

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO:

33559/2020

- (1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

ZANDISIWE MUSA

Applicant

And

KING PRICE INSURANCE CO

Respondent

JUDGMENT

MAKUME, J:

[1] In this matter the Applicant seeks an order against the Respondent in the following terms:

- 1.1 That the Respondent be directed to determine the insured value of the insured property as on date of damage using the methodology agreed in the Insurance Contract.
- 1.2 Pay the amount of the insured value to Applicant or his financier within 30 days of the order.
- 1.3 Remove from its records where it so exists an entry that Applicant's claim was rejected by Respondent.
- 1.4 Costs on an attorney and client scale.

[2] The following are common cause facts

- 2.1 During or about 2017 the parties concluded a short term insurance contract in terms of which the Respondent provided comprehensive cover in respect of the Applicant's motor vehicle being a BMW with registration number FJ91YKGP against damage to the vehicle.
- 2.2 On the 10th April 2020 the Applicant whilst driving his motor vehicle described above was involved in a collision causing damage to the motor vehicle.
- 2.3 The Applicant reported the accident to the Police and subsequently filed a claim with the Respondent.
- 2.4 The Respondent's assessor requested certain information from the Applicant being access to his cell phone records.
- 2.5 The Applicant refused to let the Respondent's assessor have access to his cell phone records. It was as a result of that refusal that the Respondent rejected the Applicant's claim and cancelled the contract.

2.6 The Applicant then filed a complaint with the Ombudsman for short term insurance. The complaint was dismissed and the Ombudsman endorsed the decision of the Respondent.

[3] The claim is for specific performance. The Respondent's case is that since the contract has been cancelled it cannot perform in terms of a cancelled contract. The Respondent maintains that the relief sought by the Applicant is incompetent in view of the absence of any prayer to review and set aside the Respondent's decision to reject the claim.

[4] The issue before me which is dispositive of the matter is whether the Respondent correctly and procedurally rejected the claim and cancelled the agreement.

[5] The material terms of the policy of insurance referred to above were as follows:

5.1 The Applicant undertook to always provide the Respondent with true and complete information.

5.2 The Applicant also undertook to provide the Respondent with all information and documentation that the Respondent asks for and to do so within the time frame set by the Respondent.

5.3 The Applicant undertook to provide the Respondent with any relevant documents required to validate the claim.

5.4 The Applicant undertook to comply with the Respondent's instructions and requests as and when required.

[6] It is common cause that the Respondent was entitled to request further information and documentation to enable it to validate the claim. In particular the Respondent requested from the Applicant to grant it permission and consent to approach MTN

Cellphone Operator to enable the Respondent to establish beacons and billing report in order to verify the Applicant's version and to establish the whereabouts of the Applicant at the time of the accident.

[7] The steps leading to the Respondent rejecting the Applicant's claim are as follows:

7.1 On the 22nd May 2020 the Respondent sent a letter to the Applicant requesting the Applicant to furnish the Respondent with authority to obtain cell phone records. The Respondent informed the Applicant that it requires the said authorisation by close of business on the 25th May 2020. That deadline was not met.

7.2 A further letter was addressed to the Applicant requesting that the information be made available by close of business on the 03rd June 2020.

7.3 On the morning of the 03rd June 2020 Applicant promised that he will make the information available and did not do so.

7.4 On the 03rd June 2020 the Respondent addressed a formal letter to the Applicant notifying him of the rejection of the claim on the basis of the Applicant's failure to comply with a reasonable request by the Respondent to enable the Respondent to verify the claim. In the letter the Applicant was informed that the policy will be regarded as cancelled by the 30th July 2020.

[8] The Applicant maintains that he refused to grant access to the Respondent because firstly such information as required was not reasonable, secondly that the Applicant insisted on being furnished with an undertaking by the Respondent to safeguard his personal information.

- [9] The Applicant by his own action failed to comply with a condition of the policy of insurance and thus breached the agreement. The Respondent as it was entitled to accepted the Applicant's breach and cancelled the policy.
- [10] The Applicant has not challenged the cancellation which still stands but has instead elected to claim specific performance on a non-existent contract.
- [11] The legal position as enunciated in **Taljaard v Sentrale Raad Vir Kooperatiewe Assuransie BPK 1974 (2) SA 450 (A)** as well as in **Commercial Union Assurance Company of South Africa Ltd v KwaZulu Finance and Investment Corporation and Another 1995 (3) SA 751 (A)** is that it is for the insurer to allege and prove that it is entitled to repudiate the claim based on the reason relied upon.
- [12] I am accordingly persuaded that the Respondent has conclusively demonstrated that it was entitled to reject the claim and subsequently cancel the policy as it did.
- [13] The Applicant places reliance for its submission on the unreported decision by Rathivhumo AJ in the matter of **Mashele v Momentum Insurance and Another (15304/2016) [2017] ZAGPSHC 33 (2 March 2017)** and says that the facts in that matter are almost identical to the facts in the present matter. That cannot be correct this matter is about cancelation of a policy based on breach whilst in Mashele the issue was about reversal of the decision to repudiate.
- [14] The other issue raised by the Respondent in respect of the defective service as well as dispute of fact are equally valid. In view of the decision I have arrived at I do not deem it necessary to deal with those issues save to say that they are valid in law and have been well made.
- [15] In the result I have come to the conclusion that the Respondent correctly cancelled the agreement and is accordingly released from any liability therein. This application fails and I make the following order:

ORDER

- (i) The Application is dismissed.
- (ii) The Applicant is ordered to pay the Respondent's taxed party and party costs.

Dated at Johannesburg on this 09 day of May 2022.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 03 MAY 2022
DATE OF JUDGMENT : 09 MAY 2022