

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO: 36990/2012

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> /NO
(3)	REVISED.
	<u>14/11/2014</u>
	DATE
	<u>L. Webster</u>
	SIGNATURE

In the matter between:

ZURICH INSURANCE COMPANY

PLAINTIFF

AND

G DE WITT T/A OVERKRUIN VERVOER

DEFENDANT

JUDGMENT

WEBSTER J

1. The plaintiff in this matter instituted an action against the defendant arising from a motor vehicle accident which took place on the evening of 29 July 2009 at the Roodeplaat dam. The defendant instituted a claim with the plaintiff, the insurance company with which the Vito vehicle which was damaged in the said accident was insured. The claim was instituted on 5 August 2009. The insurance claim consisted of two components namely (i)

the damage to the Vito vehicle of which the defendant is the registered owner; and (ii) the damage to the property of Mr and Ms Joubert.

2. The claim was settled in the amount of R188 895.18 and paid to the various service providers. The amount was computed as follows:

Pretoria Loss Adjusters	R855.00
Nokeng Cables	R3 420.00
Precision and Sons	R184 620.18

3. The plaintiff investigated the incident and came to the conclusion that the defendant made a misrepresentation of what in fact occurred on the evening of the incident. The plaintiff alleges that the driver of the vehicle, the defendant's son, was under the influence of alcohol on that night and therefore the accident was not caused by the perceived hi-jacking as stated in the claim form. The defendant is of the opinion that he could not have been aware of the state of sobriety of his son, the driver of the vehicle, at the time of the accident and therefore that the plaintiff is still liable to settle the claim.
4. The first witness, Mr Ziaan Le Roux is in the employ of the plaintiff, Zurich Insurance Company for a period of five years in the litigation claims department. He confirmed that the document appearing at pages 49 to 52 of the bundle of documents is indeed the claim form completed by the defendant to this action. The claim form makes mention of the damage to the property of the third party, Mr and Ms Joubert. He testified that although the claim consists of two components as aforementioned, it is handled as one claim. According to the witness the plaintiff appoints an assessor to assess the damage to the vehicle. The assessor will lodge a report with the plaintiff and after authorisation from the plaintiff, the assessor will send an "audit text" to a panel beater for the repair of the vehicle. An amount of R855.00 was paid to Pretoria Loss Adjusters for the assessment of damage to the Vito Bus. An amount of R3 420.00 was paid to Nokeng Cables for the towing costs of the vehicle. The plaintiff further paid an amount of R184 620.18 to Precision and Sons for the repair of the motor vehicle.

5. Mr Le Roux testified that they sent an “adjuster”, who is an assessor of property other than motor vehicles, to the premises of Mr and Ms Joubert. Certain allegations were made to the “adjuster” and as a result thereof the claim had not yet been settled with regards to Mr and Ms Joubert. By the time the report of the “adjuster” reached Mr Le Roux, authorization had already been granted for the repair of the Vito vehicle. Mr Le Roux further testified that should they have known about the allegations earlier and should the allegations have been found to be true, no claim would have been settled by the plaintiff in relation to this incident.
6. During cross-examination it was put to Mr Le Roux that the defendant is the indemnified person covered under the policy and as he was not aware of the driver’s state of sobriety at the time of the incident he could not be held liable for the repayment of the amounts already settled by the plaintiff.
7. The second witness, Gideon Joubert testified that he is the owner of the Roodeplaat Dam Angling Grounds. The witness was referred to the fold out map of the area. He confirmed the location of his business premises on the map as well as the dirt road that ends at the entrance to his premises. He testified that the road is tarred up until the railway bridge and from the bridge for a distance of about 600 metres the road is a dirt road. He testified that point B on the map depicts a popular pub among the people in the area. He confirmed that point D on the map is Sable Hills Estate, a security estate, which was a holiday resort previously. He estimated that Sable Hills is about 6 to 8 kilometres from the angling grounds. The witness was referred to the different photographs contained in the bundle. He testified that the gate at the entrance to his premises was about 4 metres wide and 2 metres in height, with a piece of train track metal on each side to serve as gate posts. There were two stop signs on the gate together with a chevron sign which was clearly visible at night. He described the damage to the premises in detail and mentioned that one of the gate posts had been broken in three pieces from the impact of the vehicle. He confirmed that there is a road sign indicating a gate at the end of the road: that sign had in fact been there for the past ten years.

8. Mr Joubert testified that the Wild Horses Inn is about 2 kilometres from the angling grounds. On the night of the incident he was contacted by an employee, Ben Pearson, informing him about the accident and he was asked to come to the gate. His wife and two children accompanied him to the scene of the accident where he observed the damage to the premises. According to Mr Joubert the Vito vehicle was lying on the left gate post. The wooden “wendy” house adjacent to the gate post on which the vehicle was lying was “...heeltemal platgery...”. He testified that the Vito vehicle had to be loaded on a “low bed” as it was damaged in such a way that it could not be driven or towed. He confirmed that the vehicle was driven by Pieter De Witt. He testified that all his employees, a friend of Mr Pieter De Witt as well as the friend’s wife were present at the scene. According to the witness, Mr Pieter De Witt was under the influence of alcohol. His (the witness) first reaction was to phone the police but Mr Pieter De Witt pleaded with him not to phone the police because he has a small baby and he is afraid of his father, Mr Gerhard De Witt, as he was driving his father’s vehicle and was not at the place where he was supposed to be. The witness phoned the Mr Gerhard De Witt to inform him about the incident. Mr Gerhard De Witt arrived at the scene about an hour and a half later as he was driving from Delmas. He testified that at no stage did Mr Pieter De Witt tell him about the attempted hi-jacking of the vehicle but that he mentioned that they were coming from Wild Horses pub and that he took a wrong turn when he left the premises of the pub.
9. Mr Joubert testified that Mr Gerhard De Witt arrived on the scene and the witness tried to calm him down as he was upset. The witness and Mr Gerhard De Witt assessed the damaged and it was agreed that Mr Joubert will be compensated for the damage to his premises. He obtained quotations for the repairs which were sent through to Mr Gerhard De Witt’s office. The police were not contacted. Mr Joubert testified that the damage to his premises was about R26 000 which was never settled by the defendant.
10. Under cross-examination Mr Joubert testified that he did not notice whether the airbags of the Vito vehicle had deployed during impact. He further testified that the entrance to his premises where the accident occurred are not

lit at night and that it might appear unexpected for someone who does not know the road or area. He conceded that the road has a slight incline before a decline that ends in the entrance to the angling grounds. He was cross-examined at length on various aspects but his version of events remained consistent throughout. The witness confirmed under cross-examination that he instructed an attorney to send a letter of demand to Mr Pieter De Witt regarding the compensation for damage to his premises.

11. The third witness, Mr Ben Pearson, has been an employee at the Roodeplaat Dam Angling Grounds for the past 13 years. He testified that on the night of the incident he was on duty at the gate of the angling grounds. He stated that he heard the noise of a vehicle approaching and then he heard a thud. He went outside to see what the commotion was all about. He testified that he observed a Vito vehicle that had crashed into the gate and the “wendy” house at the gate and he subsequently telephoned Mr Joubert. Mr Pearson testified that his house is about 10 metres from the gate and that he saw Mr Pieter De Witt stumbling as he alighted from the vehicle. He stated that he did not speak to Mr Pieter De Witt but Mr Pieter De Witt asked “*Waar is ek?*” when he got out of the vehicle.
12. Under cross-examination Mr Pearson confirmed that he saw that the airbag on the driver’s side had deployed. He testified that he had not been asleep when the accident occurred and that it was quite a serious accident gauged by the damage that was caused. He could not say whether Mr Pieter De Witt was in shock but he testified that Mr Pieter De Witt was indeed under the influence of alcohol.
13. The plaintiff closed its case after the testimony of Mr Ben Pearson.
14. The defendant, Mr Gerhard De Witt testified that he resided in Delmas at the time of the incident and that he still resides there. He testified that he is involved in the transport and cleaning industries and that Mr Pieter De Witt is an employee at his cleaning business. He received a telephone call on 29 July 2009 at about 23:00 from Ms Joubert. He was informed of the accident and that Mr Pieter De Witt was under the influence of alcohol. The witness

together with his wife reached the scene of the accident at about an hour and a half later. He testified that he observed the Vito vehicle that crashed through the gate and into "...n gedeelte van die plank huisie, of kantoortjie...". He found Mr Pieter De Witt, a friend to Mr Pieter De Witt and his wife, Mr and Ms Joubert as well as their children at the scene of the accident. He stated that he had a conversation with Mr Joubert and that he (Mr De Witt) would repair the damage the next day as Mr Joubert said that the insurance will take too long to pay for the damage caused. The next morning the witness was informed by Mr Joubert that he is going to have his own employees repair the damage. He did not observe any signs of alcohol abuse on the part of Mr Pieter De Witt and was more concerned with getting the vehicle removed from the premises of the angling grounds. He testified that Mr Pieter De Witt left with him for Delmas after they stood around the scene waiting for the towing service to remove the vehicle. He confirmed that an insurance claim was lodged with the plaintiff after the incident through his broker. The information contained in the claim form was obtained from Mr Pieter De Witt according to the witness.

15. Under cross-examination the witness confirmed that Mr Joubert telephoned him and told him "...jou seun was in 'n ongeluk, hier by ons en hy is gedrink...". He testified that Mr Pieter De Witt informed him about the accident as follows: "*Hy het vir my gesê hy, hy het verkeerde plek afgedraai, of hy het nie die area geken, waar hy gery het nie en hy het gesien.....hy het gesien iemand agtervolg hom. Daar was 'n voertuig agter hom... Hy het, hy het probeer kyk op die GPS, waarvanaf, waar moet hy heen gaan nou... En toe hy sien, toe is hy hier naby die hek... Hy het probeer stop, maar die hek was al klaar reeds te naby...*". He stated that Mr Pieter De Witt informed him that he was on his way to Sable Hills after working late, where he was busy constructing a house. He testified that Mr Pieter De Witt went to friends for dinner before going to Sable Hills. The witness stated that Mr Pieter De Witt is an employee at the cleaning business which has an office at the Kolonnade Mall. He estimated that the office is about 10 to 15 kilometres from Sable Hills. According to Mr Gerhard De Witt, his son was not under the influence of alcohol but he might have consumed one or two beers and he did not smell

any alcohol on Mr Pieter De Witt. The witness stated that Mr Pieter De Witt worked later than the normal 16:30 on the day of the incident but he could not be specific until what time. The aspect of not being informed about the alleged attempted hi-jacking by Ms Joubert during the initial telephone conversation was put to the witness. The proposed reason for not being informed by Ms Joubert was because Mr Pieter De Witt did not tell Mr Joubert about this attempted hi-jacking. His response was that Ms Joubert was more concerned about who was going to pay for the damage that was caused by Mr Pieter De Witt to Mr Joubert's premises. Mr Gerhard De Witt was cross-examined regarding the omission of all the witnesses from the claim form. His response was "*...ek het nie gedink, op daardie stadium, dis nodig nie...*".

16. The second defence witness, Mr Pieter Joshua De Witt, testified that he is married and was 31 years of age at the time of the incident. He had one daughter aged 7 months' at the time of the incident. He confirmed that he is an employee at his father's business, Annes Cleaning. He stated that the business is responsible for cleaning shopping malls and office blocks. He confirmed that at the time of the incident he was residing in Carletonville. On the day of the incident he left the office at about 19:30 and went to a friend's house, Werner Bekker who has since left South Africa for contract employment in Tanzania. Werner Bekker and his wife were not available to testify in the trial. He was planning to spend the night at his house at Sable Hills. He testified that he spent two hours with the Bekkers and that he consumed three beers. He identified the road that he intended to take to Sable Hills on the map of the area. He describes the events of that evening as follows: "*...Ek het gery by, by Werner Bekker se huis en toe ek afdraai van die dienspad af, regs draai, toe ek daar draai, toe was daar, daar is 'n dienspad wat van die ander kant af ook kom. Toe ek daar draai, daar het 'n kar uitgekome en hy het agter my aan gery. Ek het vinniger gery en die kar het vinniger gery. Ek het weer stadiger gery. Die kar wou nie verby my gekom het nie. Hy was net agter my gewees. Hy wou nie verby gekom, of niks, nie links of regs nie.....Ek het vinnig gery. Daar is soveel ingange. Daar is omtrent elke paar meter, is daar 'n ingang. Daar is nie 'n bord wat sê Kameelfontein of Kameeldrift of enige bordjie. Dit is net 'n klomp, want in*

daardie hele area is net grondpaaie. Met die, was die persoon agter my aan gewees. Ek het reguit aangery. Omdat daar 'n bord was, by die t-aansluiting wat sê Roodeplaatdam, het ek aangeneem daar sal weer vorentoe, weer 'n pad wees, wat teruggaan na die Kameeldrif, of die Kameelfonteinpad toe..." and further "...ek het, ek het op daardie stadium het ek my GPS uitgehaal om te kyk waarso, waarheen gaan die pad, waarso is 'n ander pad wat ek kan, wat ek kan ry. Op die stadium is ek besig met my GPS en ek is besig om in die spieël te kyk en ek probeer die pad vind. Dit is pikdonker. Daar is nie een lig, of 'n straatlig, of niks op, op daardie pad nie. Die volgende oomblik, dit is, die pad draai en dan is dit asof hy 'n bietjie opgaan, na 'n bult opgaan en afgaan. Ek het op die GPS gekyk en toe ek weer voor my kyk, toe het ek 'n hek gesien. Ek het die rem getrap. Die ABS van die, van die voertuig het aangekom. Hy het gladnie gerem nie en ek het die hek gestamp..."

17. Mr Pieter De Witt testified further that the area in which the incident occurred is a crime hotspot. He was aware of this fact because he researched the crime statistics for motivation in obtaining a firearm license. He was also involved in an armed robbery a few months prior to the incident.
18. He testified further that the airbag in the vehicle deployed on impact with a very loud noise like a firearm being discharged in the vehicle. A white substance was released and "...jy kan nie sien nie, jy kan nie hoor nie...dit ruik na brand binne in die voertuig...". He stated that he was disorientated; it felt as if his thumbs were dislocated and he was pulled back by the safety belt. His eyes, mouth and nose was full of the powdery substance discharged by the airbag. He was able to get out of the vehicle on his own. He stated that he told Mr Joubert that he was followed by another car and in trying to get away from that vehicle he drove through the gate. He testified that he gave his full co-operation at the scene of the accident and Mr Joubert telephoned Mr Gerhard De Witt from the witness' phone. He (the witness) thereafter phoned Werner Bekker. The matter was not reported to the police on that same night but on the next day.

19. Under cross-examination he confirmed the alleged attempted hi-jacking and stated that he was not drunk from the three beers that he consumed during the braai at Werner Bekker's residence. He was extensively questioned by counsel for the plaintiff in every aspect of the incident and beyond.

20. Counsel for the plaintiff and defendant filed written heads of argument for which the court is indebted.

21. It was submitted by counsel for the plaintiff that the issues for decision are as follows:

- *"Firstly whether De Witt Jnr was in fact drunk at the time of the accident;*
- *Whether Defendant fraudulently failed to disclose it to Plaintiff;*
- *Even if Defendant's son had been drunk and Defendant fraudulently failed to disclose it, whether Plaintiff would not still be liable in any event."*

22. Regarding the first issue for decision as set out by Mr Erasmus, counsel for the plaintiff, the plaintiff bears the onus to prove the state of sobriety of Mr Pieter De Witt. The following appears in the case of Minister of Safety and Security v Tyulu 2009(5) SA 85 (SCA) where Bosielo AJA, as he then was, states the following:

"Drunkenness was defined in Moses v Minister of Law and Order 1995 (2) SA 518 (C) at 522B - H, in a passage with which I agree. This passage reads:

'The word drunk is not defined in the Act, and it is well established that drunkenness differs markedly from being under the influence of alcohol. A familiar definition, which appears in Landsdown's South African Liquor Law 5th ed at 476, is the following:

"A man is drunk who, by reason of the alcohol which he has consumed, has lost control of his mental or physical faculties, or both, to such an extent as to render him incapable of comporting himself, or of performing any act in which he is engaged, with safety to

himself or with that regard to the rights of others which the law demands.

Landsdown adds that the only absolutely infallible test of drunkenness is a positive reaction for alcohol in the cerebro-spinal fluid, a test which is of course wellnigh impossible to secure in practice. In the present case on appeal, no blood test of any kind was performed to determine the level of intoxication of appellant....”

In the court's view it cannot be said that Mr Pieter De Witt "...lost control of his mental or physical faculties...". Could it be said that he was under the influence of alcohol? In Incorporated General Insurances LTD v Boonzaaier, NO 1974(4) SA 200 (C), the respondent, in his capacity as executor of his late son's estate, lodged a claim with the appellant for the damage to his son's motor vehicle which had been insured with the appellant at the time of his son's death caused by a motor vehicle collision. The insurance policy provided, as in the present case, that the insurer will not be liable for "any accident injury loss damage and/or liability" should the motor vehicle be driven at the time of the accident whilst the insured is under the influence of alcohol. The insured driver in the matter referred to above, was killed in a collision on the way home from a private party at which he had imbibed alcohol. The claim was repudiated by the appellant on that ground. Sitting as a court of appeal, Van Zijl J, as he then was, stated that:

"The true question is whether it can be said that the insured carried his liquor to the extent that he remained in full possession of his faculties as judged by ordinary everyday standards. If it can be said that the drinker has retained the composure of mind and emotion, the circumspection and the physical dexterity of the ordinary normal person, then he cannot be said to be under the influence of intoxicating liquor..."

Mr Pieter De Witt, the driver, testified that he was disorientated by the deployment of the airbag and the crash itself and was clearly in a state of shock. The police were not called to the scene of the accident and no blood samples were taken from the driver, Mr Pieter De Witt, nor was he subjected to a breathalyser test on the night of the incident.

23. This ties in with the second bone of contention: “*Whether Defendant fraudulently failed to disclose it to Plaintiff*”. At page 21 of the Bundle of Documents, the following appears in the policy document:

“*Spesifieke uitsonderings*

1. *Die versekeraar is nie aanspreeklik vir enige ongeluk, besering, verlies, skade of aanspreeklikheid nie*
 - (a) ...
 - (b) ...
 - (c) *opgedoen terwyl enige voertuig bestuur word deur*
 - (i) ...
 - (ii) *enige ander persoon met die algemene toestemming van die versekerde wat na wete van die versekerde onder die invloed van bedwelmende drank of verdowingsmiddels is”*

The defendant was in Delmas, approximately 80 to 100km away from the scene of the accident. The vehicle was lawfully driven by an employee of the defendant on a weeknight. He could not have known whether his employee, in this case his son, was under the influence of liquor. Being an active participant in the transport sector, he is certainly alive to the terms of the insurance policies on his vehicles. He testified that he goes out to any accident in which one of his vehicles are involved – no matter the distance he has to travel. The witnesses for the plaintiff, Mr Joubert and Mr Pearson, were also found to be credible witnesses but there is no real proof as set out in the paragraph above that establishes that Mr Pieter De Witt was under the influence of alcohol, beyond a reasonable doubt. In the light that there is no evidence to this effect, the defendant could not have “...*fraudulently failed to disclose it to the Plaintiff...*”.

24. Thirdly, counsel for the plaintiff submitted that the court should also decide the issue “...*Even if Defendant’s son had been drunk and Defendant fraudulently failed to disclose it, whether Plaintiff would not still be liable in any event*”. The policy document specifically stipulates the following:

“*Die versekeraar sal ook (ingevolge en onderworpe aan die beperkings van en vir die doeleindes van hierdie onderafdeling)*

1. ...
2. *enige persoon skadeloos stel wat sodanige voertuig op bevel van die versekerde of met die versekerde se toestemming bestuur of gebruik met dien verstande dat*
 - (a) *sodanige persoon, asof hy die versekerde is, die bepalinge, uitsonderings en voorwaardes van hierdie versekering nakom, uitvoer en daaraan onderworpe is in soverre dit van toepassing mag wees...*

In my view, the plaintiff should be and indeed is liable under the policy. I cannot find any reason for the plaintiff to deny liability for the losses suffered by the defendant.

25. Respected insurance companies cannot repudiate claims on grounds of allegations and opinions in a willy-nilly fashion. They are in a relationship of trust with their clients and should honour their promises and undertakings which they bind themselves to in the form of policy contracts. Their integrity must be flawless at all times as they are offering a service and receiving payment in return. I am of the considered view that the plaintiff did not succeed in discharging the onus resting upon it.

26. The following order is accordingly made:

It is ordered:

1. **That the Plaintiff's claim be and is hereby dismissed with costs.**



G. WEBSTER
JUDGE IN THE HIGH COURT

Date of Hearing : 24, 25 February 2014
Counsel for the Plaintiff : Adv F J Erasmus
Counsel for the Defendant : Adv M H van Twisk