow the result. Mr Rossouw SC, who appeared for the plaintiff, submitted that costs should include the costs of senior counsel because serious but ultimately unfounded allegations were made in the plea as regards the character of the plaintiff. This necessitated the employment of senior counsel. I agree.

[40] In conclusion I must express my appreciation to both counsel for the extremely efficient and courteous manner in which the trial was conducted.

Order

[41] I make the following order:

1. It is declared that the defendant is liable for the loss suffered by the plaintiff as a result of the defendant's breach of contract.
2. The quantum of such loss shall be established at a hearing on a date to be determined by the registrar in conjunction with the legal representatives of the parties.
3. The defendant shall pay the plaintiff's costs which costs shall include the costs of senior counsel.

A A Landman

Judge of the High Court

APPEARANCES:

Date of hearing:

14 September 2015

Date of Judgment:

17 September 2015

Counsel for the Plaintiff:

Adv Rossouw SC

Instructed by:

Maree & Maree Attorneys

Counsel for the Defendant:

Adc Woodrow

Nienaber & Wissing Attorneys

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