

SOUTH AFRICA / JUDGMENT

Ponderosa Pine Trading 31 CC v Santam Limited (4108/2013) [2018] ZAECHGHC 30 (26 April 2018)

[2018] ZAECHGHC 30

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Brooks

CASE / FILE NUMBER

4108/2013

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION: GRAHAMSTOWN

CASE NO. 4108/2013

PONDEROSA PINE TRADING 31 CC Plaintiff

And

SANTAM LIMITED Defendant

JUDGMENT

BROOKS J

- [1] The plaintiff is a close corporation which carries on business as a wholesaler and distributor of boards and timber. Its operations are conducted by its sole member and from its principal place of business in Queenstown.
- [2] It is apparent from the evidence that the plaintiff owned a small number of trucks, referred to loosely as “ten ton trucks”.

During 2012 the sole member decided to purchase a truck capable of carrying a load of fifteen tons. This was in order to meet the increased demands of the plaintiff’s operations. He approached a local truck retail outlet and discussed his needs and various options with a salesman. Some of the options were discarded as being too expensive. According to the salesman, who also gave evidence, it was the sole member of the plaintiff who raised the possibility of fitting a tag axle to the rear of a “ten ton truck”, having heard that this would increase significantly the load capacity of such vehicle.

- [3] The evidence discloses that trucks of the nature with which this matter is concerned all have a nominated gross vehicle mass (GVM). This reflects the maximum weight of the truck plus its load permissible in order for the road use of the truck to remain legal. It is usually recorded on a data disc or plate affixed to the truck and in the official licensing authority's records. It finds expression on the licensing disc and vehicle registration papers issued in respect of the truck.
- [4] Another weight is recorded in respect of each truck. Known as the TARE, this is the weight of the vehicle itself. It may vary according to the nature of the load body fitted to the vehicle and in the event of additional features being fitted, such as a tag axle. Once determined after manufacture and when possible alterations are completed, this too appears in all the official records and on the data disc or plate affixed to the truck.
- [5] The actual permissible weight of the load which such a truck may carry lawfully is calculated by deducting the TARE from the GVM.
- [6] The GVM of a truck referred to colloquially as "a ten ton truck" is fifteen tons. In the case of a UD 100 truck, the model number of the "ten ton truck" available to the plaintiff through the salesman concerned, the TARE is in the vicinity of six tons, meaning that although it is colloquially referred to as "a ten ton truck", the weight of the load permitted is more in the order of nine tons.
- [7] A tag axle is a second rear axle which is fitted to a truck in a manner which allows the wheels driven by it to be lifted above the road surface when the truck is unloaded or carries only a light load, and also allows the wheels to be lowered and come into contact with the road when the vehicle is more heavily loaded. According to the evidence of the salesman, this feature "would double the payload", as he put it, allowing the modified UD 100 to carry a load weighing "in excess of fifteen tons".
- [8] The evidence discloses that the modification of a UD 100 truck by the addition of a tag axle was the most cost effective manner of providing the plaintiff with a truck capable of carrying the fifteen ton load desired by its sole member. In due course, a UD 100 truck modified by the addition of a tag axle was delivered to the plaintiff.
- [9] It is common cause between the parties that when the official registration papers were issued in respect of the plaintiff's

new truck the GVM was erroneously reflected as 15000 kg, or fifteen tons. The TARE recorded in the official licensing documentation, a figure of 7380 kg, was also wrong in that it was the TARE of the truck before it had been modified by the addition of a tag axle. Accordingly, the official documentation did not reflect the permissible maximum GVM and the inevitably heavier TARE which the modification had brought about.

- [10] Also not in dispute between the parties is the fact that a truck driver may only drive a truck with a particular GVM if he or she is the holder of a driver's licence which demonstrates that the driver is qualified to drive a truck with that particular GVM. If a truck driver drives a truck with a GVM which exceeds that for which he or she is licensed, effectively he or she is an unlicensed driver.[1]
- [11] The driver employed by the plaintiff to drive the modified truck was the holder of a valid code 10 C1 driver's licence. This qualified him to drive lawfully a truck with a GVM of less than 16000 kg, or sixteen tons.
- [12] On 13 June 2013 the modified truck belonging to the plaintiff was damaged beyond economic repair when the driver attempted to avoid a collision with an animal which presented itself on the roadway between Ngcobo and Queenstown.
- [13] It is common cause between the parties that after the collision a data plate was discovered underneath the modified truck. It had been fitted by the company responsible for the modification of the truck by the addition of a tag axle. It correctly recorded the new status of the truck. With the addition of the tag axle the truck had a GVM of 24000 kg, or twenty four tons.
- [14] The plaintiff had insured its assets with the defendant. In due course it lodged a claim with the defendant for the loss suffered as a result of the damage to the modified truck. The defendant repudiated liability for payment of the claim, leading to the present action.
- [15] In its plea, the defendant justifies its repudiation on the basis of a clause listed under the "Specific Exceptions" which form part of the sub-section of the policy which deals with the insurance cover of the plaintiff's vehicles. The clause stipulates:
- "1. The Company shall not be liable for any accident, injury, loss, damage or liability:*
- (a) ...
 - (b) ...
 - (c) Incurred while any vehicle is being driven by
 - (i) The insured...while not licensed to drive such vehicle,
 - (ii) Any other person with the general consent of the insured who, to the insured's knowledge, ... is not licensed to drive such vehicle, ..."
- [16] The defendant pleaded that the plaintiff's driver who was driving the modified truck at the time of the collision held a code 10 C1 license, entitling him to drive vehicles with a GVM of up to 16000 kg, or sixteen tons, whereas the modified truck had a GVM of 24000 kg, or twenty four tons. In the result, the driver was not licensed and the defendant was entitled to repudiate liability based upon the specific exception set out in the preceding paragraph.

- [17] The plaintiff filed a replication in which it placed reliance upon a further element of clause 1 (c) (ii) in the same portion of the contract of insurance for its persistence with the claim. The clause contains a qualification to the effect that the exclusion, or specific exception, relied upon by the defendant would not apply “if the insured was unaware that the driver was unlicensed and that the insured can prove to the satisfaction of the Company that, in the normal course of his business, procedures are in operation to ensure that only licensed drivers are permitted to drive insured vehicles.”
- [18] In the replication, the plaintiff also pleaded that the modified truck was registered as a vehicle having a gross vehicle mass (GVM) of 16000 kg and that accordingly the plaintiff’s driver was licensed to drive the modified truck. This was not pursued in the evidence or argument in due course.
- [19] The sole issue for determination is whether or not the plaintiff has demonstrated that it is entitled to rely upon the qualification set out in its replication. In that regard it was accepted by the plaintiff that it bore the onus of proof on a balance of probabilities.[2]
- [20] It is apposite to record that the evidence of witnesses called on behalf of both the plaintiff and the defendant was heard initially by the late Sandi J. Unfortunately he passed away before delivering a judgment in this matter. It is the view of the parties that much of the evidence led in the matter is common cause between them and that in the circumstances the most cost effective and efficient way to deal with the matter would be to produce the record of the proceedings and to argue the merits of the matter afresh before a different judge. This has now occurred. There is an agreement between the parties that costs should follow the result and should include the costs occasioned by the appearances before the late Sandi J.
- [21] Notwithstanding the considerable extent to which the objective facts relevant to this matter are common cause between the parties, the resolution of the central issue in the matter is dependent upon an assessment of the probabilities inherent in the evidence of placed before the court pertaining to the knowledge of aspects pertaining to GVM, TARE and determination of load capacity in respect of a truck which the plaintiff’s sole member held at the time of the collision. Closely linked thereto is an assessment of the evidence pertaining to his knowledge of the requirements and limitations imposed upon a driver by the different categories of drivers’ licenses. The sole member was the only witness called to give evidence on behalf of the plaintiff. The salesman with whom he dealt was called to testify on behalf of the defendant. There are differences in the evidence led to address the nature and extent of the sole member’s awareness (and therefore the plaintiff’s awareness as the insured) of the factors which would indicate that the plaintiff’s driver effectively was not licensed to drive the modified vehicle. In essence, mutually destructive versions were placed before the court. It is trite[3] that burdened with the onus, the plaintiff

“can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant’s, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant’s version is false.”

- [22] The plaintiff’s sole member confirmed that before purchasing the modified truck he had two “ten ton” trucks. It was necessary for him to acquire another truck to meet an increase in demand for the plaintiff’s products. He approached a Queenstown truck retail outlet with a view to obtaining a truck which could load fifteen tons. He stated that the salesman informed him that a UD 100 truck, capable of carrying a load of nine tons, would be able to carry a load of fifteen tons if it were fitted with a tag axle. He confirmed that the GVM is the total weight of the truck whilst the TARE is the weight of the truck without a load. He further confirmed that he had seen the original of the code 10 C1 license issued to the driver employed by the plaintiff and who was driving the modified truck at the time of the collision. This license enabled him to drive a truck with a GVM of less than 16000 kg, or sixteen tons. The plaintiff’s sole member also stated that the first time he saw the data tag or plate attached to the chassis of the truck which recorded that it had a GVM of 24000 kg, or twenty four tons, was after the collision.
- [23] Under cross examination, the plaintiff’s sole member conceded that on the information now available to him he was aware that the relevant driver was not licensed to drive the modified truck. He stated that he was not aware of this at the time of the collision. He conceded that before purchasing the vehicle he investigated various options. He confirmed that TARE refers to the weight of the truck itself and that this would increase if, for example, a load bed were to be added to the truck. He confirmed further that when a truck is loaded with fifteen tons, this weight is added to the TARE which, in itself, could be in the region of seven tons. He confirmed that the GVM includes the load on the truck and the TARE; therefore a vehicle with a loading capacity of fifteen tons would have a GVM of more than fifteen tons. If the vehicle had a TARE of seven tons, when loaded with fifteen tons the GVM would be twenty two tons, or 22000 kg. By this mechanism he conceded that if he wanted a truck which could carry fifteen tons then by definition the truck plus its load would weigh more than fifteen tons. He conceded that this is what he got when he purchased the modified truck. He further conceded that the data plate is attached to a vehicle in a place which is accessible to anyone who may wish to inspect the vehicle.

[24] Called to give evidence on behalf of the defendant, the salesman with whom the plaintiff's sole member dealt confirmed that his request was for a truck that could carry "plus" fifteen tons. However, he stated that it was the sole member who suggested that a tag axle could double the capacity of a UD 100 truck. He saw this as a way "to get a cheaper smaller truck to do the same job as the bigger more expensive truck". He had initially asked for a quotation for a "double diff", which standardly comes with a load capacity of about sixteen tons, but then considered this option to be too expensive.

[25] The salesman stated that the maximum permissible mass, or GVM, of a standard UD 100 truck with a single axle and no modifications,

without diesel and without a driver, is 15000 kg, or fifteen tons. Without a tag axle such a vehicle could carry at most a load of about nine tons. According to the salesman, the plaintiff's sole member knew that with a tag axle such a vehicle would have a load capacity of almost double this weight and, importantly, he knew that the total weight would be more than 15000kgs, or fifteen tons, in the result. The sole member of the plaintiff knew what he wanted and knew what he was getting. The salesman said that he knew a lot about trucks, that he was "not an innocent first time buyer" and knew that he was getting a truck that could load more than fifteen tons.

[26] It was an unchallenged opinion of the salesman that the plaintiff's sole member "knew he was getting a bigger truck [and] it was his responsibility to find out whether it was a code 10 or a code 14 driver needed now that it has been modified and upgraded."

[27] There being no real challenge to the veracity and accuracy of the evidence given by the salesman, it becomes necessary to evaluate in the context of that evidence the claim made by the sole member of the plaintiff that he did not know what GVM stood for, that he was otherwise confused and did not know that the modified truck could not lawfully be driven by a driver who only had a code 10 C1 license. In my view, such naivete is incompatible with the amount of knowledge on the part of the plaintiff's sole member which is demonstrated by the evidence given by the salesman. It is inconsistent with the probabilities surrounding the circumstances in which the purposeful and informed purchase of a substantially modified truck was negotiated by the plaintiff's sole member. These negotiations occurred against the background of the plaintiff's ownership of two "ten ton" vehicles, each with a GVM of 15000 kg, or fifteen tons, which were inadequate for the transportation of loads in excess of nine tons. This was known to the sole member of the plaintiff who sought a solution which would enable him to transport a load of fifteen tons in order to meet the increased demands of the market. Inevitably, the result, once achieved, would be a loaded vehicle with a GVM in excess of fifteen tons – more likely in the region of twenty two tons and certainly in excess of the limitation of sixteen tons imposed on a driver with only a code 10 C1 driver's license. This must have been evident to the plaintiff's sole member. Applying the principles set out in NATIONAL EMPLOYERS' GENERAL INSURANCE CO LTD v JAGERS [4] the balance of probabilities does not favour the plaintiff on the point. On the contrary, the probabilities favour the evidence

given by the salesman on behalf of the defendant. He had no substantial interest in the outcome of the trial. I am unable to find that his evidence was false or mistaken and falls to be rejected. Therefore, the plaintiff cannot succeed in discharging the onus on a balance of probabilities which must be discharged in order to bring it within the qualification to the clause of the insurance

contract which excludes the defendant's liability in the case of an unlicensed driver and thereby avoids its consequences.

[28] Even if I am incorrect in rejecting the claim made by the plaintiff's sole member that he was unaware that the plaintiff's driver was unlicensed, the mere acceptance of the subjective expression of this lack of knowledge on the part of the sole member would be insufficient to discharge the onus borne by the plaintiff.

[29] There is a second element to the qualification which the plaintiff alleges it is entitled to assert in response to the defendant's

repudiation. Not only must the plaintiff demonstrate that its sole member was unaware of the unlicensed state of the driver, it is also necessary for the plaintiff to "prove to the satisfaction of the Company that, in the normal course of his business, procedures are in operation to ensure that only licensed drivers are permitted to drive insured vehicles."

[30] How is this element of the clause containing the qualification to be interpreted? It has been held[5] that whilst the starting point remains the wording in the document itself, the process of interpretation does not stop at a perceived

literal meaning of the relevant words but considers them in the light of all relevant and admissible context, including the circumstances

in which the document containing the words came into being. Moreover, the full context must be considered "in accordance

with sound commercial principles and good business sense so that it receives a fair and sensible application." [6] None of these principles is offended by an approach which involves interpreting the relevant portion of the contract of insurance with "common sense and perspective" in order that it might be given a "commercially sensible" meaning. [7]

[31] Viewed in the light of the principles set out in the preceding paragraph, it is clear that the purpose of the wording in the

qualification is to regulate the potential exposure of the defendant to risk as much as may be practical by ensuring that where a driver is unlicensed this circumstance has arisen notwithstanding diligence on the part of insured in the initiation and pursuit of procedures designed to eliminate or at least minimise the risk of an unlicensed driver driving the vehicle insured by the defendant. Such procedures must surely include, by way of example, the physical checking of data tags or plates attached to a particular vehicle, the physical checking of the correctness of the documentation issued by the licensing authority in respect of such vehicle and

the validity of the actual driver's license both as to the GVM limit attached thereto and the possibility that the license may have expired. There was no evidence placed before the court to demonstrate that any such procedures were in place within the normal course of the plaintiff's business or that any such procedures had been adopted by the plaintiff's sole member. Had there been, the new data plate would have been seen. Or the plaintiff's sole member would have stated that, notwithstanding a diligent search, he couldn't find it. The evidence to the effect that he had seen the original of the driver's license is insufficient to discharge the onus placed upon the plaintiff by this clause in the contract of insurance.

[32] It follows that in these circumstances the plaintiff was unable to "prove to the satisfaction of the company that, in the normal course of his business, procedures are in operation to ensure that only licensed drivers are permitted to drive insured vehicles".

[33] In conclusion, the plaintiff has failed to discharge the onus of proof required to bring the plaintiff within the ambit of the qualification and to challenge the defendant's repudiation of its claim successfully.

[34] The following order will issue:

"1. The plaintiff's claim is dismissed.

2. The plaintiff is directed to pay the costs of the action, such costs to include the costs occasioned by the appearances before Sandi J and the preparation of a record of those proceedings."

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances

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For the respondent: Adv. A D Schoeman SC

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Grahamstown

Date heard:

17 April 2018

Date delivered:

26 April 2018

- [1] GERSON HOVEKA t/a HOVY NAMIBIA TOUR AND SAFARI v FGI NAMIBIA LTD 2002 JDR 0321 (Nm)
- [2] JOOSUB INVESTMENTS v MARITIME AND GENERAL INSURANCE COMPANY LIMITED 1990 (3) SA 373 (C)
- [3] NATIONAL EMPLOYERS' GENERAL INSURANCE CO LTD v JAGERS 1984 (4) SA 437 (E)
- [4] Note 3 supra
- [5] BOTHMA-BATHO TRANSPORT (EDMS) BPK v S BOTHMA & SEUN TRANSPORT (EMDS) BPK 2014 (2) SA 494 (SCA)
- [6] HYPROP INVESTMENTS LTD AND ANOTHER v SHOPRITE CHECKERS LTD (315/10) [2011]ZASCA 51 (31 MARCH 2011)
- [7] EKURHULENI METROPOLITAN MUNICIPALITY v GERMISTON MUNICIPALITY RETIREMENT FUND 2010 (2) SA 498 (SCA) paras [12] – [13].

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