

SOUTH AFRICA / JUDGMENT

Unitrans Freight (Pty) Ltd v Santawi Ltd (13515/02) [2002] ZAGPHC 28 (13 September 2002)

[2002] ZAGPHC 28

COURT

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

13515/02

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO:13515/02

DATE:2002-09-13

In the matter between

UNITRANS FREIGHT (PTY) LTD.....Applicant

and

SANTAWI LTD.....Respondent

JUDGMENT

WILLIS, J: The defendant has taken exception to plaintiff's particulars of claim on the basis that it does not disclose a cause of action against the defendant. The relevant portions of the particulars of claim read as follows:-

"3. At all material times hereto plaintiff bore the risk in and to an ERF 360 truck/tractor, registration number NC 791 ("the ERF") which it was hiring at a monthly charge of R15 000,00 and which it was using in the conduct of its business.

4. 4.1 On 24th March 2000 the ERF was being driven in a northerly direction on the R563 Krugersdorp/Hekpoort Road and it commenced a right turn into the intersection of the N1 roadway leading to Pretoria and the place hereinfore described is within the jurisdiction of this court.

4.2 At the time and place aforesaid a collision occurred between the ERF and an Isuzu motor vehicle having registration number DGH 886NW there and then being driven by one R P Shai.

4.3 The said Shai was acting within the course and scope of his employment with De Kroon Brandstof Verspreiders BK ("De Kroon"),

alternatively Shai was driving at the instance of or under the direction of De Kroon, further alternatively for De Kroon's benefit."

It is then alleged that the cause of the collision was solely due to the negligence of the said R P Shai and the usual allegations with regard to negligence are made. There is then an allegation as to the damages that were suffered and then the particulars of claim continue as follows:-

"8.1 At all material times hereto the Isuzu motor vehicle driven by R P Shai was covered by a policy of insurance under No. which was issued by the defendant to J G Olieverspreiders of P O Box 582, Brits.

8.2 The wording of the policy issued by defendant to J G Olieverspreiders in so far as it concerns the Isuzu motor vehicle is annexed hereto marked "B". In terms of subsection "(b)" of Annexure B the defendant indemnified any person driving the said vehicle (the Isuzu) with the consent of the insured, that is to say J G Olieverspreiders.

8.3 At the time of the collision between the ERF and the Isuzu, the latter motor vehicle was being driven for and on behalf of De Kroon with the knowledge and consent of J G Olieverspreiders.

9.1 De Kroon was placed under a winding-up order by the Transvaal Provincial Division of the High Court on 30 January 2001.

9.2 By virtue of the provisions of the Insolvency Act, the defendant is liable to indemnify the plaintiff for the loss and damage which plaintiff has suffered."

It will immediately become apparent that there is no contractual nexus nor any delictual nexus between the plaintiff and the defendant. This much was conceded by Ms Crutchfield who appeared for the plaintiff. Ms Crutchfield submits that the provisions of section 156 of the Insolvency Act No. 24 of 1936, however, create the liability. This section reads as follows:

"Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover

from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured." Mr Crutchfield conceded that if the words "another person" appearing after "indemnify" and before "hereinafter called the insured" were taken to mean the insured as such person is ordinarily understood, i.e. the policyholder, then the particulars of claim would indeed be excipiable. She submitted that the words "another person" referred to earlier, according to their plain, ordinary and literal construction meant literally another person. Even if one is to adopt this construction of the words "another person", it is significant that the words are qualified as follows, "is obliged to indemnify". It is obvious to me that the obligation can only arise from a contract and the contract must be between the parties concerned. I may illustrate the position as follows: Let us suppose that A (let us call her the insurer) agrees with B (let us call him the insured), that if upon the happening of an uncertain future event B is liable to pay C a certain sum of money, A will pay C that sum of money. The uncertain future event occurs. The obligation of A to pay C can only arise if B asserted because the contract was entered into between A and B. C cannot assert it against A. To this Ms Crutchfield submitted that the law with regard to a stipulatio alter/ would apply. She referred me to the following extract which appears in the South African Law of Insurance, 3rd ed by Gordon and Getz at p.264 which reads as follows:

"Before the third person has accepted the benefit he acquires no rights and the insurer and the insured may agree to cancel or modify the benefit. But the insured cannot unilaterally revoke it ... Once the third person has accepted the benefit he acquires the right of a party to the contract. The benefit may not be revoked without his consent. If the insurer fails to implement the benefit he may sue for damages or specific performance."

The relevant portion of the agreement which was annexed to the particulars of claim reads as follows:

"Die versekeraar sal ook enige persoon skadeloos stel wat sodanige voertuig op bevel van die versekerde of met die versekerde se toestemming bestuur of gebruik met dien verstande ..."

and then there are various qualifications. It is important to note that the indemnity applies to any person who drove the vehicle on the instructions of the insured or with the insured's consent. It does not apply to a person in the position of the plaintiff. In other words, there is not a general indemnity given to anybody but only an indemnity to a person who drove the vehicle with the consent of the insured or upon the insured's instructions.

Accordingly, in my view, the exception was well taken. The following order is made:

1. The exception is upheld.
2. The plaintiff is given leave to file amended particulars of claim within 20 days of this order.
3. The plaintiff is to pay the costs of the exception.

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