

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



Case number: A219/2018

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

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DATE SIGNATURE

DALMAR PLANT HIRE (PTY) LTD
APPELLANT

AND

RMB STRUCTURED INSURANCE LTD FIRST RESPONDENT

OPTIMUM GROUP 4 (PTY) LTD t/a
OPTIMUM FINANCIAL SERVICES SECOND
RESPONDENT

JUDGMENT

TOLMAY, J: (BAQWA J et SARDIWALLE J CONCURRING)

INTRODUCTION

[1] This is an appeal against the judgment of the Court *a quo* in which absolution of the instance was granted against the appellant (Dalmar). The Court *a quo* granted leave to appeal.

[2] Dalmar initially issued summons against the first respondent (“RMB”) and second respondent (“Optimum”). Dalmar’s claim was based on an insurance agreement and the claim against Optimum, an insurance broker, was based on an alleged failure of Optimum to properly advise Dalmar of the requirements for adequate insurance cover. Dalmar, in due course, amended its particulars of claim and formulated its claim exclusively against Optimum. In the amended particulars of claim Dalmar accepted that it did not have a claim against the insurer, RMB. Before the commencement of the action Dalmar settled its claim against RMB on the basis that RMB was entitled to repudiate its claim. The trial proceeded against Optimum only.

[3] Dalmar’s case was that Optimum, which was its insurance broker during the period, advised a change of insurers, from Centriq Insurance Company Limited (“Centriq”) to RMB. There was one very significant difference between the requirements of the Centriq and RMB policies which ultimately led to the dispute between the parties, this was that Centriq only required one tracking device to be installed to the insured vehicle, whereas RMB required that two such devices should be installed.

[4] It was common cause, on the pleadings, that Dalmar and Optimum during May 2010 concluded an oral agreement in terms of which Optimum was appointed to act as its insurance broker. It was also common cause that in terms of the agreement Optimum was obliged to exercise its duties with reasonable skill and care and without negligence and that, in terms of the agreement, Optimum would take all reasonable steps to convey material changes to the insurance agreement to Dalmar.

[5] The facts pertaining to the insurance claim reflects that, during July 2012 Dalmar, represented by Optimum, concluded an insurance agreement with Centriq. On 10 December 2012 a Hino 500 1726 TIP C/C tipper truck (“the insured vehicle”) was added to the policy schedule. In the particulars of claim Dalmar alleged that on 1 July 2013 the rights and obligations of Centriq were ceded to RMB, alternatively a new insurance agreement with RMB was entered into and the one with Centriq was cancelled. Optimum admitted this in its plea. Despite this the Court *a quo* stated in its judgment that no evidence in this regard was led. However, in the light of the admission no evidence in this regard was required.

[6] Dalmar’s case was that both the insurance agreements concluded with Centriq and RMB contained specific, but different endorsements, regarding the requirement relating to the installation of a tracking device or devices, which had to be fitted to the insured vehicle. Dalmar’s case was that there was a material change to what was required by the two insurers and

Optimum, as the insurance broker, had a duty to communicate this specific change to Dalmar. Optimum's case was that the change was not material.

ABSOLUTION FROM THE INSTANCE

[7] As the Court *a quo* granted absolution from the instance, after Dalmar closed its case, this Court is not required to make a final finding regarding liability, but merely has to decide whether absolution from the instance should have been granted at the end of Dalmar's case.

[8] It is trite that the test to be applied, when absolution is sought at the end of the plaintiff's case, is not whether the evidence led by the plaintiff established what would finally have to be established, but whether there is evidence upon which a court, when applying its mind reasonably, could or might find for the plaintiff. This implies that a plaintiff has to make out a *prime facie* case, it has been pointed out that absolution should be granted sparingly.¹ At absolution stage there should be no weighing up of inferences, but what should be established is, whether one of the reasonable inferences is in favour of the plaintiff.² In view of the aforesaid a trial court should be circumspect when it considers granting absolution at the end of a plaintiff's case.

[9] In the matter of *De Klerk v Absa Bank Ltd and others*³ the Court stated the following:

¹ Gordon Lloyd Page & Associates v Riviera 2001(1) SA 88 (SCA) p 92 – 93, see also De Klerk v Absa Bank 2003(4) SA 315 (SCA) p 323.

² Cilliers, Loots & Nel, Herbstein & Van Winsen, The Court Practice of the High Courts of South Africa, (5th ed), vol 1, Cilliers, Loots & Nel p 923.

³ 2003 (4) SA 315 (SCA)

“Counsel who applies for absolution from the instance at the end of a plaintiff’s case takes a risk, even though the plaintiff’s case be weak. If the application succeeds the plaintiff’s action is ended, he must pay the costs and the defendant is relieved of the decision whether to lead evidence and of having his body of evidence scrutinised should he choose to provide it. But time and time again plaintiffs against whom absolution has been ordered have appealed successfully and left the defendant to pay the costs of both the application and the appeal and with the need to decide what is to be done next. The question in this case is whether the plaintiff has crossed the low threshold of proof that the law sets when a plaintiff’s case is closed but the defendant’s is not.”⁴

[10] This appeal should accordingly be considered whilst taking consideration of the “low threshold of proof that the law sets” when a decision is made on whether absolution should be granted or not.

THE DUTIES OF AN INSURANCE BROKER

[11] There is no doubt that an insurance broker owes a duty to an insured, in *Stander v Raubenheimer*⁵ the Court referred with approval to the following statement in Ivamy’s *General Principles of Insurance Law* 5th edition at 516 where the following is stated:

⁴ *Ibid* para 1.

⁵ 1996 (2) SA 670 (O).

“It is the duty of the agent, in the exercise of the authority entrusted to him, to act with reasonable and proper care, skill and diligence.

If he is a professional agent, such as a broker, the standard by which the duty is to be measured is that of persons of experience and skill in his profession and in the place where he was employed to perform it. ...

Whether he has actually acted with the required degree of skill depends in each case on the circumstances.”⁶

[12] The Court in *Stander v Raubenheimer* found that the broker was liable for the loss suffered by the insured where the insured claimed against its insurer due to the fact that there was an exclusion in the policy based on the fact that the insured house had a thatched roof. The duty owed by an insurance broker was also confirmed in various other matters.⁷ It follows that Optimum had a duty to inform Dalmar of any material change to the policy.

THE PLEADINGS AND EVIDENCE

[13] Optimum in its plea admitted that it did not convey the change in wording to Dalmar it is stated as follows in the plea:

⁶ *Ibid* p 675.

⁷ *Durr v Absa Bank Ltd and Another* 1997(3) SA 448 (SCA) at 460 F – 461 D, *Lenaerts v JSN Motors (Pty) Ltd and Another* 2001(4) SA 1100 (W), Similar findings were made in *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd and Another* 2004 (2) SA 1 (SCA) and in *Mutual & Federal Insurance Co. Ltd v Ingram NO and Others* 2009 (6) SA 53 (E).

“Save to admit that the Second Defendant did not convey the immaterial change in wording between the endorsement in “POC2” and “POC1”, the remaining allegations contained in this paragraph are denied.”

[14] Optimum pleaded that it was necessary for Dalmar to install two self arming tracking devices in terms of both the Centriq policy and the RMB policy.

Optimum contended that the requirement to install two self arming tracking devices was communicated to Dalmar by both Centriq and by Optimum on 11 December 2012. However, the communications predates the RMB policy and *prima facie* could not have applied to it, but seems to deal with only the Centriq policy.

[15] Optimum admitted that it was obliged to take all reasonable steps to convey material changes to the insurance agreement to Dalmar. Optimum pleaded however that the changes were not material.

[16] It is apparent that in order to determine whether there was a material change in the requirement relating to the installation of the tracking devices, the provision in the Centriq policy must be interpreted. In this regard the first sentence of the endorsement in the Centriq policy refers in the singular to “a *self arming tracking device*” which must be fitted to “*the vehicle*”. That sentence seems to indicate that a single self arming tracking device must be fitted to the insured vehicle. The second sentence in the endorsement states that “*the self arming tracking device must be fitted to both units*”. That raised

the question what is meant by "*both units*". It was common cause that the vehicle in question consisted of a single unit and not of two units.

[17] The uncontested evidence of Ms. Smuts was that Dalmar queried the meaning of the sentence in the Centriq policy with Optimum, which took the matter up with Centriq, and then confirmed to Dalmar that if the vehicle consists of two units, such as a truck and trailer, a self arming tracking device must be installed to both units of the vehicle, being the truck as well as the trailer. What was conveyed and understood by both Dalmar and by Optimum, under the Centriq policy, was that two units need only be installed if the vehicle consists of two units. This evidence is supported by a trail of emails that confirmed that two devices were only required if the vehicle consisted of two units.

[18] The evidence of Ms. Smuts was that Optimum at all relevant times from December 2012 understood the endorsement in the Centriq policy to mean that only one tracking and recovery device was required for the insured vehicle.

[19] Dalmar's case was that in terms of the Centriq policy two self arming tracking devices were only required if a vehicle consisted of two separate units. The endorsement that was made on the RMB insurance policy schedule makes it clear that the insured was required to have two self arming tracking devices installed to the vehicle. Based on the wording of the agreement it was necessary to do so, regardless of the fact that the insured vehicle did not consist of two separate units i.e. a horse and a

trailer.

[20] Ms. Esterhuizen conceded in her evidence that the quotation which was presented to and initialled by Mr. Swart, constituted a communication to Dalmar that two self activating tracking and recovery units must be fitted to the vehicle in terms of the new RMB policy. It is common cause that it contained the endorsement requiring the fitting of two tracking units. The relevant question however was whether Dalmar's attention was pertinently and sufficiently directed to the fact that two tracking units were now required under the RMB policy. This evidence must be considered in the light of the Centriq policy, which only required two devices, if the vehicle consisted of two units. She pointed out that in email correspondence clarification was obtained from Optimum that two devices were only required if the vehicle consisted of two units. Dalmar acted on the basis that in terms of the first Centriq policy, only one tracking unit was required if the vehicle consisted of one unit.

[21] Dalmar pleaded that it was a term of the broker agreement that Optimum would take all reasonable steps to convey material information from an insurer to Dalmar, and this term was admitted in Optimum's plea. It was argued that the taking of reasonable steps to convey the information to Dalmar implied that Optimum should not merely have given a copy of the document in which the material change or information was contained to it, but should have seen to it that Optimum's attention was drawn to the material change. Optimum should have ensured that the insured was aware of the requirement and complied therewith.

[22] It was furthermore argued on behalf of Optimum that it was necessary

for Dalmar to present expert evidence at the trial. Based on the admissions, referred to above, however the contractual terms were admitted by Optimum and accordingly such evidence was not required, at least not at absolution stage.

[23] In paragraph 5.2.3 of the defendant's plea it was pleaded that:

"The requirement to install two self arming tracking devices was communicated to the plaintiff both by the first defendant and the second defendant on 11 December 2012. These communications are annexed hereto and marked "P1" and "P2" respectively."

[24] These communications however clearly relate to the Centriq policy to which the Hino vehicle was added on 10 December 2012. The RMB policy only came in force long after the aforesaid date.

[25] In paragraph 11.2 of the defendant's plea it was pleaded that:

"The second defendant was not required to communicate the change between the endorsement found at "POC1" and "POC2" as the second defendant had, at all material times, advised the plaintiff that it was required to attach two self arming and tracking devices to the vehicle, at all times."

[26] However, the only version in this regard which was put to Ms. Esterhuizen and Ms. Smuts was that the communication was contained in

the quotation which Mr. Swart initialled and signed on 5 July 2013. The December 2012 communications obviously did not address the provision in the RMB policy, as that policy was only issued some seven months later.

[27] In considering the evidence and pleadings one must at all times be cognisant of the fact that the test to be applied is the one that finds application at absolution stage.

JUDGMENT OF THE COURT A QUO

[28] The Court *a quo* identified the first issue to be decided as being whether the provision in the two agreements constituted a material change that was abnormal and required Optimum to convey the information to Dalmar. It then found that the Centriq agreement had no relevance to the RMB agreement. This finding seems to be based on a misdirection, as it must be kept in mind that the Centriq agreement did not require the installation of two tracking devices to the insured vehicle, unless it consisted of two units. The RMB agreement however, specifically required this. The crux of the dispute between the parties and before the court was the difference between the conditions relating to the installation of tracking devices and whether this constituted a material deviation.

[29] The Court *a quo* furthermore concluded that, apart from the above, that the two agreements are totally separate and independent of each other and should be interpreted separately. However, the interpretation of the RMB agreement and the Centriq agreement was not contentious, what was of importance was the difference in requirements, which *prima facie* placed a

duty on the insurance broker to inform Dalmar of the variation contained in the RMB agreement.

[30] The Court *a quo* seemed to have concluded that there was no material change in the RMB policy compared to the Centriq policy, but this conclusion is incorrect as the Centriq policy, in terms of the evidence led, only required one anti-theft device to be installed, whereas the RMB policy required two.

[31] The Court *a quo* made the following findings:

“In my view there cannot be any dispute that the information contained under the heading referred to above was brought to the plaintiff’s attention, as can be inferred from the plaintiff’s director’s initial on this page and his subsequent signature at the end of this document.”

The plaintiff’s director, who signed this document, failed to testify. It must therefore be inferred that he was fully aware of the requirement and condition that two safety devices be installed, and he accepted those conditions on behalf of the plaintiff.”

[32] The Court *a quo* placed great emphasis on the fact that the representative of Dalmar signed the terms and conditions of the RMB agreement.

[33] With reference to Mr. Swart's signature of the quotation, it was submitted on behalf of Optimum that it was not merely a financial quote, it was argued that it contained a warranty that "*the insured warrants that the above vehicle is fitted with two CIB approved self arming tracking and recovery devices*". Dalmar argued that there is however no such warranty in the document which Mr. Swart signed. The warranty referred to is in the RMB policy document, which was not in existence on 5 July 2013, which was not attached to the quotation, and was only issued after the quotation had been accepted by Mr. Swart. Despite the contradictory arguments one needs again to apply the principles applicable to the granting of absolution of instance.

[34] Importantly, the wording of the quotation does not state that all new requirements have been explained, it merely states that all covers were accepted, discussed and explained. Taking into consideration the requirements at absolution stage, the Court *a quo* was not in a position to find that these words exclude the possibility that the relevant requirement was not explained.

[35] The Court *a quo*'s finding implies that the insured, who signed the insurance agreement, fully appreciated the totality of the contents of the insurance agreement. However, one must consider that despite the fact that the insured is legally bound by the terms of the insurance agreement, this case is not about that agreement, but deals with the duty of the insurance broker towards his client, namely to communicate material changes to his

client, if that duty is not recognized there would be no point in appointing an insurance broker.

[36] The Court *a quo* furthermore made the following finding:

“On a proper interpretation of the relevant policy agreement it is quite clear that two tracking devices were required and that the plaintiff was fully aware of that condition when the quotation was accepted. There was no misunderstanding, and the only conclusion that can be drawn is that a binding agreement was concluded. In the absence of the evidence of Mr Swart there is nothing to be said against the conclusion that there was a proper meeting of minds.

The first agreement with Centriq and the inquiry about the meaning of the two devices being required can in my view not be used to interpret the terms and conditions of the RMB agreement. It does not form part of the plaintiff’s claim at all and must be regarded as res inter alius acta (sic). Plaintiff therefore failed to prove a misrepresentation or a failure to properly investigate on the part of the second defendant as the cause of action.”

[37] As far as the failure to call Mr. Swart to testify is concerned, the record indicates that Optimum was aware that Mr. Swart was not available and would not be called as a witness at the time when Ms. Esterhuizen and

Ms. Smuts were called to testify. Optimum's counsel did not, in cross-examination of Ms. Esterhuizen or Ms. Smuts, put on record that an adverse inference would be drawn, if Mr. Swart did not testify, or suggested that Mr. Swart could give evidence, or would give evidence contrary to that which they gave.

[38] The evidence of Ms. Smuts, that Mr. Swart did not read the quotation document, but merely signed it was not challenged during cross-examination. In *President of the RSA v SARFU*⁸, The following of relevance was said:

*"The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed."*⁹

[39] The failure to challenge the evidence entitled Dalmar to accept that the evidence was accepted and therefore need not have been corroborated. At the very least counsel for Optimum should have challenged Ms. Smuts on the basis that, having regard to the printed words above the signature of Mr. Swart's signature it would be argued by Optimum that on the probabilities Mr.

⁸ 2000 (1) SA 1 (CC) at para 62–65, See also *Rautini v Passenger Rail Agency of South Africa* [2021] JOL 51546 (SCA) para 14 – 15, *S v Boesak* 2001(1) SA 912 (CC) para 26.

⁹ *Ibid* para 63.

Swart did read and consider the entire document and that her evidence to the contrary should be rejected on the probabilities.

[40] In *Pexmart v H Mocke*¹⁰ it was found that whether an adverse inference should be drawn if a witness is not called will depend on the facts of the case. We were not referred to any decision in any Court, in which an adverse inference was drawn from a failure to call a witness in respect of a matter which was not in dispute, or in respect of which the evidence before the Court was not contradicted. The Court in *Pexmart*¹¹ referred to its previous decision in *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd*¹² in which it was stated that there was not a general and inflexible rule to be applied without more in every case that an adverse inference is to be drawn, where a party fails to call a witness who is available and able to elucidate the facts;

[41] It was argued, correctly, that in *Pexmart* it was indicated during the course of the plaintiff's case that the witness, Mr. Henn, would be called. In the present case it was made clear that Mr. Swart was not available and would not be called. It was furthermore pointed out that in *Pexmart* the Court took account of the fact that during the course of the plaintiff's case contradictory evidence had been led, which could have been clarified had the witness been called. In the matter before us there was no contradictory evidence put which could have been clarified by Mr. Swart.

¹⁰ 2019 (3) SA 117 (SCA) para 69 (*Pexmart*), see also Zeffert and others: *The South African Law of Evidence* (2003) p 136.

¹¹ *Ibid* para 69.

¹² 1979 (1) SA 621 (A) at 624B–F.

[42] In *Pexmart* the Court held that the probable reason for not calling Mr. Henn as a witness was that it was feared that his evidence would expose facts unfavourable to the plaintiff's case. There is no basis for such an inference in this case, as the evidence of Ms. Smuts, that Mr. Swart had not read the document, was not challenged.

[43] In the circumstances of this matter, there is no basis upon which an adverse inference can properly be drawn that Ms. Smuts was wrong in her evidence that Mr. Swart had not read the document, and that had Mr. Swart been called, he would have confirmed that he read the document and was aware of the stipulation that two tracking units must be installed to the vehicle.

[44] The Court *a quo* continued to find that the agreement with Centriq and the meaning of the two devices being required, could not be used to interpret the terms and conditions of the RMB agreement, and was *res inter alias acta*. The Court concluded that Dalmar failed to prove a misrepresentation, or a failure to properly investigate on the part of Optimum, as a cause of action. However, Dalmar's claim was not based on a misrepresentation. The record shows that Dalmar accepted that it was bound by the terms of the insurance agreement and that is why the claim was against Optimum and not RMB. In this regard the Court *a quo* failed to appreciate the nature of Dalmar's claim.

[45] The Court *a quo* did not consider the fact that Dalmar signed and was bound by the terms of the RMB agreement. It however does not follow by necessary implication that Dalmar understood the specific requirement that

an additional tracking device had to be installed to the vehicle. It would seem that the Court *a quo* confused the principles of *caveat subscriptor* and the duty of an insurance broker towards his client.

[46] As far as the interpretation of contracts are concerned, as the case is here, it must be noted that in the matter of *Gaffor v Uni Versekerings Adviseurs (Edms) Bpk*¹³ the Court pointed out that when the interpretation of contracts are in issue the trial court should “... *refuse absolution unless, the proper interpretation appears to be beyond question*”.

[47] It is obvious that if there was no material change in the requirement relating to the installation of the tracking and recovery device, when the RMB policy is compared to the Centriq policy, then there was no duty on Optimum to point out the wording of the endorsement. But, on the other hand, if there was a material change, then there was undoubtedly such a duty.

[48] The Court *a quo* stated that the Centriq policy required that two self tracking devices must be fitted to the vehicle and then proceeded to quote words on the basis that these appeared in the Centriq policy being “*self arming tracking and recovery device warranty (two units to be installed)*”. This is however not the wording of the endorsement in the Centriq policy, but is the wording of the endorsement in the subsequent RMB policy. The Court referred to annexure “POC1” but the wording appears in the endorsement in annexure “POC2”, which is the RMB policy. As a result, the wording which

¹³ 1961 (1) SA 335 (AD) at page 340B–C.

the Court *a quo* relied upon for finding that the Centriq policy required that two self tracking devices must be fitted, does not appear in the Centriq policy, but appears in the subsequent RMB policy.

[49] The Court *a quo* held that queries were raised by Dalmar to Optimum as to the meaning of the quoted term. A query was raised, but the record indicates that the query was not raised in respect of the wording quoted by the Court *a quo* (which only appears in the subsequent RMB policy), but was raised in regard to the phrase “*the self arming tracking device must be fitted to both units*” which appeared in the Centriq policy.

[50] The Court *a quo* stated that Dalmar, acting on the broker’s advice only installed one tracking device to the Hino truck. That finding is correct. However, the Court found that Dalmar did so notwithstanding an endorsement to the insurance policy. This endorsement, as already pointed out appears in the RMB policy and not, as found by the Court *a quo*, in the Centriq policy.

[51] The Court *a quo* having erroneously found that the provisions relied upon and quoted appeared in the Centriq policy, erroneously concluded that the Centriq policy required two tracking devices to be installed to the vehicle. Had the Court *a quo* referred to the correct wording of the endorsement in the Centriq policy and had regard to the evidence, the Court *a quo* would have concluded that the Centriq policy, as understood by both Dalmar and Optimum, required only one tracking and recovery device to be fitted to the Hino vehicle.

[52] The Court *a quo* continued furthermore to hold that the Centriq policy had no relevance to the RMB policy and could only play a limited role as to what Dalmar's understanding was when the RMB contract was concluded. The proper interpretation of, as well as the understanding of Dalmar and Optimum, as to what was required in terms of the Centriq policy was relevant to the question whether there was a material change to this requirement in the RMB policy. Having regard to what both Dalmar and Optimum understood, in the light of the evidence led, namely that only one tracking device was required to be installed to the insured vehicle, in terms of the Centriq policy, there was *prima facie* a material change between that requirement, and the requirement in the subsequent RMB policy, where two tracking and recovery devices were required to be fitted to the vehicle.

CONCLUSION

[53] Taking into consideration the requirements for the granting of absolution of the instance the Court *a quo* misdirected itself when it granted absolution of the instance and consequently the appeal should be upheld.

[54] The following order is made:

- 1. The appeal is upheld.**

- 2. The order of the Court *a quo* is set aside and the following order is made:**

2.1 “The application for absolution of the instance is dismissed and the defendant is ordered to pay the costs occasioned by the application.”

3. The matter is remitted to the Trial Court for a hearing and decision.

4. The respondent to pay the costs of the appeal.

R G TOLMAY

JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 June 2022.

DATE OF HEARING: 13 APRIL 2022

DATE OF JUDGMENT:

ATTORNEY FOR APPELLANT: DELPORT VAN DEN BERG

ADVOCATE FOR APPELLANT: ADV N MARITZ (SC)

ADV E ELS

ATTORNEY FOR RESPONDENTS:

ANDREW MILLA & ASS

ADVOCATE FOR RESPONDENTS:

ADV L CHOATE