THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 515/2013

In the matter between:

ROBERT BHEKUKWENZA HLELA	**FIRST APPELLANT**
BHABHA CHRISTOPHER DLAMINI	**SECOND APPELLANT**
THENGEZAKHE KHWELA	**THIRD APPELLANT**
SOUTH AFRICAN INSURANCE BROKERS CC	**FOURTH APPELLANT**

and

SA TAXI SECURITISATION (PTY) LTD	**FIRST RESPONDENT**
SA TAXI FINANCE HOLDINGS (PTY) LTD	**SECOND RESPONDENT**
CLARENDON TRANSPORT UNDERWRITING MANAGERS (PTY) LTD	**THIRD RESPONDENT**
SA TAXI RISK MANAGEMENT SERVICES (PTY) LTD	**FOURTH RESPONDENT**
THE NATIOINAL CREDIT REGULATOR	**FIFTH RESPONDENT**
THE HOLLARD INSURANCE COMPANY LTD	**SIXTH RESPONDENT**

Neutral citation: *Hlela v SA Taxi Securitisation (Pty) Ltd* (515/2013) [2014] ZASCA 112 (26 August 2014)

Coram: Navsa ADP, Shongwe, Majiedt, Swain JJA and Dambuza AJA

Heard: **26 August 2014**

Delivered: **17 September 2014**

Summary*:* Finance agreement – cession of motor vehicle insurance policy by debtor to lender – object to secure ownership of lender in vehicle– right to appoint broker to manage ceded policy not ceded to lender.

ORDER

On appeal from the full court of the KwaZulu-Natal High Court, Pietermaritzburg, sitting as the court of appeal, (D Pillay J with Koen J and Henriques J concurring):

1 The appeal is upheld with costs such costs to include the costs of two counsel.

2 The order of the court a quo is altered to read as follows:

'(a) The appeal is dismissed with costs such costs to include the costs of two counsel.

(b) The order of the court of first instance is altered to read as follows:

(i) It is declared that the first, second and third applicants are entitled to cancel the insurance brokerage mandate held by the second respondent.

(ii) The first, second, third and fourth respondents are ordered to give effect to the first, second and third applicants' cancellation of the insurance brokerage mandate held by the second respondent.

(iii) It is declared that the first, second and third applicants are entitled to appoint brokers to manage the comprehensive short term motor vehicle insurance policies ceded by them to the first respondent subject to the approval of the first respondent.

(iv) The first, second and third respondents are ordered to pay the costs of the application, jointly and severally, the one paying the others to be absolved.'

JUDGMENT

Swain JA (**Navsa ADP, Shongwe and Majiedt JJA and Dambuza AJA** concurring):

[1] The first appellant, Mr Robert Hlela, the second appellant, Mr Bhabha Dlamini and the third appellant, Mr Thengezakhe Khwela (the appellants) are mini-bus taxi operators.

[2] The appellants required finance to purchase mini-bus taxis and approached the first respondent, SA Taxi Securitisation (Pty) Ltd (TS) for loans. TS agreed to provide the funds. The finance agreements were structured as leases of the vehicles to the appellants by TS.

[3] In order to secure the right of ownership TS enjoyed in the vehicles in terms of the finance agreements, the appellants were obliged to insure the vehicles with a registered insurer on terms acceptable to TS. The appellants, in terms of the finance agreements, ceded their 'entire right, title and interest in and to every insurance policy effected' in terms of the finance agreements to TS.

[4] In performance of the appellants' obligation to insure the vehicles they signed a proposal for insurance directed at the third respondent, Clarendon Transport Underwriting Managers (Pty) Ltd (Clarendon). In the proposal the chosen broker was identified as the second respondent, SA Taxi Finance Holdings (Taxi Finance) and the chosen insurer was the sixth respondent, The Hollard Insurance Company Ltd (Hollard).

[5] In the certificates of insurance issued by Clarendon, the broker was, however, not reflected as Taxi Finance, but as the fourth respondent, SA Taxi Risk Management Services (Pty) Ltd (Taxi Risk). The entitlement of TS to substitute the

broker of choice of the appellants with another broker lies at the heart of the present dispute. (Taxi Securitisation, Taxi Finance and Taxi Risk will be referred to collectively as the Taxi respondents).

[6] The present dispute arose when the appellants appointed the fourth appellant, South African Insurance Brokers CC (appellants' broker) to manage their insurance portfolios with Clarendon and to obtain more competitive insurance rates.

[7] TS, however, refused to agree to the substitution of Taxi Risk by appellants' broker, maintaining that as the cessionary of the respective insurance policies, *it* had the right to appoint a broker of its choice, to manage the policy for the duration of the finance agreements.

[8] The appellants accordingly applied in the KwaZulu-Natal High Court, Durban for declaratory relief entitling them to waive and/or cancel the insurance brokerage mandate arranged and/or held by the Taxi respondents. An order was also sought directing those respondents, including Clarendon, to give effect to the termination of the mandate of Taxi Finance and Taxi Risk to act as brokers for the appellants in managing and arranging insurance for the vehicles in question.

[9] The appellants obtained the relief sought before the court of first instance, essentially on the basis that the cession of the insurance policies was one *in securitatem debiti*. It was held that the insurance brokerage contract being a separate contract from the insurance contract was not subject to the cession. The appellants accordingly retained and did not divest themselves of the right to appoint a broker of their choice. Leave to appeal to the full court of the KwaZulu-Natal High Court, Pietermaritzburg (the court a quo) was granted to the Taxi respondents by the court of first instance.

[10] The appeal to the court a quo was successful. The central finding was that the cession was an outright cession with the result that TS as the cessionary was free to mandate its own intermediary to manage the insurance policies. The

application was accordingly dismissed. Special leave to appeal was subsequently granted to the appellants by this court.

[11] Before dealing with the merits of the appeal, it is necessary to deal with two preliminary issues. The first, is an application brought by Clarendon and Hollard to participate in the present appeal. At the hearing the application was dismissed with costs for the reasons which follow.

[12] In the proceedings before the court of first instance Clarendon and Hollard delivered notices of intention to defend which they then withdrew on the basis that they would both abide the decision of the court of first instance. Clarendon and Hollard did not thereafter participate in the application for leave to appeal to the court a quo, nor in the appeal itself.

[13] In the participation application the reason advanced for that decision was a mistaken view that the relief claimed in the court of first instance 'did not impact upon the position' of Clarendon and Hollard. This view however, was not erroneous. The only possible interest that Clarendon and Hollard have in the outcome of the present appeal is a determination of the identity of the broker who will represent the appellants in managing the policies issued in their favour. This can hardly be described as a 'substantial interest' in the outcome of the appeal in the sense described by this court in *Standard Bank of SA Ltd v Harris & another NNO (JA du Toit Inc Intervening)* 2003 (2) SA 23 (SCA) para 5. A further distinguishing feature is that the application is opposed by the Taxi respondents. In addition, as fairly conceded by counsel for Clarendon and Hollard, the main purpose in seeking leave to participate in the appeal was to advance an additional argument based upon condition seven contained in the insurance policies. This condition provided that unless expressly endorsed upon the policy, no person other than the insured would have any rights against Hollard. It was alleged by Clarendon and Hollard that there was no allegation in any of the affidavits that the policies had been endorsed to grant any rights to TS. The appellants, however, only referred to this condition in their replying affidavit before the court of first instance. The Taxi respondents objected to

any reliance being placed by the appellants upon the condition, as it would effectively amount to the introduction, in reply, of a new case. In the result, the appellants did not advance any argument before either the court of first instance or the court a quo based upon the condition. The participation by Clarendon and Hollard in the appeal with this objective would clearly be prejudicial to the Taxi respondents.

[14] The second preliminary issue concerns the contention of the Taxi respondents that the outcome of the appeal has become moot. The Taxi respondents filed an affidavit before the hearing of the present appeal, setting out details of how the credit agreements concluded by each of the appellants had been cancelled prior to special leave to appeal being granted. As a result of the cancellation of the credit agreements, the policies of insurance issued to the appellants by Hollard lapsed, as the appellants no longer had an insurable interest in the motor vehicles.

[15] The Taxi respondents accordingly contended that the order sought by the appellants would have no practical effect or result as contemplated in s 21A(1) of the Supreme Court Act 59 of 1959. At the hearing, however, counsel for the appellants and the Taxi respondents agreed that the appeal should be heard. This consensus reflected the practical reality that many other taxi operators were in the same position as the appellants. They had concluded identical finance agreements and had been issued with similar insurance policies by Clarendon and Hollard. It was assumed, without being decided in *Radio Pretoria v Chairman Icasa* 2005 (1) SA 47 (SCA) para 40 that the 'practical effect or result referred to in s 21A(1) of the Supreme Court Act is not restricted to the parties *inter se* and that the expression is wide enough to include a practical effect or result in some other respect'. In this wider sense there would be a practical result for other taxi operators with vehicles financed by TS.

[16] I turn to the merits of the appeal. Contrary to the approach adopted by the court of first instance and the court a quo, the issue of whether the appellants have

the right to choose a broker of their choice during the subsistence of the finance agreements, does not require a resolution of the nature of the cession contained in clause 4.6. What is required is an examination of the relevant documentation in the context of the provisions of s 106 of the National Credit Act 34 of 2005 (the NCA), the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act) and the Code of Conduct promulgated in terms of the FAIS Act.

[17] TS is a registered credit provider in terms of the NCA. It is clear that TS proposed to the appellants the particular policies of insurance issued by Hollard and underwritten by Clarendon, the object of which was to insure the vehicles against damage or loss. TS was entitled to do this in terms of s 106(1) of the NCA. Section 106(4), however, provides that a consumer must be given, and must be informed of the right to waive the proposed policy and substitute a policy of the consumer's choice.

[18] Taxi Finance and Taxi Risk are registered as intermediary services providers in terms of the FAIS Act. Section 1(1) of the FAIS Act includes, in the definition of intermediary services, buying, selling or managing a financial product, collecting or accounting for premiums payable, as well as dealing with the claims of a client against a product supplier. A broker acts as an intermediary between the insured and the insurer – Joubert (ed) *The Law of South Africa* (2 ed) vol 12 para 470. In the context of the present dispute the term 'broker' will be used to include an intermediary as defined in the FAIS Act.

[19] Section 15 of the FAIS Act obliges the registrar to draft and publish a code of conduct for authorised financial services providers which is binding on providers and their representatives. Section 20(*a*)(i) of the code provides that a provider must, subject to any contractual obligations, give immediate effect to a request from a client who voluntarily seeks to terminate any agreement with the provider, or relating to a financial product or advice.

[20] Section 21 of the code prohibits a financial services provider from requesting or inducing in any manner a client to waive any right or benefit conferred on the client, by or in terms of any provision of the code or recognise, accept or act on any such waiver by the client. Any purported waiver is null and void.

[21] On the facts of this case TS was obliged to inform the appellants of their right to waive the proposed insurance policy and substitute it with a policy of their choice. TS in performance of this obligation presented for signature to Mr Hlela on 10 November 2008 a document entitled 'Acknowledgement of Freedom of Choice and Cession of Rights'.[1] This document reads as follows:

'You have applied for finance from SA Taxi Securitisation who will require certain security from you to protect its interest either in the form of a cession of a life policy or a comprehensive short-term vehicle insurance policy or both. In the case of a short term policy, this will be ceded to SA Taxi Securitisation for the duration of the finance agreement until such time as all outstanding obligations have been met.

With regard to a credit life policy, you may choose whether to cede an existing policy having the appropriate value or enter into a new one.

If you wish to enter into a new policy or make an existing policy available you have the freedom of choice as to:

i. The insurer and the broker or the intermediary providing they are acceptable to SA Taxi Securitisation prior to the agreement being finalised

ii. Whether or not the value of the policy benefits, taking into account any other policy benefits ceded to SA Taxi Securitisation shall exceed the value of your debt

iii. SA Taxi Securitisation's Short-term insurance policy must include comprehensive vehicle insurance cover, including passenger liability and [abscondtion], violation and credit shortfall extensions

---

[1] It was common cause that the documents presented to Mr Dlamini and Mr Khwela were in identical terms.

iv. In the case of a life policy, whether or not the benefits are to be provided in an event other than death or disability

It is hereby brought to your attention that the short-term insurance policy will be ceded to SA Taxi Securitisation for the duration of the agreement as per clause 4.6 of the contract.

SA Taxi Securitisation request that you acknowledge, by signing below, that before the policy is used as security for your debt or obligations to SA Taxi Securitisation:

i. You have been given written notification of your entitlement to freedom of choice (see above)

ii. You have exercised this

iii. You were not coerced or induced in any way when in the exercising of your choice.'

[22] On the same day Mr Hlela was required to sign the finance agreement which endured for a period of 60 months, commencing on 15 December 2008. Mr Hlela was obliged in terms of this agreement to keep the vehicle insured for the duration of the agreement, with a registered insurer approved by TS. Clause 4.6 contained the cession of the insurance policy to TS in the following terms:

'4.6 The Lessee hereby cedes his entire right, title and interest in and to every insurance policy effected in terms of this agreement to the Lessor, including the right to receive any payment from the insurer in terms of each such policy, and the Lessee undertakes, upon demand, to deliver each such insurance policy to the Lessor. The Lessor shall be obliged, after termination of this agreement, to return each such policy of insurance to the Lessee, and to cede the right, title and interest therein back to the Lessee. Such obligation shall, however, be suspended until all claims made or to be made under each such policy of insurance in respect of causes that arose during the currency of this agreement have been paid by the insurer.'

[23] Mr Hlela also signed a 'Midi Bus Proposal Form' which named 'SA Taxi Finance (Pty) Ltd' as the chosen broker and stipulated that the policy was underwritten by 'The Hollard Insurance Company Limited'. The 'Certificate of Insurance' which was subsequently issued described the insurer as the Hollard Insurance Company Limited. The period of insurance was from 10 November 2008

to 9 November 2010. As pointed out above, contrary to the choice of the appellants the broker was not reflected as Taxi Finance but as Taxi Risk.

[24] When the terms of the document entitled 'Acknowledgement of Freedom of Choice and Cession of Rights' set out above are considered, it is clear that the choice made by the appellants was in respect of a single comprehensive fixed short-term vehicle insurance policy proposed by TS. The reference to the policy is consistently in the singular.

[25] The parties, however, clearly envisaged the need for more than one insurance policy to be concluded to cover the duration of the finance agreement of 60 months. This is self-evident from the fact that the duration of the chosen policy was only for a period of two years. The terms of the finance agreement also envisaged the need for more than one insurance policy. Clause 4.5 provides that TS will be entitled 'at the end of the insurance policy effected in terms of this agreement, to procure the renewal thereof for the remainder of the duration of this agreement'.

[26] When an insurance policy is renewed a new policy of insurance comes into being on the same terms as the old policy which expires by effluxion of time. Without a new agreement between the appellants and Hollard no contract of insurance could exist after the expiry of the initial period of insurance. A new policy of insurance would consequently exist on its renewal from time to time, during the existence of the finance agreement. See *Southern Insurance Association Ltd v Cooper* 1954 (2) SA 354 (A) at 360G-361B.

[27] The right of renewal of the policy accorded to TS in terms of the finance agreement did not release TS from the obligation in terms of s 106(4) of the NCA to afford to the appellants their right to choose the new policy, which would come into existence upon the renewal of the old policy. The appellants were entitled to either renew the existing policy, or substitute it with a policy of their choice, subject of course to the acceptance by TS of the choice of insurer in terms of clause 4.1 of the finance agreement.

[28] The appellants' right to alter their choice of broker must be considered in the light of this conclusion. It is clear that the appellants in the document entitled 'Acknowledgement of Freedom of Choice and Cession of Rights' acknowledged that they had freedom of choice as to 'the insurer and the broker or the intermediary' provided they were acceptable to TS before the finance agreement was finalised. The exercise of the choice as to the broker was quite clearly linked to the choice of the particular policy. On termination of a policy the right to choose a new policy would accordingly include the right to choose a new broker or intermediary, in respect of the new policy.

[29] In any event, the parties could never have intended that the appellants' exercise of their freedom of choice as to the identity of 'the broker or the intermediary' would immediately be negated by the cession of the policy to TS. This conclusion is reinforced by the simultaneous exercise by the appellants of their choice of Taxi Finance as their broker. Their expressed choice of a broker would be an exercise in futility, if the common intention was immediately to cede to TS the right to appoint a broker of its choice to manage the policy. Such an interpretation would be insensible or unbusinesslike and undermine the apparent purpose of the document. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[30] It is therefore clear that the parties never intended to cede to TS the right to appoint a broker to manage the policy for its duration. TS accordingly was not entitled to appoint Taxi Risk to manage the insurance policies of the appellants. The appellants were entitled in terms of s 20(*a*)(i) of the Code to request the termination of Taxi Finance's mandate as their broker. Taxi Finance was obliged to give effect to this request subject to any contractual obligations. The appellants are accordingly entitled to terminate the appointment of a broker and appoint a new broker at any stage during the subsistence of a policy ceded to TS. The choice of a new broker would be subject to acceptance by TS in terms of the 'Acknowledgement of Freedom of Choice and Cession of Rights'.

[31] Before launching the proceedings before the court a quo the appellants appointed their broker to manage the appellants' portfolio with Clarendon. Clarendon refused, however, to give effect to the appointment of the appellants' broker on the ground that the consent of TS and Taxi Finance was required before this could be done. Such consent was not forthcoming on the ground that TS held the right to appoint the broker. The Taxi respondents were not entitled to reject the appellants' choice of broker solely on that basis. The conduct of Taxi Finance and Taxi Risk in refusing to do so was in breach of their obligations in terms of s 20(*a*)(i) of the Code.

[32] The court a quo accordingly erred in upholding the appeal of the Taxi respondents. The relief granted by the court of first instance requires amendment to make it clear that it is the mandate of Taxi Finance that the appellants were entitled to cancel. Counsel for the Taxi respondents conceded that if it was found that the appellants were entitled to appoint a broker or intermediary to manage the policies ceded to TS, a declarator should issue to clarify this.

[33] The following order is made:

1 The appeal is upheld with costs such costs to include the costs of two counsel.

2 The order of the court a quo is altered to read as follows:

'(a) The appeal is dismissed with costs such costs to include the costs of two counsel.

(b) The order of the court of first instance is altered to read as follows:

(i) It is declared that the first, second and third applicants are entitled to cancel the insurance brokerage mandate held by the second respondent.

(ii) The first, second, third and fourth respondents are ordered to give effect to the first, second and third applicants' cancellation of the insurance brokerage mandate held by the second respondent.

(iii) It is declared that the first, second and third applicants are entitled to appoint brokers to manage the comprehensive short term motor vehicle

insurance policies ceded by them to the first respondent subject to the approval of the first respondent.

(iv) The first, second and third respondents are ordered to pay the costs of the application, jointly and severally, the one paying the others to be absolved.'

K G B SWAIN

JUDGE OF APPEAL

Appearances:

For the Appellants:	J Suttner SC (with him H Gani)
	Instructed by:
	Pather & Pather Attorneys, Durban
	Claude Reid Inc, Bloemfontein
For the 1st, 2nd & 4th Respondents:	A R G Mundell SC
	Instructed by:
	Marie-Lou Bester Inc, Johannesburg
	Bezuidenhouts Attorneys, Bloemfontein
For the 3rd and 6th Respondents (Intervening Party):	P T Rood SC
	Instructed by:
	Kern & Partners, Johannesburg
	Horn & Van Rensburg Bloemfontein