REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 18463/2010

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

....
DATE SIGNATURE

In the matter between

LLOYDS OF LONDON *c/o* LLOYDS OF SOUTH AFRICA **PLAINTIFF**

and

BARAN TRANSPORT CC **DEFENDANT**

J U D G M E N T

Wepener J:

[1] The plaintiff, an insurer or underwriter, sues the defendant for repayment of an amount paid to the defendant pursuant to damages sustained to the vehicle of the defendant, insured by the plaintiff. The plaintiff's allegations are, generally stated, that it paid out for repairs to the insured vehicle whilst believing that it was obliged to do so. However, by virtue of an exclusionary clause contained in the agreement of insurance, it

was not obliged to indemnify the defendant. It is alleged that the facts which the plaintiff rely on to avoid liability only came to its attention after paying out the amount for the repairs of the vehicle.

[2] The clause relied upon by the plaintiff reads as follows:

> '*Specific exceptions:*
>
> *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 under the influence of intoxicating liquor or drugs…*'

[3] In addition, the plaintiff alleges that '*any claim made under the agreement of insurance which is in any respect fraudulent or in which any fraudulent means or devices are used, by the defendant or anyone acting on their behalf or with their knowledge or consent to obtain any benefit under the Insurance agreement or if any event is occasioned by the wilful act or connivance of the defendant, then the benefit under the Insurance agreement in respect of such claim shall be forfeited.*' The plaintiff alleges that such was the case in this matter and the defendant should forfeit any benefit.

[4] A third issue to be determined is what the terms of the agreement between the parties were. It is common cause that an agreement existed and the parties accept that fact. The defendant, however, put the plaintiff to the proof of the terms of the contract that existed between them. As a result of my finding on the first two issues raised for consideration it is unnecessary for me to determine the exact terms of the contract.

[5] On the assumption that the insurance agreement containing the exclusionary clause, above, was indeed the agreement between the parties, I turn to deal with the two factual issues i.e. whether the driver was under the influence of intoxicating liquor and whether the defendant made fraudulent misrepresentations when submitting its claim.

[6] The evidence presented on the first issue is that of Inspector Tsotetsi ('the inspector') and Mr. Enoch Tsotetsi, a co-employee of the driver of the truck, which formed the subject matter of the insurance claim.

[7] The inspector testified that on 24 November 2008 at about 14h20, he attended the scene of an accident. There had been two incidents at the scene. First, a vehicle had collided with one of the road workers who did construction work in the area and secondly, the insured vehicle had overturned and fell onto a tow truck, whose occupant was fatally injured as a result of the incident.

[8] The inspector concentrated on the second incident and found the driver of the insured truck upon the scene. He established that an ambulance had come up in the wrong direction of an off ramp, against the flow of traffic. The driver of the insured vehicle confirmed this and stated that he had swerved out for the ambulance. The inspector confirmed the facts of the incident with other persons on the scene.

[9] So much for the evidence regarding the collision. There is nothing in this evidence to show the manner of driving of the driver of the insured vehicle from which it can be concluded that he was not able to properly control his

vehicle. On the contrary, the evidence tends to show that the conduct of the driver of the ambulance caused an emergency situation and that the driver of the insured truck was obliged to swerve away in order to avoid a collision. This lead to the truck overturning.

[10] The inspector then realised that the driver of the insured vehicle smelt of alcohol. He said that the driver had bloodshot eyes. He further observed that his speech was slow as if deliberately attempting to compose himself. The driver stated that he had been drinking the day before. The inspector also stated that the driver was cooperative and that he had sustained injuries to his head. He confirmed that the driver gave an account of the incident that seemed acceptable. Although in a state of shock, the driver had a clear conversation with the inspector. He also noted that the driver's balance was not disturbed and described him as being stable. He confirmed that a sister drew a blood sample of the driver. Under cross-examination he confirmed that it was the smell of alcohol that primarily actuated him to arrest the driver of the insured vehicle. The inspector also stated that he attended court from time to time in relation to charges against the driver of the insured vehicle, but he did not know what happened to the case against the driver.

[11] Without considering the evidence presented for the defendant save, for one aspect, which I will refer to, I have to decided whether the evidence lead by the plaintiff shows on a balance of probability that the driver was under the influence of intoxicating liquor with the result that the exclusionary clause can be relied upon by the plaintiff. Mr Hollander, appearing on behalf of the plaintiff, accepted that the plaintiff had the onus to prove that the driver was indeed under the influence of intoxicating liquor. In order to find that the driver was under the influence of intoxicating liquor, it is necessary to find that the driver's skill and judgment, normally required of a driver in the manipulation of a vehicle, were indeed diminished or impaired as a result of the consumption of intoxicating liquor (see *Price v Mutual and Federal Insurance Co (Pty) Ltd*

2007 (4) SA 39 (SECLD) at para 10 and *Incor General Insurance Ltd v Boonzaaier NO* 1974 (4) SA 200 (C) at 203C-E.)

[12] It appears that, despite the positive factors in the driver's favour as testified to by the inspector, the plaintiff relies on four aspects to argue that I should infer that the driver was under the influence of intoxicating liquor. These are: the smell of liquor; the bloodshot eyes; the slow speech; and the driver's admission to having taken liquor the previous day.

[13] However, the co-worker, Mr. Tsotetsi, during his cross-examination, virtually by chance mentioned that the driver normally speaks very slowly. Only three factors can therefore be relied upon by the plaintiff in order to attempt to discharge the onus upon it that the driver's faculties were impaired. This is the smell of liquor, bloodshot eyes and the driver's admission of having consumed alcohol the previous day. In my view, neither of these three factors can refute the fact that driver was composed, gave a clear and acceptable account of what happened and appeared to be balanced. There is nothing to show that his ability to manipulate the vehicle was impaired. His version that the ambulance caused him to swerve was corroborated on the scene and it can not be inferred that his driving ability was impaired at the time of the accident.

[14] I am of the view that the plaintiff failed to establish the facts required for the exclusionary clause to be available to it to avoid it liability under the agreement of insurance, should that clause indeed form part of the agreement.

[15] The plaintiff's reliance on an exclusion of liability based on the alleged fraudulent statements on the claim form is by and large based on the fact that

the form notes that the driver was not tested for alcohol or drugs whilst in truth and in fact, he was so tested. Mr Barnard, a manager in the employ of the defendant, testified that the information contained in the form is the exact information which he had in his possession as supplied by the driver when he returned to work a week or two later. He also said that on the day after the incident it was found that the driver had been released by the police and he found no indications that he would be charged for any offence.

[16] I have observed Mr. Barnard in the witness stand and there is no reason to disbelieve him. The fact that he is not proficient in a second language is of no moment. He answered questions to the best of his ability and made a good impression on me. There are not contradictions or inherent improbabilities in his evidence which would lead me to doubt his evidence. One aspect of his evidence was criticised by Mr Hollander. Mrs Groenwald testified that she telephoned a Mr Barnard of the defendant during March 2009 to discuss the issue of the driver being under the influence of liquor at the time of the accident. She said that Mr Barnard said that the driver had run away. Four observations need to be made in regard to this evidence. Firstly, the driver indeed absconded from his work sometime after the accident. Secondly, why would Mr Barnard give such an answer if he knew what he had filled in on the claim form during December 2008? Thirdly, if the issue was discussed with Mr Barnard the underwriter knew about the problem during March 2009 then why did it pay the claim in April 2009? Fourthly, there was some uncertainty in the manner in which Mrs Groenewald gave her evidence when she was asked whether she could be mistaken. I am of the view, that her evidence does not detract from the veracity of Mr Barnard’s evidence. I accept his evidence as true. His explanation of how it came about that the form contained the information that it does has a ring of truth and I find the information was supplied in the bona fide belief that it was true.

[17] The only argument before me was that the information was fraudulently supplied and thus it would allow the plaintiff its liability under the agreement of insurance. As a result of the factual finding made by me, the plaintiff failed to establish a basis to rely on the exclusion of liability based on fraud.

[18] At the end of the case presented for the plaintiff, the defendant asked for absolution from the instance. I refused the application and said that I will give my reasons during judgment. These reasons have to a large extent become academic but in short, and based on the evidence presented by the plaintiff, the following was the position when it closed its case. On the evidence before me, the information supplied to the underwriter was clearly wrong, whether falsely or innocently supplied was a matter of inference. Where there are two inferences to be drawn of more or less equal probability, absolution will be refused. The information on the form may well have been as a result of an innocent mistake or as a result of a deliberate falsification but that was not to be speculated about at the stage of the proceedings when absolution was sought. On that basis alone, I was of the view that the court may possibly find for the plaintiff and the other considerations did not come into play. In the circumstances I refused absolution of the instance.

[19] In all the circumstances the plaintiff failed to prove its case against the defendant on a balance of probabilities on any of the factual basis advanced by it. I consequently make the following order:

'The plaintiff's claim is dismissed with costs.'

WEPENER J
JUDGE OF THE HIGH COURT

COUNSEL FOR THE PLAINTIFF: *Adv L Hollander*
PLAINTIFF'S ATTORNEYS: *Gjersoe Incorporated*

COUNSEL FOR THE DEFENDANT: *Adv S Du T Maritz*
DEFENDANT'S ATTORNEYS: *Esthe Muller*

DATE/S OF HEARING: *10 - 11 October 2012*

DATE OF JUDGMENT: *16 October 2012*