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G.P.-S.12136—1952-3—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

Eagle Star Insce Co. Ltd *Appellant,*

versus

Henry David WILLEY. *Respondent.*

Appellant's Attorney Webber Sons *Respondent's Attorney*
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate D. P. de Villiers *Respondent's Advocate* G. Gordon
Advokaat vir Appellant T. D. B. Knight *Advokaat vir Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op Tuesday, 11th November

(CPD. 21)

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

EAGLE STAR INSURANCE COMPANY LIMITED Appellant

&

HENRY DAVID WILLEY Respondent

CORAM : Centlivres C.J. van den Heever, de Beer, Reynolds et Hall JJ.A.

Heard : 11th Nov. 1955. Delivered : 24.11.55

J U D G M E N T

CENTLIVRES C.J. :- The parties to this Appeal entered into a motor car policy whereunder the appellant (to which I shall refer as the insurer) undertook to indemnify the insured (the respondent). Section II of the policy reads as follows :-

" LIABILITY TO THIRD PARTIES

The Company will indemnify the Insured in the event of an accident caused by or through or in connection with any Motor car described in the Schedule hereto against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of

(i) Death of or bodily injury to any person not being a member of the Insured's household

" but excluding death of or bodily injury to any person in the employment of the Insured arising out of and in course of such employment.

(ii) Damage to property other than property belonging to the insured or held in trust by or in the costody or control of the Insured.

The Company will pay all costs and expenses incurred with its written consent. "

During the currency of the policy a collision occurred between the insured car which was being driven by the insured and another car. A passenger in the insured's car was injured and she brought an action against the insured, claiming damages on the ground of negligence. The insurer refused to implement its undertaking to indemnify the insured . The insured thereupon brought an action in the Cape Provincial Division against the insurer claiming a declaration that the insurer was liable to indemnify him in terms of the policy of insurance in respect of the action brought against him by the passenger. The insured in his declaration did not aver that the passenger was not a member of his household. The insurer, in a request for further particulars asked whether the insured alleged that the passenger was not a member of his household. The insured refused to reply to that request on the ground that the allegation referred therein was not relevant to the insured's cause of action. The insurer thereupon excepted to the insured's declaration as

disclosing no cause of action. The Provincial Division dismissed the exception with costs and granted leave to appeal.

The question to be decided in this appeal is whether it is incumbent upon the insured to aver in his declaration that the passenger whom I have mentioned was not a member of his household. The promise made by the insurer was to indemnify the insured against all sums etc. which the insured "shall become legally liable to pay in respect of (1) death of "or bodily injury to any person not being a member of the "Insured's household." Apart from decided cases dealing with certain types of insurance one would have thought that there would be no doubt that the insurer in the present case would have to frame his declaration in such a manner as to bring his claim within the four corners of the promise made to him : in other words he would have to allege in the present case that the passenger in his car was not a member of his household. If the insured must make that allegation then the burden of proving that the passenger was not a member of his household would rest on him.

In Munro, Brice and Company v War Risks Association (1918 K.B. 78) which was a marine insurance case, Bailhache J. said at pp. 88 and 89 :-

" The rules now applicable for determining the burden of proof in such a case as the present may, I think, be stated thus :-

1. The plaintiff must prove such facts as bring him prima facie within the terms of the promise.

2. When the promise is qualified by exceptions, the question whether the plaintiff need prove facts which negative their application does not depend upon whether the exceptions are to be found in a separate clause or not. The question depends upon an entirely different consideration, namely, whether the exception is as wide as the promise, and thus qualifies the whole of the promise, or whether it merely excludes from the operation of the promise particular classes of cases which but for the exception would fall within it, leaving some part of the general scope of the promise unqualified. If so, it is sufficient for the plaintiff to bring himself prima facie within the terms of the promise, leaving it to the defendant to prove that, although prima facie within its terms, the plaintiff's case is in fact within the excluded exceptional class. Illustrations of this rule are actions against common carriers and the analogous cases in which a promisor undertakes to perform a given act unless excused by certain excepted events, as, for example, a vendor to deliver, strikes excepted ; a charterer to load a ship in a given number of lay days, subject to the usual exceptions now found in charterparties.

3. When a promise is qualified by an exception which covers the whole scope of the promise, a plaintiff cannot make out a prima facie case unless he brings himself within the promise as qualified. There is ex hypothesi no unqualified part of the promise for the sole of his foot to stand upon. As an instance I take a marine

" policy with the particular average franchise. There, reading the promise and the exception together, the promise is not a promise to pay particular average or to pay particular average except in certain events. It is a promise to pay particular average exceeding 3 per cent. To bring himself within that promise a plaintiff must show more than a particular average loss ; he must show a particular average loss exceeding 3 per cent.

4. Whether a promise is a promise with exceptions or whether it is a qualified promise is in every case a question of construction of the instrument as a whole.

5. In construing a contract with exceptions it must be borne in mind that a promise with exceptions can generally be turned by an alteration of phraseology into a qualified promise. The form in which the contract is expressed is therefore material. "

The above statement of the law appears to have received general acceptance by textbook writers on insurance and no doubt insurance companies have, in drafting their policies, relied on that statement. In the fifth rule Bailhache J. lays stress on the materiality of form. The words in the third party liability claim "not being a member of the Insured's household" mean the same as "who is not a member of the Insured's household" and may be said to define "any person." On the other hand they also mean the same as "except a member of the Insured's "household." Apparently if the words "except" etc. had been used the form is such that the burden of proving that the passenger is a member of the Insured's household would

rest on the insurer but if the words in question are construed, as defining "any person" then the promise made by the insurer should apparently be regarded as a qualified promise and the burden of proving that the passenger was not a member of his household would rest on the insured. A good illustration of the importance attached to form is given by Welford and Otter - Barry's Fire Insurance, 3rd ed. at p. 125 where he says :

" The exception from liability, instead of being framed as an exception, may be expressed as a qualification or limitation upon the undertaking of the insurers. The contract of the insurers then ceases to be a general undertaking to indemnify the assured, subject to exceptions, in which case the insurers are liable, unless the exception applies : the contract is a qualified undertaking only, and no liability arises, unless the loss falls within the qualification. The distinction may be illustrated thus. If the insurers wish to exclude liability for incendiary fire, they may do so by either method. If the method of using an exception is adopted, their undertaking will be expressed in general terms as a contract to insure against "loss by fire, except incendiary fire." By the second method the undertaking will be qualified : it will be an insurance against "loss by non-incendiary fire." Though both methods accomplish the same result, namely, the exclusion of liability for incendiary fire, the distinction between them is not merely one of expression, it is a distinction of substance having an important bearing upon the onus of proof, since

" by the second method, the onus is placed upon the assured to prove that the loss falls within the undertaking as qualified. "

"Loss by non-incendiary fire" is the same as loss by fire which is non-incendiary or loss by fire not being incendiary. In each expression the word "fire" is qualified or defined. According to Welford and Otter-Barry who appear to be supported by the fifth rule enunciated by Bailhache J., a promise to make good such loss would be a qualified promise, and the onus is placed upon the insured to prove that the loss falls within such promise.

If I have to decide this case according to what appears to be the accepted law in regard to certain types of insurance such as marine and fire then it appears that I must pay particular attention to the form of the language used. In the present case there is no doubt in my mind that the words "not being a members of the Insured's household" qualify the words "any person" and are not cast in the form of an exception to a general liability. There is a marked contrast between those words and the words following the word "household." Those words start with the words "but excluding" which are indicative of an exception. As I have no doubt as to the form of the language used there

is no room for the application of the contra proferentem rule in construing the words in question. In the result, therefore, the onus rests on the insured to prove that his passenger was not a member of his household. Consequently as there is no allegation in the declaration to this effect the appeal should succeed.

Counsel on both sides seem to have approached the problem on the basis that the principles applied in other types of insurance inregard to the burden of proof apply also to insurance policies of the kind I am now considering. I wish to guard myself against being taken to agree to that basis. In other types of insurance the result of casting on the insured the onus of proving a negative may well result in the policy becoming worthless. This is well illustrated by the remarks of Bailhache J. in Munro, Brice case (supra) at p. 81 :-

" The assured having proved that his vessel foundered at sea has proved a loss by a peril of the sea, for in the last resort every vessel that sinks at sea is lost by a peril of the sea. The loss is then within the terms of the promise and the question is, Must the assured go further and show that the sea peril was not induced by a cause excepted by the free of capture and seizure clause? If so, an assured, as in this case, being insured by two policies, one against marine and the other against war

" risks, may fail on both ; on the latter because he cannot show that the loss was due to a war risk, on the former because he cannot show that it was not. "

Similarily a fire policy which contains an exemption from liability to pay for the loss when the fire has been caused by incendiarism would be of little practical value in cases where the cause of the fire is unknown, if the insured had to prove that it was not caused by incendiarism. Thus too in the case of an accident policy "there might be a great "many cases..... where nothing could be recovered if the "pursuer had to prove conclusively that the cause of death "was accident and not suicide" (per Lord Justice Clerk in Macdonald v Refuge Insurance Company, 27 S.L.R. 764 at p. 766). In the three instances I have given, the cause of the loss suffered is not peculiarly within the knowledge of the claimant and this probably furnishes the reason why the Courts have not cast the burden of proving the negative on the claimant. In the case of such a policy as the one I am now considering it is obviously a matter within the peculiar knowledge of the insured whether the passenger in his car was, or was not, a member of his household and it cannot be said that there will be any hardship on the insured if the onus is cast on him to prove that the passenger was

not a member of his household. However, in view of the conclusion at which I have arrived viz: that the appeal should succeed, if this case is to be governed by the fifth rule laid down by Bailhache J., it is unnecessary for me to express any opinion whether those rules should be applied to a policy such as was issued in this case.

In my opinion the appeal succeeds with costs and the order made by the Provincial Division should be struck out. The exception is allowed with costs in the Provincial Division : the plaintiff's declaration is set aside and leave is given to the plaintiff to file a fresh declaration within three weeks from the date of this order.

van den Heever J.A.)
de Beer J.A.)
Reynolds J.A.) concur
Hall J.A.)