REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES:NO
(3)	REVISED: YES
.....	11/05/2021
SIGNATURE	DATE

CASE NO: 634/2017

In the matter between:

HENDRICK QHIBI Plaintiff

and

MIWAY INSURANCE LTD Defendant

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This is an insurance claim emanating from an insurance contract ("the contract") concluded on 19 July 2013 by the parties herein. The subject of the contract against which the Defendant agreed to indemnify the Plaintiff for loss and/or damage ensuing was a 2015 Toyota Fortuner 2.5D-4D RB A/T motor vehicle)" the insured vehicle"). A reciprocal undertaking by the Plaintiff was that he would make payment of monthly premiums and observe all other terms and conditions contained in the contract

[2] The insured vehicle subsequently became involved in a collision in consequence of which the Plaintiff lodged a claim with the Defendant for payment of damages occasioned by the accident. The Defendant investigated the circumstances of the happening of the insured event and resolved to repudiate the claim. Disgruntled by this response by the Defendant, the Plaintiff instituted these current proceedings against the Defendant persisting on compensation of his loss arising from the collision.

[3] When the matter served before this Court, the Defendant had raised two preliminary points. However, prior to commencement of the proceedings, it abandoned the one and retained the other concerning a time-bar clause. Fundamentally, the Defendant's assertion is that in terms of the provisions of the time bar clause, the Plaintiff ought to have instituted this action within 270 days from the date on which it rejected the Plaintiff's claim. The Plaintiff's claim cannot be entertained in view of it having been brought well after the expiration of the period. For better appreciation of this matter a terse background of the facts is necessary.

FACTUAL MATRIX

[4] The facts that gave rise to the claim are largely common cause. The contract is said to consist of two documents. These are the Coversheet and The Policy Wording. The Defendant captured the contact particulars of the Plaintiff on communication issues stemming from the contract as: **P o Box 3816, Acornhoek, 1360**; and **maverynice@webmail.co.za**. Following the conclusion of the contract, it was sent to the Plaintiff per contact particulars furnished by him. The Plaintiff received the updated Coversheet and Policy Wording by e-mail at the abovementioned e-mail address on 16 June 2016.

[5] The claim lodged by the Plaintiff against the Defendant followed on one early evening on 24 August 2016 when the insured vehicle left the R37 road at a look-out point approximately 13km from Sabie and 5km from Hendriksdal where it plummeted and rolled down a steep embankment. The insured vehicle was damage beyond economical repair. On the very day

of the accident, 24 August 2016, the Plaintiff lodged a claim relying on the terms of the contract for indemnification for the loss suffered.

[6] The Defendant engaged the services of one Morne van Rooyen to conduct investigations regarding the circumstances surrounding the accident. Following receipt and perusal of Morne Van Rooyen's conclusions set out in his report, the Defendant felt that it would be justified to decline indemnification occasioned by the loss. In rejecting the claim, the Defendant maintained that the Plaintiff had supplied it with false information warranting it to lawfully reject the claim.

[7] On 2 September 2016, the Plaintiff was notified of the repudiation of his claim, which was accompanied by reasons therefore in writing. The Plaintiff has accepted that he received the letter informing him of the rejection of his claim on 2 September 2016. On 9 September 2016, the Plaintiff placed a call to Morne van Rooyen enquiring about the status of his claim. Morne Van Rooyen telephonically advised him that his claim had been rejected whereupon the Plaintiff requested that the rejection letter be sent to an alternative e-mail address cited on the Coversheet. Morne Van Rooyen duly obliged.

[8] The Defendant asserts that the Plaintiff's failure to comply with the contract entitled it to refuse the claim and to lawfully cancel it on the ground of his breach of it. The Plaintiff's attorney ("the attorney") as well enquired on the outcome of the claim. On 22 November 2016, the attorney was told that the outcome had been communicated to the Plaintiff. On 22 December 2016, at the request of the attorney, the letter of 2 September 2016 rejecting the Plaintiff's claim was again sent to the attorney.

[9] On 22 December 2016, the attorney telephonically disputed the election to reject the Plaintiff's claim. The Plaintiff now disputed the election to reject his claim and submitted a "complaint". According to the Defendant, this complaint was not in line with the agreed procedure in the contract, which provides as follows:

"If I am not satisfied with the outcome of my claim, I must first raise my objection in writing to MiWay together with reasons within 90 days for the day that I received written notification of the outcome of my claim. The objection must be addressed to Disputes and emailed to disputes@miway.co.za or faxed to 011 990 0001 or posted to MiWay Insurance, PostNet Suite #382, Private Bag X121, Halfway House, 1685."

[10] The Defendant alleges that the objection described above was raised outside the agreed 90 days, it was not in writing and the reasons therefore are unknown. The Defendant responded to him in writing on 10 January 2017 and again informed him that the rejection of his claim would not be reversed. The Defendant again provided reasons for the repudiation.

[11] On 6 November 2017 and assured that the Defendant was adamant not to reverse its decision to repudiate the claim, the Plaintiff served the summons on the Defendant seeking the relief as per this action. At the hearing of this matter, the Defendant advised this Court that it needed to raise a preliminary point that, if upheld, might be dispositive of the entire claim of the Plaintiff. On that ground, the parties made an application that the preliminary point be treated discretely and that the case would proceed if the preliminary point fails. The court considered the matter and persuaded that it would be convenient and cost effective to separate the issues, granted the application.

[12] Following the entertainment of the separation of issues, the parties agreed that the preliminary point be adjudicated on the agreed facts described below:

12.1 the existence of the agreement of insurance, the terms and conditions of which are encapsulated in annexure "P1" and annexure "P2" to the defendant's plea;

12.2 The occurrence of the accident and the submission of the claim by the Plaintiff personally to the Defendant on 24 August 2016;

12.3 the repudiation of the claim on 2 September 2016 by the Defendant; and

12.4 The institution of legal action by service of the summons upon the Defendant on 6 November 2017.

ISSUES

[13] It would appear that the only conspicuous issue for adjudication is whether or not the Plaintiff instituted these proceedings outside of the prescribed period mentioned in the time-bar clause. The issue is as such, simple. If the institution of the action was outside of the prescribed period stipulated in the time-bar clause, the claim cannot succeed and that will mark the collapse of the Plaintiff's claim. Conversely, if the opposite holds, the Court must

continue to hear the case. Against that backdrop, it is advisable to turn to the guiding legal principles on the subject.

LEGAL POSITION

[14] The parties are agreed that the Plaintiff issued and served the summons commencing this action outside of the period stipulated in the time-bar clause. This understanding between the parties necessarily implies that there is also agreement that proceedings are generally initiated by issuing of summons and that a letter of demand false outside of that process. In this regard, it could be instructive to refer to *Commercial Association Co v Rainer* NO **(1896) 3 Off Rep 88**. Both parties refer to the Constitutional Court case of *Barkhuizen v Napier* **NO 2007 (5) SA 323 (CC),** which dealt with time-bar clauses in somewhat similar circumstances.

[15] The Constitutional Court in Barkhuizen *supra* acknowledged that circumstances could exist where it could be defensible to reject enforcement of a time-bar clause especially where it would render the contract unfair and unreasonable. Accordingly, Barkhuizen serves as authority that a blanket approach in these matters is not possible because concepts such as fairness and unreasonableness are nebulous. That fact inexorably requires examination of each given set of facts to arrive at a solution.

[16] *pacta sunt servanda* finds application in this matter insofar as it is the argument of the parties that it was concluded freely and voluntarily. The point of divergence of these parties, however, is the fairness and injustice that might arise having regard to the circumstances under which the contract was entered into. In Barkhuizen, it was held that the circumstances were not well-explained to decide fairness and unreasonableness. In consequence, the court held that *pacta sunt servanda* found application. The insurance claim process is now governed by the Policy Protection Rules published in **GN R1128** in **Government Gazette 26853 of September 2004**, as amended by **GN R1212** in **Government Gazette 33882 of 17 December 2010** under Section **55(5)** of the Short-term Insurance **Act 53 of 1998.**

[17] Pertinent to this matter is Rule 7.4 of the Policy Protection Rules, which provides:

> *"7.4 (a) An insurer must accept, reject or dispute a claim or the quantum of a claim for a benefit under a policy within a reasonable period after receipt of a claim.*

(b) *An insurer must within 10 days of taking any decision referred to in paragraph (a), in writing, notify the policyholder of its decision.*

(c) *If the insurer rejects or disputes a claim or the quantum of a claim, the notice referred to in paragraph (b) must inform the policyholder:-*

(I) of the reasons, for the decision;

(ii) that the policyholder may within a period of not less than days after the date of receipt of the notice make representations to the relevant insurer in respect of the decision;

(iii) of the right to lodge a complaint under the Financial Services Ombud Schemes Act. 2004 (Act No 37 of 2004) and the relevant provisions of the Act relating to the lodging of such a complaint in plain understandable language;

(iv) in the event that the relevant policy contains a time limitation provision for the institution of legal action, of that provision and the implications of that provision for the policyholder in an easily understood manner; and

(v) in the event that the relevant policy does not contain a time limitation provision for the Institution of legal action, of the prescription period that will apply in terms of the Prescription Act. 1969 (Act No. 88 of 1969) and the implications of that provision for the policyholder in an easily understood manner.

(d) *If a claim is rejected or disputed, or a quantum is disputed as contemplated in paragraph (a) on behalf of an insurer by a person other than the insurer, such other person must provide the notice contemplated in paragraph (b) and include in that notice, in addition to the information referred to in paragraph (c), the name and contact details of the insurer and a statement that any recourse or enquiries must be directed directly to that insurer.*

(e) *If the policyholder makes representations to the relevant insurer in accordance with paragraph (c)(ii) the insurer must within 45 days of receipt of the representation, in writing, notify the policyholder of its decision to accept, reject or dispute the claim or the quantum of a claim for a benefit under a policy.*

(f) *If the insurer, despite the representations of the policyholder, confirms the decision to reject or dispute the claim or the quantum of a claim, the notice referred to in paragraph (e) must:-*

(I) inform the policyholder of the reasons for the decision;

(ii) include the facts that informed the decision; and

(iii) include the information referred to in paragraph (c)(iii) to (v).

(g) *Any time limitation provision for the institution of legal action that may be provided for in a policy entered into before 1 January 2011 may not include the period referred to in (c)(ii) in the calculation of the time limitation period;*

(h) *Any time limitation provision for the institution of legal action that may be provided for in a policy entered into on or after 1 January 2011:-*

(I) may not include the period referred to in (c)(ii) in the calculation of the time limitation period; and

(ii) must provide for a period of not less than 6 months after the expiry of the period referred to in paragraph (c)(ii) for the institution of legal action..."

EVALUATION

[18] The Plaintiff has admitted that he instituted his claim against the Defendant outside of the prescribed period stated in the contract. He challenges the validity of the time-bar clause on the ground that its observance in these circumstances would be unfair and unreasonable to the Plaintiff. It is trite that he who alleges must prove. The Plaintiff therefore has the onus of alleging and demonstrating that enforcement of the time bar clause would produce unfairness and injustice to the Plaintiff. The only intimation of an alleged unfairness or unreasonableness is that the Plaintiff has been paying his premiums and was up to date when the accident occurred and that the dismissal of special plea would not mark the collapse of the Defendant's case.

[19] These are hardly factors that this Court would consider when determining unfairness and unreasonableness. The Plaintiff concluded this contract over the telephone and the policy documents comprising the contract were send to him subsequently. I would assume that he

perused the terms and conditions, which he found acceptable. The postulation aforesaid must be correct because following the conclusion of the contract, he knew that he had to make monthly premiums for continued indemnification of his loss by the Defendant. The Plaintiff's papers are stridently silent on how enforcement will be unfair and unreasonable.

[20] The contract is categorical on how the claim process ought to unfold upon the occurrence of an insured event. The Plaintiff lodged his claim punctually, which the Defendant rejected on 2 September 2016 and furnished reasons therefor. The letter repudiating the Plaintiff's claim complies with Rule 7.4 of the Policy Protection Rules, which I have described above. Among other reasons cited for the repudiation is that the Plaintiff supplied the Defendant with dishonest information.

[21] In consequence of the dishonesty, the Defendant advised that it would not honour the Plaintiff's claim and that it was cancelling the policy reckoned from the date of the accident as it was entitled to do as per the contract. Having rejected his claim, the Defendant went on to inform the Plaintiff that he had a period of 90 days from 2 September 2016 within which to raise objection with the Defendant. The letter continues to state that regardless of whether or not the Plaintiff raises an objection within the 90-day period, he would still have another 180 days within which to serve summons on the Defendant failing which his right to challenge the decision of the Defendant would be forfeited.

[22] The Plaintiff went completely silent and it was only on 22 December 2017 that his attorney challenge the validity of the repudiation. Although the lodging of a formal objection was not necessarily prejudicial to the Plaintiff, it is notable that this was already outside of the prescribed 90-day period. Notwithstanding that the Defendant had advised the Plaintiff of its reasons for refusing to pay, it nonetheless set out a full exposition of the dishonesty to his attorney in a letter dated 10 January 2017. As such, at every turn the Plaintiff was furnished with reasons for the rejection, his rights fully explained despite that there was no allegation of illiteracy and that he was legally represented as early as 22 December 2017 to date.

[23] I am at loss why the Plaintiff would claim that enforcement of the terms and conditions of the contract would be unfair and unreasonable to him. The fact that he was up to date with his premiums and that a dismissal of the special plea would not mean the end of this case for the Defendant are hardly, without more, factors for consideration. The Plaintiff's reference to Barkhuizen *supra*, *Representative of Lloyds & others v Classic Sailing Adventures (Pty) Ltd* **[2010] JOL 25605 (SCA**) and *Links v Member of the Executive Council, Department of*

Health, Northern Cape Province **2016 (5) BCLR 656 (CC)** is completely misguided.

[24] The statement in Barkhuizen *supra* on which the Plaintiff seem to rely was made obiter. Even so, the Constitutional Court made it clear that each case would have to be decided on its own merits suggesting that such facts would have to be alleged and proved. In Representative of Lloyds and Others, the Supreme Court of Appeal dealt with conflict of laws. I cannot do more than citing Paragraph 23 of the judgment below:

"Rather than asking whether statutory provisions are prohibitory or dispositive, a better approach to determining whether parties may exclude the operation of statutory provisions by choice of another system of law might be to question whether they can waive the application of the provisions. This question was addressed in SA Co-Op Citrus Exchange v Director-General, Trade & Industry7 where Harms JA, dealing with procedural statutory provisions, held that they may be renounced by a party (in that case the State) for whose benefit they are enacted. But where public policy and interest would be prejudiced by a waiver, such provisions cannot be escaped. Waiver is not possible, said this Court, if it affects public policy or interest or a right.8 This principle was affirmed in De Jager & andere v ABSA Bank Bpk,9 where this Court held that the application of the provisions of the Prescription Act 68 of 1969 may be waived by a debtor under a contract after the prescriptive period had run because renunciation did not substantially or materially impact on the public interest."

[25] Put differently, the general rule is that parties in an agreement are free to elect a country whose laws would apply to a contract but where doing so offends public policy, the South African law would carry the day. In this case the SCA declined to apply the English law in line with what the parties had chosen for had it done so, Representative of Lloyds would have escaped liability. In the circumstances, this case is totally distinguishable from the current. More baffling is the Plaintiff's reference to the case of Links, which dealt with the Prescription **Act, 68 of 1969.** This case too is different from the case *in casu*.

CONCLUSION

[26] Parties who have freely and voluntarily entered into contracts ought to be bound by the terms and conditions arising therefrom. The exception is, of course, where enforcement of such terms and conditions would cause unfairness and unreasonableness to the other party to the contract, it would be justifiable to decline to hold that other party liable. The Plaintiff has failed to give a factual background that would persuade this Court to find that despite his conclusion of the contract with the Defendant, it would be unfair and unjust to enforce the

terms and conditions on him.

[27] In view of the above, I am bound to uphold the special plea and I make the following order:

1. The Plaintiff's claim is dismissed; and

2. The Plaintiff is to pay the costs of the Defendant.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 12 May 2021 at 10:00.

APPEARANCES:

Counsel for the Plaintiff:	**Adv K Shai**
Instructed by:	**A.K Khoza Attorneys**
Counsel for the Defendant:	**Mr E.H. Wiese**
Instructed by:	**H.J Badenhorst & Association**
Date of Hearing:	**19 April 2021**
Date of Judgment:	**12 May 2021**