IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: A159/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

27/06/2022
DATE SIGNATURE

KING PRICE INSURANCE COMPANY LTD Appellant

and

SIZWE ANTONIO MHLONGO Respondent

JUDGMENT

PHOOKO AJ (<u>with KHUMALO J concurring</u>)

INTRODUCTION

[1] This is an appeal by the Appellant against the Judgment and Order granted by by Magistrate Mahlangu on 14 February 2021 sitting in the Regional Court for the Regional Division of North Gauteng, Pretoria. The court of first instance

awarded damages in the amount of R374, 960.50 and punitive costs in favour of the Respondent.

THE PARTIES

[2] The Appellant is King Price Insurance Company, a company duly incorporated in terms of the company laws of the Republic of South Africa with registration number 2009/012496/06 whose main address of business is at Block A, 3RD Floor, Menlyn Corporate Park 175 Corobay Avenue, Waterkloof Glen X11, Pretoria ("the Appellant").

[3] The Respondent is Sizwe Antonio Mhlongo, a major male businessman ('the Respondent").

THE ISSUE

[4] The issue for determination before us is whether the court a *quo* erred in its Judgment and Order?

THE FACTS

[5] This matter emanates from a written vehicle insurance policy ("the insurance contract") entered into between the Appellant and the Respondent on 29 November 2016.

[6] In terms of the insurance contract, the Appellant insured the Respondent's car, a Mercedes Benz E-200, with registration number DJ 77-RS GP, against any risk and/or loss.

[7] The Respondent contributed a monthly premium of R1 532.59 towards the Appellant in fulfilment of the terms and conditions of the insurance contract.

[8] On Saturday 21 October 2017, the Respondent was involved in a car accident at or near Coubrough Road in Midrand, Gauteng. Consequently, the Respondent's car was towed to a storage facility and found to be damaged beyond economic repair.

[9] On Monday 23 October 2017 the Respondent contacted the Appellant and reported the accident.

[10] On 7 December 2017, following a certain interview that was conducted by the Appellant with the Respondent regarding the events that had occurred prior to the accident, the Appellant rejected the Respondent's claim. In addition, the Appellant cancelled the Respondent's policy.

[11] Aggrieved by the Appellant's decision to reject his claim and cancel the insurance contract, the Respondent instituted a claim for damages in the court *a quo* for R 374 960.50 as being the fair, and/or reasonable and/or market related value of the vehicle.

[12] The court *a quo* ruled in favour of the Respondent and awarded punitive costs against the Appellant.

[13] The Appellant, unsatisfied with the Judgment and Order of the court *a quo*, initiated this appeal.

APPLICABLE LAW

[14] One of the long-settled principles regarding appeals is that a court of appeal must not easily interfere with the judgment of the court *a quo* unless that court had materially misdirected itself on the facts.[1] As was correctly stated by Ngcobo CJ, as he was then, in *Bernert v Absa Bank Ltd*[2] that:

> "… What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading "the cold printed word." The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to "tie the hands of appellate courts". It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it" (footnotes omitted).

[15] In light of the above, if this court does not find any misdirection by the court *a quo*, there will be no reasons for it to interference with the decision of that court.[3] However, if the record of proceedings dictates otherwise, this Court will not be reluctant to reverse such decision.

[16] I now turn to consider the submissions of the parties to ascertain whether this court can interfere with the judgment of the court of first instance.

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[1] *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC).
[2] 2011 (3) SA 92 (CC) para 106.
[3] *S v Monyane & Others* 2008(1) SACR 543 SCA at para 15.

APPELLANT'S SUBMISSIONS

[17] The Appellant's main contention is that the Respondent did not prove the *quantum* of his claim.

[18] According to the Appellant, the Respondent claimed specific damages that are equivalent to the retail amount that the Respondent was insured for and did not at any stage indicate that he was entitled to the settlement amount.

[19] The Appellant further submitted that the Respondent merely indicated that the amount in question was due to Standard Bank. In addition, the Appellant contended that under cross-examination, "the plaintiff [Respondent] conceded that the amount he claims should be the insured amount, which is the vehicle's retail value. Judgment, however, was granted for a settlement amount owed to a financing institution".[4]

[20] The Appellant further argued that the Respondent made an admission before the court *a quo* to the effect that he does not know what the retail value of his vehicle was and that the retail value is different from the money owed to the bank. Based on this, the Appellant, *inter alia*, argued that a "party relying on the agreement is also required to allege and prove that the damages it seeks to recover were indeed damages suffered by it".[5]

[21] Furthermore, the Appellant argued that the Respondent in the court *a quo* did not seek any relief to the effect that in the case that the Respondent succeeds,

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[4] Appellant's head of argument para 20.19.
[5] Ibid para 2.21.

the Appellant should be ordered to establish the retail value of the motor vehicle and settle it.

[22] The Appellant to a certain extent also argued that the Respondent was driving at an excessive speed but did not disclose this information to the Appellant.

[23] The Appellant further argued that the court *a quo*, despite being aware that the wreck had some value and that it was in the possession of the Respondent, failed to take it into consideration.

RESPONDENT'S SUBMISSIONS

[24] Counsel for the Respondent *inter alia* argued that the Respondent proved his claim as per the insurance contract by producing a settlement amount of R374 960.50 from Standard Bank, which is one of the amounts the Appellant is obliged to settle on behalf of the Respondent. According to the Respondent, "the Appellant had the onus to prove that the Respondent's claim was excluded by complete relevant information".[6]

[25] The Respondent further contended that the amount of R374 960.50 was the settlement amount owed to Standard Bank at the time of the accident.

[26] Furthermore, the Respondent argued that the Appellant was incorrect to argue that the Respondent "is entitled to claim or prove the retail value".[7] As a result, the Respondent submitted that the Appellant must pay the insured value which

[6] Respondent's head of arguments para 1.
[7] Respondent's head of arguments para 4.

is in essence the retail value.

[27] The Respondent also contended that the R374. 960.50 is a fair amount, alternatively a reasonable amount and/or a market related value of the vehicle. According to the Respondent, the Appellant did not challenge the Respondent's submission to the effect that it was the Appellant who assisted its clients with the retail value of the car.

[28] Based on the above submissions, the Respondent submitted that the court *a quo* correctly ruled that the Appellant was contractually obliged to settle the amount financed by Standard Bank on the vehicle.

[29] The Respondent also argued that the defence of speed should not succeed because if it was a material issue for the purposes of the claim, it would have been disclosed in the rejection of the Respondent's appeal against the refusal to approval his claim.

[30] Ultimately, the Respondent argued that there is no express exclusion of cover in the insurance contract where the insured is found to have travelled at an excessive speed.

EVALUATION OF SUBMISSIONS

[31] My reading of the Judgment and Order of the court a *quo* including the submissions of the parties do not reveal a misdirection by the court *a quo* that would justify interference by this Court.

[32] On the question of liability in *Klipton Clothing Industries (Pty) Ltd v Marine &*

Trade Insurance Co of South Africa Ltd[8] it was held that when interpreting an insurance contract "the court should incline towards upholding the policy against producing a forfeiture". In my view, an insurer cannot escape liability to indemnify the insured by relying on some insignificant statement that was not disclosed which is not materially connected to the risk or assessment of the claim. The court *a quo* was correct in finding that the Respondent complied with the terms of the insurance contract and that the Appellant did not dispute this position.

[33] The Appellant had indicated that its rejection of the Respondent's claim was on the basis that the Respondent had failed to *inter alia* disclose his whereabouts including the purchase of liquor on the day of the accident. According to the Appellant, the said "information was untrue".[9] Even if these submissions were to be accepted, I fail to understand how they affected the validity of the Respondent's claim because the Respondent's vehicle was insured and covered for any damages that may arise including those damages that are caused by Respondent's own negligence.[10]

[34] Furthermore, in *Ivanov v Santam Limited*[11] it was held that "[a]n untrue or incorrect statement which does not amount to wrongful or material misrepresentation cannot be relied upon to exclude or limit liability simply on the fact of its untruthfulness". I find this paragraph relevant in this case because the Respondent answered the questions that were asked by the Appellant's representatives relating to the accident. Accordingly, it would be unfair for the

[8] 1961 (1) SA 103 (A) at 106.
[9] Defendant's Plea para 7.4.
[10] *Strydom v Certain Underwriting Members* 2000 (2) SA 482 (W) at F.
[11] (21903/04) [2006] ZAGPHC 75 (8 August 2006) para 18.

Appellant to ask about the events related to the accident but then expect the Respondent to give a narration of everything that he did on that day from the house, round abouts, including embarking on a shopping. Consequently, a version that the Respondent gave untrue information is difficult to comprehend.[12]

[35] About the issue of speeding, I need to say no more except that I agree with the Respondent's submission in that if this was a material issue, the Appellant would have stated it in the letter rejecting the Respondent's claim. But this would have not changed the position because the Respondent's vehicle was covered against all risks including those arising from the Respondent's own negligent that includes excessive speeding.

[36] On the quantum, although the Appellant contended that the Respondent at no stage claimed a settlement amount of R374 691.50, a reading of the Respondent's Particulars of Claim does show that the Respondent had also claimed "the fair alternatively reasonable, alternatively market related value of the motor vehicle".[13] In my view, this is where the Appellant had an opportunity to counter allege what they thought was a reasonable amount for the damages suffered by the Respondent but the Appellant opted not to deal with that aspect of the Respondent's claim in its Plea or lead any evidence.

[37] About the salvage/wreck, again the Appellant did not address this issue in its Plea. In addition, the Appellant did not lead any evidence in that regard during the trial. A party is bound by his or her pleadings. Consequently, the Appellant

[12] See also Judgment of the court a quo at 255.
[13] Particulars of Claim para 16.

must stand or fall by his own pleadings.[14]

[38] The court *a quo* in my view correctly found that the insurance agreement was clear about how the Appellant was going to compensate the Respondent where there were damages suffered by the Respondent. To this end, the court *a quo* *inter alia* relied in the insurance contract provision to rule in favour of the Respondent.[15] The said provision provides that:

> "If the car is financed we will first pay out the outstanding settlement over to the relevant financial institution up to the maximum insured value. This excludes the settlements, penalties and interest, penalties and interest charges on arrear payments that your financial institution may charge. Then the balance, if any, will be paid to you."

[39] In my view, the aforesaid provision further resolves the issue of *quantum*.

[40] Having carefully considered the appeal record, Appellant's and Respondent's written and oral submissions, I am of the view that the court *a quo* reached a correct conclusion and that there is no need to interfere with its ruling.

[41] I, therefore, propose the following order:

(a) The appeal is dismissed:

(b) The Appellant is ordered to pay the costs of this application on the scale as between attorney and client.

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[14] *Bowman NO v De Souza Raoldao* 1988 (4) SA 326 (T) at 327D – H.
[15] See also Judgment of the court *a quo* at 256.

M R PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

N V KHUMALO

JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

APPEARANCES:

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Date of Hearing:	15 February 2022
Date of Judgment:	27 June 2022