

SOUTH AFRICA / JUDGMENT

Samchem Corporation (Pty) Ltd v Compass Insurance Company Limited (2021/27074) [2023] ZAGPJHC 1233 (30 October 2023)

[2023] ZAGPJHC 1233**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Dlamini

CASE / FILE NUMBER

2021/27074

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: 2021/27074****NOT REPORTABLE****NOT OF INTEREST TO****OTHER JUDGES****REVISED****In the matter between:**

SAMCHEM
CORPORATION (PTY) LTD
Plaintiff
And
COMPASS
INSURANCE COMPANY LIMITED
Defendant

Coram:

Dlamini J

Date of hearing: 27 July 2023
Date of delivery: 30 October 2023
This judgment is deemed to have been delivered electronically by circulation to the parties' representatives via email and shall be uploaded onto the caselines system.

JUDGMENT

DLAMINI J

- [1] The plaintiff is claiming money judgment against the defendant in the sum of R16 349 849.21 for an indemnity arising out of a marine cargo insurance contract issued by the defendant in favour of the plaintiff. The claim is opposed by the defendant.
- [2] At the hearing of the trial, the plaintiff brought an application to amend its particulars of claim. The application to amend was not opposed by the defendant and was accordingly allowed.
- [3] The facts underlying the dispute are largely common cause.
- [4] On or about 31 July 2020 the plaintiff ("Samchem") and the defendant ("Compass") entered into a written insurance contract (the insurance agreement). In terms of the agreement, the defendant insured the transportation of the plaintiff's face mask from Johannesburg until the offloading and delivery of the face mask in Durban.
- [5] The insurance agreement is constituted by a Schedule and a general policy wording.
- [6] It is common cause that the truck carrying the face mask was hijacked on 5 August 2020 and the face masks were stolen. The plaintiff filed its claim for the loss of the goods with the defendant.
- [7] On 9 October 2020, the defendant repudiated the plaintiff's claim, whereafter the plaintiff launched this application.
- [8] The plaintiff called two witnesses, Mr Laserow a director of the plaintiff, and Mr David Mokgayi, the driver of the hijacked truck.
- [9] The defendant called four witnesses, Mrs Handy, a representative at the time of the defendant, Mrs Moodly, an employee of Imperial Truck Rental, Mr Rugbeer, and Mr Reddy both employees of MiXTelematics Africa (Pty) Ltd.
- [10] All the witnesses confirmed the truth of their statements under oath and were then cross-examined.

- [11] Mr. Laserow for the plaintiff testified that during the Covid-19 pandemic, his company Sanchem purchased face masks from a company in Hong Kong. The masks were delivered at OR Tambo International Airport for the plaintiff to transport and deliver the mask to a client in Durban. Mr. Laserow avers that he then contacted Mr. Bernie Beaumont (“Bernie”) his insurance broker to obtain quotes for the insurance of the transportation of the mask to Durban. He says that on 30 July 2020, Mr Beaumont advised him that he had obtained insurance cover from Compass to transport the goods.
- [12] On 31 July 2020, Samchem and the defendant concluded a written insurance agreement. Mr Laserow avers that he then hired a truck and a driver Mr. Mokgayi to drive and transport the goods to Durban. On 5 August 2020, he learned that the truck and its goods were hijacked near Vosloorus. The truck was later recovered however the goods were not. Hence, this claim.
- [13] Mr David Mokgayi confirmed that he was hired by Mr. Laserow to drive the hired truck that contained the face mask to Durban. On the way near Vosloorus, he was hijacked at gunpoint, and face masks were stolen. The plaintiff then closed its case.
- [14] In my view, nothing significant came out in the cross-examination of both Mr. Laserow and Mr Mokgayi.
- [15] The defendant called Ms. Margaret Handy. She testified that she was at the time employed by Paragrim Risk Consultants (Pty) Ltd as a marketer. She confirmed that she was contacted by Mr. Beaumont who required on behalf of the plaintiff terms of insurance of a once-off, all-risk transit for personal protective equipment (PPE's) face mask from Johannesburg to Durban, by professional third party carriers (“TP”). She insist that had Mr. Beaumont not written that the conveyance would be by professional third-party carriers, she would have referred the proposal to one of her superiors at Paradigm or Compass to check whether the risk would be acceptable. She avers that if her superiors had decided to accept the risk at all, it is likely that the premium rate and excess payable by the insured in the event of a loss would have been adjusted upwards because of the high risk imposed by the insured.
- [16] Ms, Handy admitted that the word “life” tracking in the warranty was a typographical error and that it should have read "live". She says she could not comment on the legal consequences of the warranty as she was not a legal expert.
- [17] Under cross-examination Ms Handy conceded, that although Mr Beaumont sought a quotation for TP, the policy wording permitted conveyance by owned, hired, or operated by the insured. Ms. Handy also, conceded that after the plaintiff's claim, Compass changed its policy wording to insert to the requirement that the satellite tracking device must be monitored.

[18] The issue in dispute is whether the plaintiff breached a warranty regarding the tracking of the carrying conveyance ("the warranty") and the requirements that the tracking devices "Provide Life Tracking At All Times". Whether the plaintiff materially increased the risk without consent of the defendant by hiring a vehicle and employing a driver to convey the goods instead of using professional third-party carriers. In light of this, whether the plaintiff made a material misrepresentation that entitled Compass to decline the indemnity.

MISREPRESENTATION

[19] The legal principles of misrepresentation in our law are now well established, namely that:

19.1 A misrepresentation was made

19.2 That it was material and,

19.3 That it induced the contract

[20] Samchem submitted that Mr. Beaumont's request for quotation does not qualify as a statement of past or present fact. Even if the request for quotation is considered a representation, there is no evidence that it was material and induced the contract. That is so, insists the plaintiff because having been asked to quote a price for a conveyance by a professional third-party carrier, Ms. Handy decided to quote for transportation that expressly included a road conveyance owned, hired, or operated by the insured.

[21] Furthermore, the plaintiff avers that it cannot be argued that the defendant was subjectively induced to conclude the insurance agreement based on Mr. Beaumont's quotation when it chose to quote and contract on a different basis. I am persuaded by Samchem's submission in this regard and will elaborate on this point on my reasons below.

[22] The case made by Compass is that if Mr. Beaumont of the plaintiff had advised Ms. Handy that the insured hired a truck and employed a driver instead of using a professional third-party carrier, she would probably not have accepted the proposal, at the very least without first consulting her superiors. Even if Compass decided to accept the risk at all, the premium rate and the excess would likely have been adjusted upwards to take into account the increased risk. Compass submitted that when the plaintiff signed the insurance contract

on 31 July 2020, based on what Mr. Beaumont had assured Compass that the conveyance would be by professional third parties, the plaintiff instead resorted to hiring a vehicle and a driver, this constituted a material pre-contractual misrepresentation which induced the contract and which entitled Compass to decline insurance.

[23] The common law duty to disclosure in terms of Section 53 (1) of the Short-Term Insurance Act 53 of 1998 was succinctly set out by the Court in *Regent Insurance v King's Property Development*

[1] as follows;

23.1 The requirement of materiality is an objective one, judged not from the point of view of the insurer but from that of a reasonable and prudent person. The question is thus whether the reasonable person would have considered the fact (not disclosed or misstated) as relevant to the risk and its assessment by an insurer.

23.3 The test for inducement remains subjective – was the particular insurer induced by a material misstatement to issue the policy?

[24] The trite principle of our insurance law is that warranties must be interpreted favorably for the insured due to their impact on the liability of the insurer. See, *Kliptown Clothing Industries (Pty) Ltd v Marine & Trade Insurance Co SA Ltd* [2] *Guardrisk Insurance Company Ltd v Café Chameleon CC* [3].

[25] It is useful at this stage to look at the material terms of the contract and how it defines conveyancing. The term transit was defined as “ Road conveyancing (including conveyances owned, hired or operated by the insured”.

[26] In general, contracting parties possess enough freedom in choosing how they structure their agreements, and it is not the function of the court to protect consenting parties from bad bargains. The established principle of our law of contract is that legal certainty and the notion of *pacta sunt servanda* must always be honored and enforced by our courts.

[27] In my view, Compass's submission that there was misrepresentation made by the plaintiff is meritless and stands to be dismissed. This is so because, on a sensible and business-like interpretation of the Schedule and policy wording, Compass expressly permitted the plaintiff to convey the goods in an owned, hired, or operated by the plaintiff. Even if, it can be assumed that Mr. Beaumont requested a different quotation, it is Compass itself that chose to contract with the plaintiff in the manner that gave the plaintiff the choice to hire the truck and appoint its own driver instead of conveying the goods with a TP. Sight should not be lost that the insurance contract was drawn up by Compass itself. The defendant was at liberty and had all the opportunity to include all the relevant terms and conditions that it deemed essential to protect itself. This Compass failed to do.

[28] I am therefore satisfied that there was no misrepresentation by the plaintiff, it is Compass itself that permitted the plaintiff to transport the mask in the manner that the plaintiff did.

BREACH OF WARRANTY

[29] It is common cause that the purpose of the insurance agreement was to indemnify the plaintiff against the loss of the cargo, that is the face mask. It is also not in dispute that the defendant added an express warranty that the must be "life" tracking of the motor vehicle.

[30] During the hearing of the matter, it was much agreed between the parties that the term "life" tracking is misplaced, and that a sensible interpretation is that the contract should have read “live” tracking. Mr Rugbeer testified that in essence there is no difference between the Track and React service and the tracking service in so far as the communication of what Mr.

Rugbeer referred to as automatic vehicle locations (AVL) signals is concerned. It is a common cause that the tracking device that was installed in the truck used a global positioning system (GPS) to send information about the truck's position at set intervals to an internet-based user interface. The only difference between the tracking service and the Track and React service is that in the latter the AVL signals are monitored.

- [31] On this score, Samchem submits that the defendant's case is that this Court should read "live" as meaning monitored. This is so because according to the plaintiff, Mrs. Handy's evidence was that after the plaintiff's claim, Compass changed its policy wording to insert the requirement that the satellite tracking device must be monitored and that it did so because it realised that there was a gap or ambiguity in the policy wording. Accordingly, there is no basis for this Court to "read in" the requirement of monitoring.
- [32] in the main Compass submitted that the purpose of the warranty was the constant (Live... At All Times") observation of the carrying conveyancing to prevent or reduce the risk of the theft of the cargo. The defendant insists, that the warranty would otherwise not serve its purpose if it were to be interpreted so that the sending of electronic signals without observing them would be sufficient. Accordingly, Compass is adamant that the plaintiff has breached the warranty and this claim must be dismissed.
- [33] In my view, Compass's submission in this regard has no merit and stands to be dismissed. Compass, submission in this regard suffers the same challenges as it did in relation to the issue of misrepresentation above. It is the defendant itself that only required in terms of the warranty that the should only be "life" tracking. Once the parties have agreed that "life" tracking should have meant live tracking, this must thus be the end of this inquiry.
- [34] Furthermore, Nowhere in the warranty is it stipulated that the tracking must be monitored. This requirement was an afterthought on the part of Compass and was only raised after the plaintiff had issued this claim This much was admitted by Mrs Handy, who testified that the insurance contract was standard and did not contain the word "monitored".
- [35] Mrs Handy further confirmed that Compass changed its policy wording to include that the satellite tracking device must be monitored after the plaintiff's claim. It is evident that this amendment was a result of the realisation on the part of Compass that the policy wording was ambiguous and Compass failed to remove this ambiguity in the warranty when it contracted with the plaintiff.
- [36] I am precluded from including the term "monitored" in this contract as this will result in this court making a contract for the parties in circumstances where the SCA in Endumeni, [4] cautioned that the courts must not interpret contracts in a manner that will result in the court making a contract for the parties other than the one they in fact made.
- [37] In light of the above, I am satisfied that there was no breach of the warranty on the side of the plaintiff.

[38] For all the reasons stated above I am satisfied that the plaintiff's claim must succeed and the plaintiff is entitled to the orders that it seeks. I make the following order:

ORDER

1. The defendant is ordered to pay the plaintiff the sum of R16 311 032. 92
2. The defendant is ordered to pay interest on the aforesaid amount at the rate of 7% per annum from 9 October 2020 until paid in full.
3. The defendant is ordered to pay the costs of the action.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 27 July 2023.

Delivered: 30 October 2023.

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[1] 2015 (3) SA 85 (SCA)

[2] 1961 (1) SA 103 (A)

[3] 2021 (2) SA 322 (SCA)

[4] 2012 (4) SA

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