4-11-75

G.P.-S.59968—1970-71—2 500 J 219 199/7

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

INCORPORATED GENERAL INSURANCES LIMITED Appellant,

versus

[illegible]ANCBA VERVOER (EIENDOMS) BEPERK Respondent

Appellant's Attorney / *Prokureur vir Appellant* [illegible]
Respondent's Attorney / *Prokureur vir Respondent* [illegible]

Appellant's Advocate / *Advokaat vir Appellant* P.M. Wulfsohn S.C., D.V. Duke.
Respondent's Advocate / *Advokaat vir Respondent* J.H. Conradie

Set down for hearing on
Op die rol geplaas vir verhoor op

(W.L.D.)

Coram: Holmes, Wessels, Rabie, Hofmeyr et Miller ARR

Wulfsohn - 9.45-11.00, 11.15-12.10, 3.00-3.30, 3.45-4.30

Conradie - 12.10-12.45, 2.15-3.00.

C.A.V.

The Court dismisses the said appeal, with costs (Judgment per Rabie JA) 28/9/76

[signature] Registrar

Writ issued / Lasbrief uitgereik	
Date and initials / Datum en paraaf	

Bills taxed—Kosterekenings getakseer

Date / Datum	Amount / Bedrag		Initials / Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

INCORPORATED GENERAL INSURANCE LIMITED.....Appellant

and

FRANSBA VERVOER (EDMS.) BPK.....Respondent

Coram: Holmes, Wessels, Rabie, Hofmeyr, et Miller, JJ.A.

Heard: 14 September 1976.

Delivered: 28 September 1976

J U D G M E N T

RABIE, JA.:

This is an appeal against an order made by McEwan, J., in the Witwatersrand Local Division, declaring that appellant is, in terms of insurance policy No. 5CH 3458, liable to indemnify respondent for the loss suffered by it by reason of two of its vehicles having been in-

volved...../2

volved in an accident.

Respondent carries on business as a transport contractor in Potchefstroom. It applied to appellant for insurance of its vehicles on 18 April 1972, and the above-mentioned policy was issued to it on 29 June 1972. The proposal form was filled in by a Mr. Wiese, a partner in a firm of insurance brokers (Westvaal Insurance Brokers) at Potchefstroom, and signed by Mrs. J.C. Weber. Mrs. Weber and her husband, Mr. F.C.W. Weber (hereinafter referred to as Weber), were respondent's directors at the time. Weber was the managing director, and, in addition to managing respondent's affairs, he also conducted an independant transport business in his own name. Mrs. Weber also had a transport business of her own. On 18 April 1972, when Mrs. Weber applied for insurance in respect of respondent's vehicles, she also signed proposals for the insurance of vehicles which belonged to her husband and to herself, and policies were subsequently

issued...../3

issued by appellant in respect thereof. Two of respondent's vehicles insured under policy no. 5 CH 3458 (hereinafter referred to as "the policy", except where otherwise indicated), viz., a Mercedes Benz mechanical horse (TX 16746) and a Hendred trailer (TX 16747), were damaged in an accident on 1 December 1972. Respondent called upon appellant to make good its loss, but appellant denied liability, alleging that the driver of the vehicles was not properly licensed as required by the policy. On 5 March 1973 respondent instituted motion proceedings. In its answering affidavit appellant raised - for the first time - the defence that it was entitled to repudiate the policy on the ground that respondent, in making its proposal for insurance, had failed to disclose information which was material to the assessment of the risk to be insured, viz., the fact that vehicles belonging to Weber had during the period 24 October 1969 to 8 October 1970 been involved in four accidents and that claims in respect

thereof...../4

thereof had been made against the company by which the vehicles were insured. In its replying affidavit, deposed to by Weber and dated 4 May 1973, respondent advanced the contention that, inasmuch as the vehicles which were involved in the accidents did not belong to it, it was under no duty in law to make disclosure of the accidents. The disputes between the parties could not be determined on the affidavits, and the matter was accordingly referred to trial.

In its plea to respondent's particulars of claim appellant raised, as its main defence, the point that respondent failed to make disclosure of the accident and claims history of Weber's vehicles. The following allegations are made in sub-paragraphs (h), (i), (j) and (k) of paragraph 2 of the plea:

> "(h) The facts relating to the said accidents, damages or losses, and the said claims, constituted information known to the Plaintiff as well as to the said persons in control of the Plaintiff, and was material to the decisions by the Defendant whether

to...../5

to have accepted the risk entailed in the granting of/the said insurance, and/or as to the nature or the extent of the risk and the amount of the premium to be payable by the Plaintiff to the Defendant.

(i) In breach of the said duty, the Plaintiff at no material time made any disclosure to the Defendant of any of the facts relating to the said accidents, or the said damages or losses, or the said claims, and the Defendant was unaware of the said information in its decision to accept the risk entailed in its granting of the said insurance with its said terms, and in fixing the amount of the premium payable by the Plaintiff under the said insurance policy.

(j) By virtue of the said material non-disclosure, the Defendant has been materially prejudiced, or alternatively, the said facts were likely materially to have affected the Defendant's said assessment of the said risk, in that it would not have issued to the Plaintiff the said insurance policy with its said terms and/or on the basis of the said premium fixed therein.

(k)...../6

(k) In the premises and as it is in law entitled to do, the Defendant has repudiated the said insurance policy and is not liable to the Plaintiff thereon".

It was agreed at a pre-trial conference that an insurance company, referred to in the evidence as Sentrakas, paid out a total amount of R12 771 to Weber in respect of losses sustained in the four accidents.

In this Court appellant was granted leave to amend paragraph 2 of its plea, respondent consenting thereto, by adding an alternative paragraph, 2 bis thereto. In the new paragraph it is alleged inter alia:

"(b) It was a material term of the said insurance policy (especially in the preamble and in Condition 9 therein), read with the proposal and declaration in such proposal, as signed by the Plaintiff, that the basis of the said contract was that the truth of statements and answers therein was a condition precedent to any liability of the Defendant to effect payment under the said policy, in respect of information material to the

Defendant's assessment of the risk.....

.....

(d) In breach of the said term, the Plaintiff acted as in paragraph 2(i) supra, and the Defendant was unaware and it acted as in paragraph 2(i) supra, the allegations wherein are repeated herein.

(e) The Defendant repeats herein paragraph 2(j) supra.

(f) In the premises, the Defendant is not liable to effect any payment to the Plaintiff, and the Plaintiff is not entitled to succeed in its claim".

In the preamble to the policy it is stated that the proposal and the declaration therein "shall be the basis of this contract and is deemed to be incorporated herein". The declaration contained in the proposal form reads as follows (I have inserted the word "bevat", which is required by the context):

"SPESIALE VERKLARING DEUR DIE VERSEKERDE.
Ek ons verklaar dat al bostaande verklarings en besonderhede wat deur my ons gelees en nagesien is, in alle opsigte waar en juis is, en alle

inligting..../8

inligting bekend aan my ons wat moontlik die versekerbare risiko betref, (bevat), en dat hierdie en enige ander geskrewe verklaring wat deur my ons of ten behoewe van my ons gemaak is, aangaande die voorgenome versekering, die grondslag sal vorm en ingelyf sal wees in die Kontrak tussen my ons en Incorporated General Insurances Beperk, en bindend sal wees."

In Condition 9 of the policy it is said inter alia that "the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the Company to make any payment under this policy."

In its replication to appellant's plea, respondent advanced the contention, as it did in the motion proceedings, that there was no duty on it to make disclosure of the accidents involving Weber's vehicles. The relevant paragraphs of the replication reads as follows:

"2. AD PARAGRAPH 2(h)

The Plaintiff admits that the said claims constituted information known to Mr. F.C.V. Weber, but

says...../9

says that disclosure of the information in question could not reasonably have been considered by the Plaintiff or Mrs. Weber as being material in view of the fact that the drivers who were involved in the said accidents were not in Plaintiff's employment and would not be driving any of Plaintiff's vehicles, and they were at the relevant time no longer in the employ of F.C.V. Weber. The Plaintiff furthermore denies that disclosure of the said information could in all the circumstances have been material to Defendant's assessment of the risk or the extent of the premium.

3. AD PARAGRAPH 2(i)

The Plaintiff denies breaching the duty as alleged, and refers to paragraph 2 above.

4. AD PARAGRAPH 2(j)

The Plaintiff denies that there has been any material non-disclosure by the Plaintiff and denies that the Defendant (sic) has been breached, either as alleged or at all.

5. AD PARAGRAPF 2(k)

The Plaintiff denies that the Defendant was or is entitled to repudiate the policy".

The defence, referred to above, that the driver of respondent's vehicle was not properly licensed, was, by agreement between the parties, not made an issue at the

trial...../10

trial.

At the commencement of the trial on 3 February 1975, appellant's counsel, accepting that the onus was on appellant to establish the defence raised by it, stated that there was "apparently going to be a secondary issue" in the case, and that he had been given to understand that respondent "intended to put forward certain evidence to the effect that the defendant was notified (i.e., of the accidents involving Mr. Weber's vehicles) prior to the proposal having been signed." Appellant at no time objected to respondent's raising the "secondary issue", although it is not covered by any averments in respondent's replication, and the trial Court ultimately pronounced on the issue so raised.

The proposal forms signed by Mrs. Weber contain various questions which have to be answered by the person applying for insurance. Question 9 reads as follows: "Hoeveel ongelukke of verliese het die afgelope drie jaar

voorgekom...../11

voorgekom ten opsigte van die voertuig wat u nou wil verseker of enige ander voertuig deur u bestuur of deur enige ander persoon wie na u wete sal bestuur?" On the form signed on respondent's behalf, the space provided for giving an answer was left blank. This, it seems to have been accepted by the parties, was equivalent to a negative answer, which was correct in so far as respondent's vehicles were concerned. The answer given to question 9 on Weber's form was "Geen", which was, of course, not a correct answer, four of his vehicles having been involved in accidents during the period mentioned in the question. The answer to question 9 on Mrs. Weber's form was that one vehicle had been involved in an accident and that the loss amounted to approximately R600.

The trial Court, relying inter alia on evidence which showed that Weber managed not only his own transport business, but also that of respondent, held that Weber's personal business was sufficiently closely linked

to...../12

to that of respondent's to have required respondent to disclose to appellant the aforementioned fact that Weber's vehicles had been involved in four accidents. The Court accordingly found against respondent on this issue.

On the further issue canvassed at the trial, viz., whether the accident and claims history of Weber's vehicles had been disclosed to appellant prior to its receiving respondent's proposal for insurance, the trial Court held that appellant had not discharged the onus of proving that such disclosure had not been made, and that respondent was accordingly entitled to the order claimed by it.

Respondent's counsel contended in this Court that the trial Court erred in coming to its aforesaid conclusion that respondent should have informed appellant of the accidents which had befallen Weber's vehicles, but, in the view I take of the appeal, I do not find it necessary to deal with this contention. I shall accordingly assume, without deciding the question, that the trial

Court's...../13

Court's finding on the said issue was correct.

In order to show that appellant had notice of the accidents in which Weber's vehicles had been involved, respondent relied on the evidence of Mr. P. B. Bosch, one of the partners in the firm, Westvaal Insurance Brokers. Bosch's evidence was to the following effect. He was approached by Weber, who required new insurance for respondent's vehicles because the insurance which he had at that time was due to expire and could not be renewed because the company concerned, Sentrakas, was no longer permitted to provide insurance for non-farmers. He (Bosch) telephoned three insurance companies with a view to obtaining quotations. He spoke to the manager of appellant's Klerksdorp branch, one van Stryp, who told him that, before he could give any quotations, he required information as to the claims history ("eisegeskiedenis") of the vehicles and the no-claim bonus applicable to every vehicle that was to be insured.

(Bosch stated in this connection - and he was not cross-

examined..../14

examined thereon - that insurance companies "sal --- niks doen sonder daardie gegewens nie"). Weber gave him (Bosch) some of the information needed, but not all, whereupon he approached Sentrakas. Sentrakas told him of four accidents in which Weber's vehicles had been involved and gave him particulars of the amounts which had been paid out in respect thereof. It also furnished him with details of no-claim bonuses. After he had obtained this information, Bosch said, he telephoned van Stryp and conveyed to him all the information he had received from Sentrakas. Van Stryp answered that "dit klink aanvaarbaar", and that he would let Bosch have a quotation. He then told van Stryp that he would write him a letter to confirm their telephonic conversation, and he suggested to van Stryp that he should send him his quotation in the meantime. He made this suggestion, he said, in order to save time, because postal deliveries between the two towns (Potchefstroom and Klerksdorp) were slow. He wrote a letter to van Stryp, confirming what he had told him on

the ...../15

the telephone, and had the letter posted. ("Ek het dit laat pos."). Van Stryp sent him a quotation, as promised, whereupon he wrote a letter to respondent, giving details of the quotation received from van Stryp. This letter, which was an exhibit at the trial, is dated 2 December 1972. It states, inter alia, as to the premiums quoted, that: "Alle premies is bereken op geeneis bonusse wat verkry is by Sentrakas. Indien die gegewens nie korrek is nie sal die bedrae dienooreenkomstig verander word". (This letter, it may be added, also contains details of a quotation received from another company, Protea Insurance Company.) After respondent had decided to accept van Stryp's quotation, he (Bosch) telephoned van Stryp to inform him that respondent had decided to accept his quotation and that it would apply for insurance, which was subsequently done.

Bosch, when cross-examined as to why question 9 on respondent's proposal form was left unanswered, stated that it was not necessary to give an answer since appellant

was ...../16

was already in possession of the necessary information. He said that, according to his experience, an insurance company will not accept a proposal if it is not in possession of the relevant claims history. With regard to information about no-claim bonuses, question 5.c on the proposal form reads: "Is u geregtig op n Geen Eis Bonus?". In the space provided for an answer Wiese wrote "Ja, sal voorsien word", on each of the three forms filled in by him, and across the top of each of the forms he wrote, in addition, "Geeneisbonusse word voorsien". Bosch testified that schedules giving particulars of no-claim bonuses were attached to the proposal forms.

Bosch was cross-examined at length as to why Wiese wrote "Geen" when answering question 9 on Weber's proposal form. He tried to justify the answer, but fared rather badly in the attempt. He began by conceding that "Ja" would have been a correct answer, but added that "maar, soos ek dit sien, kon dit 'Geen' gewees het ook". He said that the question was "dubbelsinnig"

because ...../17

because it referred to one vehicle only, whereas the intention was to insure a number of vehicles, and he added: "En dan in die ander plek vra hulle van bestuurders wat die voertuie sal bestuur. Ek het geen gegewens van enige bestuurder se eise-geskiedenis van sy verlede nie. So, met die gevolg, die vraag kan ook 'Nee' wees. Of 'Geen' wees." He proceeded to say, in answer to further questions, that the space provided for giving an answer was too small to admit of a full answer, and that, in any event, "die gegewens was op daardie stadium alreeds in die maatskappy se besit. Dit was nie vir my nodig om die vraag te antwoord nie." Beyond saying that "Dit kon gedoen gewees het", he could offer no explanation why a short answer, like "Ja, reeds voorsien", could not have been given, or why a separate document containing the relevant information could not have been attached to the proposal form.

With ...../18

With regard to the letter written by him to van Stryp, Bosch testified that he could not produce a copy thereof. He stated that his firm went out of business during the second half of 1973, and that he then had to deal with some 170 files. He destroyed some of the documents; some were returned to the companies from which they had emanated, and others were handed to a brokers' firm, Holder Agentskappe, in Potchefstroom. He stated that he was not certain what happened to his copy of the letter which he had written to van Stryp. It was, he said, "blykbaar" one of the documents which he had destroyed, but he was not certain about this. He thought, at one stage - and apparently he told appellant's legal representatives so on the day before he began his evidence -, that the document had been returned to appellant's branch business in Klerksdorp, but he was not sure about this, and during the forenoon of the day (4 February 1975) on which he began to give his evidence

he...../19

he went to Holder Agentskappe in order to see whether respondent's file was with them. He found the file with them, but it did not contain a copy of his letter. A copy of Van Stryp's letter containing the quotation was also not in the file.

Bosch was also cross-examined at some length as to his knowledge of the proceedings instituted by respondent. He stated that he visited Weber from time to time, as he did with all his clients, and that Weber told him on one of these occasions - he thought it might have been early in 1973 - that appellant refused to make payment under the policy on the ground that the driver of the vehicle was not licensed. Later in 1973 Weber told him that the matter was still "besig om te sloer", and he heard no more about the matter until the Friday of the week before the trial was due to start. On that day he received a telephone call from Weber, who asked him to come and see him. He went to see him the next day

Weber...../20

Weber then told him that the trial was about to come on and that he (Bosch) would have to give evidence and explain "stap vir stap tot en met die polis uitgereik is, wat alles plaasgevind het". He did not discuss the matter with Weber in any detail and spent only about twenty minutes with him. He went to Johannesburg on the Monday, and then saw respondent's counsel and attorneys for the first time. Bosch also testified that he never knew of the motion proceedings instituted by respondent in 1973, and that he could offer no explanation as to why he was not asked to make an affidavit after appellant had raised the defence of non-disclosure.

Before dealing with counsel's contentions regarding Bosch's evidence, reference should be made to some of the evidence given by the two witnesses called by appellant. The first witness was a Mr. Campbell, an insurance assessor. He said inter alia that the premiums mentioned in the policy issued to respondent

appeared...../21

appeared to be "normal, standard premiums", and he agreed with the suggestion of appellant's counsel that there was nothing in the policy to suggest "that the insurer, in issuing the policy, was aware of anything special to require changes to the standardized policy." The second witness was a Mr. Ogden, who became the manager of appellant's Klerksdorp branch in May 1974. He stated that he had been unable to find a letter as testified to by Bosch in appellant's records. When questioned as to what information he (Ogden) would require before furnishing a broker with a quotation, he replied that he would "prefer" to have the applicant's claims history, and that, if that was not "at hand", "we could quote subject to claims experiance". The witness also said that the policies issued to respondent, Weber and Mrs. Weber were on standard terms and at standard rates. (I may add at this stage that appellant's counsel argued in this Court that the premiums quoted by Protea Insurance Company

were...../22

were also standard, or normal, but the matter was not properly investigated and the argument cannot be sustained). With regard to van Stryp, Ogden stated that he left the appellant's company in good favour.

Van Stryp was not called to testify. Appellant's counsel, in closing his case, stated that appellant's attorneys had "not established contact with Mr. van Stryp".

It appears from the judgment of the Court a quo that it was argued by appellant in that Court (i) that Bosch's evidence was so unsatisfactory that he should not be believed, and (ii) that, even if he was believed, his evidence did not establish that his letter was received by appellant. With regard to (i), as will appear more fully later in this judgement, the learned trial Judge, while critical of Bosch's evidence, came to the conclusion that he was unable to find that he was "so palpably

untruthful...../23

untruthful that his evidence ought to be rejected out-right". As to (ii), the learned Judge held that appellant had failed to discharge the onus of showing that the letter was not received by van Stryp.

In this Court appellant's first argument ("A"), which was not advanced in the Court below, was that Bosch's evidence is inadmissible. The first alternative argument ("B") was that, whether or not Bosch be believed, his evidence did not establish that the accident history of the vehicles was disclosed to appellant, and the second alternative argument ("C") was that Bosch should not be believed. The arguments will be considered in turn.

Ad "A": The argument that Bosch's evidence is inadmissible.

Counsel's...../24

Counsel's submission is that parol evidence of the alleged disclosure by Bosch of the vehicles' accident history is inadmissible; and the argument is as follows: the written policy refers to the proposal and declaration (quoted above) as the basis of the contract; Condition 9 of the policy declares the truth of the statements and answers in the proposal form to be conditions precedent to the liability of the appellant to make payment under the policy; the proposal form and the declaration at the foot thereof do not disclose the vehicles' accident history, though such is invited by question 9 and by the terms of the declaration; the position is, therefore, as though there was nothing material to report, and consequently Bosch's evidence amounts to an attempt, by inadmissible parol evidence, to add to or vary the policy as if it had stated that "the information from Bosch is also part of the basis of the policy". It was also submitted in this regard that Bosch's letter was not part of what counsel called "the contract-

making ...../25

making process"; that process, he submitted, started only with the submission of respondent's proposal form. Counsel's argument is, in my opinion, defeated by what is stated in the "Spesiale Verklaring" which appears at the foot of the proposal form. It has already been quoted, but for the sake of convenience I repeat part of it:

> "Ek Ons verklaar ....., dat hierdie en enige ander geskrewe verklaring wat deur my ons, of ten behoewe van my ons gemaak is, aangaande die voorgenome versekering, die grondslag sal vorm en ingelyf sal wees in die Kontrak....."

From this it appears that a written statement which has already been made ("wat.....gemaak is") at the time of the proposal in connection with the intended insurance ("aangaande die voorgenome versekering") is, as the proposal itself, considered to be incorporated in the contract that comes into being between the insurer and the insured. Bosch's letter was, on his evidence, a

written...../27

written statement "aangaande die voorgenome versekering", and it is accordingly to be regarded, if received by appellant before it issued the policy, as having been incorporated in the policy. This being so, Bosch's evidence cannot be regarded as an attempt to add to or vary the policy by the introduction of inadmissible evidence. This conclusion as to the meaning and effect of the "Spesiale Verklaring" renders it unnecessary to consider the validity of further arguments which were advanced by respondent's counsel for holding that Bosch's evidence is admissible.

Ad "B": The argument that, whether or not Bosch be believed, his evidence did not establish that the vehicles' accident history was disclosed to appellant.

(i) Counsel contended, first, that whether Bosch's communication was oral or written, it did not disclose the dates on which the vehicles were involved in accidents,

with...../28

with the result, so it was argued, that appellant was not fixed with notice that the accident history was relevant to the proposal which was subsequently submitted. The same argument was addressed to the trial Court, but the learned Judge rejected it. It is true, as was argued by appellant's counsel, that Bosch did not say that he gave van Stryp the dates of the various accidents, but Bosch was not questioned thereon, and it was not put to him pointedly that he was not told the dates by Sentrakas. It may be added that Bosch said that he gave van Stryp all the information he required. In these circumstances, and in the absence of evidence from van Stryp, there is, in my view, no proper basis for the argument that Bosch's communication to van Stryp, whether oral or written, did not disclose the dates of the various accidents.

(ii) Appellant's counsel contended, in the alternative, (a) that it was common cause (I quote from his heads of

argument...../29

argument) "that an oral communication of past history to an insurer will not be classed as a disclosure", and (b) that there was no acceptable evidence that Bosch's letter (even if it was sent) reached appellant.

As to (a), the submission does not appear to be in accordance with the facts, Bosch said that insurance companies are generally unwilling to give a quotation on oral information, but he did not say that they do not regard an oral communication of an accident or claims history as a disclosure.

As to (b), counsel contended that, even if Bosch be believed when he says that he wrote a letter to van Stryp, there is no proof that the letter ever reached him. He said, first, that Bosch's evidence that he had the letter posted was insufficient to give rise to the presumption that the letter reached van Stryp in the ordinary course of the post. This submission is sound. It was argued, secondly, that the fact that

Ogden...../30

Ogden could not find Bosch's alleged letter points to the fact that no such letter was received. There is a good deal of force in this contention, but regard should also be had to the fact, admitted by Ogden, that the papers in the relevant file were not bound together, and that the file also did not contain a copy of a document containing particulars of the quotation which van Stryp gave to Bosch's firm. Bosch testified that van Stryp gave him the quotation in writing, and it seems very likely, I should think, that van Stryp would have done so.

Counsel argued, also, that the policies issued to respondent, Weber and Mrs. Weber, all appear to have been issued on standard terms and conditions, and that, if Ogden's and Campbell's evidence is accepted, it is unlikely that van Stryp would have issued such policies if he had received Bosch's letter. This argument, too, has much force, and it was duly considered by the learned

Judge...../31

trial Judge. His view was that appellant's contentions on this aspect of the case had "considerable force", but, after considering the arguments advanced by respondent's counsel, he came to the following conclusion (I quote from the judgment):

> "If the onus to prove that the letter had been received had rested upon the plaintiff I should have had some hesitation, after considering the above arguments, in finding that such onus had been discharged. On the other hand, I am not satisfied that the only probable inference from the available evidence is that the letter was neither written nor received".

The first argument which respondent advanced in this connection in the Court a quo (and on which it also relied in this Court), was that it was unlikely that van Stryp would have given a quotation, or issued a policy, without having been informed in writing as to the vehicles' accident and claims history, and that it is therefore probable that van Stryp would have raised a

query...../32

query (of which there is no evidence) if he had not received a letter containing the necessary information from Bosch. Appellant's counsel contended in this Court that there would have been no need for any such query if the accident history had not been disclosed by Bosch, but I doubt whether this can be regarded as a sufficient answer to the point made by respondent. Bosch, referring to the question of the claims history, said that an insurance company requires that information "om te bepaal of hulle die versekering kan aanvaar of nie", and that "die maatskappy sal in die eerste plek niks doen sonder hierdie gegewens nie". And, when it was suggested to him that his letter might not have been received by van Stryp, his reply was that it must have reached him ("Dit moes hom bereik het") because there was no enquiry ("navraag") afterwards. Bosch's evidence that an insurance company normally requires to be informed of the accident history is supported, it seems to me,

by...../33

by that of Ogden. As pointed out above, Ogden said, when questioned as to what he would require before giving a quotation, that he would "prefer" to have the claims history, and that if that is not "at hand", "we could quote subject to claims experience".

The other arguments advanced by respondent in the Court a quo and again relied on by it in this Court, are dealt with as follows in the judgment of the trial Court:

> "Secondly, it was submitted that there were other possible explanations as to why van Stryp had issued standard policies.
> These were
>
> (1) he might have overlooked the written notification of the accidents at the time when he issued the policies; or
> (2) he may not have regarded the prior accidents as being sufficiently material to warrant any action being taken other than a disallowance of the no-claim

bonuses...../34

bonuses.

> These are matters of speculation that only van Stryp himself could have cleared up. In this connection it may be relevant that Mrs. Weber did disclose one accident in her proposal form, but, according to the evidence, her policy was issued on the same terms and at the same rates as the other two policies, so that it is clear that the disclosure of one accident could not have been regarded by van Stryp as being sufficient to require any action other than the disallowance of a no-claim bonus and as calling for any further investigation. It was argued that the two suggestions made by counsel for the plaintiff as to what van Stryp might have done were improbable. Van Stryp's lack of reaction to Mrs. Weber's disclosure, however, indicates that they are not so improbable that they must be ignored."

Appellant's counsel contended that the learned Judge erred in his view of the probabilities when he came to this conclusion, and that he misdirected himself on the facts in holding that the suggestions made by respondent's counsel (set out in the passage quoted) were "not so im-

probable...../35

probable that they must be ignored". There is no warrant for the view that the learned Judge misdirected himself in the manner suggested, and I am not persuaded that he erred in coming to that conclusion.

(iii) I come now to appellant's second alternative argument under its contention "B". It is to the following effect: the communication by Bosch was for the limited purpose of obtaining a quotation, and, even if it included a disclosure of the vehicles' accident history, it was superseded by the proposal form some four and a half months later, and Bosch's communication was (I quote from counsel's heads of argument) "probably not present to the mind of appellant when it issued the policies on standard terms and conditions, and acted as on a non-disclosure". This argument is, I think, disposed of by what I have said above in regard to appellant's contention "A". Bosch's letter was a communication "aangaande die voorgenome versekering", and, by virtue

of...../36

of the provisions of the "Spesiale Verklaring" at the foot of the proposal form, it must be considered to be incorporated in the contract between the parties. It cannot, therefore, be said that the letter was superseded by the proposal form. I would add, furthermore, that in the absence of evidence from van Stryp, it can hardly be suggested that the letter was "probably" not present to his mind at the time when the policy was issued.

Ad "C": The contention that Bosch should not be believed.

It was argued in this Court that, although the Court a quo had the advantage of seeing and hearing Bosch as a witness, it (a) did not comment upon his demeanour, (b) sought to draw inferences from admitted facts and from facts found to be proved, and (c) misdirected itself in certain respects. It was argued that this Court is in as good a position as the trial Court to draw inferences, and that, since it is entitled to disregard

certain...../37

certain of the trial Court's findings of fact, it is now at large to reconsider the case and to come to its own conclusion thereon. It is true, as is said in (a), that the judgment of the Court a quo contains no express comment on the demeanour of Bosch, but I am nevertheless not prepared to accept that the learned Judge was in no way influenced by what he saw of Bosch in the witness-box. Bosch began his evidence on a Tuesday afternoon; he was cross-examined - by senior counsel - for part of the afternoon, and again for part of the next morning; the cross-examination extends over 52 pages of the typed record. It was argued at the trial - as in this Court - that Bosch should not be believed, and that his evidence should be rejected outright, and in the circumstances it is difficult to suppose that the way in which Bosch gave his evidence played no part in the learned Judge's consideration of the criticism that was levelled at Bosch's evidence. That the learned

Judge...../38

Judge, who reserved his judgment at the end of the case, had due regard to the argument that Bosch was not a credible witness, appears from the following extract from his judgment:

> "I shall consider first the question whether or not Bosch should be believed.
>
> Bosch's evidence was not satisfactory in all respects. He was sometimes vague, but that is not surprising seeing that he had been out of the insurance broking business for some years. He contradicted himself at times. He gave certain almost fatuous explanations as to why Mrs. Weber or his partner had caused the answer "Geen" to be given in answer to question 9 on Weber's proposal form. The first was that the space provided was too small to give full information of the accidents. The form has two boxes in which the number of accidents and the total cost are to be inserted and there is no reason why these should not have been filled in, further details being furnished on a separate sheet, if necessary. The second was that the form was designed to be completed by a single person in relation to a single vehicle. He was forced to concede that no

difficulty...../39

difficulty was experienced in answering other questions in the plural. Possibly less specious explanations were that the information concerning the accidents had already been given to the defendant and that as the drivers concerned in the accidents had been dismissed it might have been thought that it was unnecessary that the accidents should have been disclosed on the form.

Weber's personal proposal form is, of course, not directly relevant to the issue in the present case. If, however, the accidents had been disclosed on it, that would have strengthened the plaintiff's case, because it is a reasonably clear inference from the evidence that all three proposals must have been dealt with together.

Notwithstanding the above criticism of Bosch as a witness I am unable to find that he was so palpably untruthful that his evidence ought to be rejected outright."

At pp. 33 and 34 of this judgment, supra, I

referred...../40

referred to what appellant's counsel submitted were misdirections on the part of the trial Court. As there indicated, I do not think that there were such misdirections.

I now proceed to discuss the other alleged misdirections:

(i) It was submitted that the following statement in the judgment is a misdirection, viz.: "Weber's personal proposal form is, of course, not directly relevant to the issue in the present case." (The statement occurs in a passage from the judgment which is quoted above). I fail to see how this statement, appearing in the context in which it does, can be regarded as a misdirection. When the learned Judge said that the statement was not "directly" relevant, he obviously did not mean that it was not relevant, for he proceeded to discuss Bosch's evidence in regard to Weber's proposal form, and, also, counsel's criticism of that evidence.

(ii)...../41

(ii) The learned Judge, in dealing with an argument that responent's failure to plead the disclosure of the accidents gave rise to a suspicion that the defence was thought up at a very late stage in the proceedings, said: "A possible explanation, however, is that it appears from Bosch's evidence that there was very little communication between Weber and Bosch until shortly before the trial ... He apparently was not consulted at the time when the point of non-disclosure was taken in the answering affidavit. It seems likely therefore that the plaintiff learned only shortly before the trial that Bosch would say that the information had been communicated to the defendant company." It was argued that the learned Judge misdirected himself in taking this view of the matter. Weber, it was submitted, knew of the defence of non-disclosure when he signed his answering affidavit in the motion proceedings, and the reason why he did not consult with Bosch at the time was "probably", so it was argued, "because he realised that Bosch had no knowledge of the accident and claims history".

The ...../42

The suggestion seems to be, if I understand the argument correctly, that Weber knew that Bosch had not disclosed the vehicles' accident history to appellant, and that he persuaded Bosch to give false evidence to the effect that he informed van Stryp of the accidents. There is no clear evidence as to Weber's knowledge of what passed between Bosch and van Stryp, and there is no evidence to justify the inference that Weber persuaded Bosch to give false evidence. Respondent's counsel suggested that if Weber wanted Bosch to give false evidence to meet the defence of non-disclosure, he could have asked him to make a false affidavit in the motion proceedings. The suggestion is not without force, but, however this may be, I cannot agree with the submission that the trial Court was guilty of a misdirection.

(iii) The learned Judge, in dealing with counsel's criticism of respondent for not calling Weber, Mrs Weber or Wiese to testify, stated that in his view "they could

have ...../43

have contributed little or nothing to this issue", i.e., whether or not Bosch communicated the vehicles' accident history to van Stryp. The learned Judge, it was argued, misdirected himself in making this statement, because Weber could have explained "his mysterious silence" (a quotation from counsel's heads of argument), while Mrs. Weber and Wiese could have explained why the proposal forms did not disclose the vehicles' accident history. As to the latter suggestion, Bosch gave evidence on the point, and in the circumstances I fail to see how the learned Judge's observation concerning Mrs. Weber and Wiese can be called a misdirection. It is true, as was argued, that Weber might have been asked to explain why he did not say in his replying affidavit that proper disclosure had been made by Bosch, but the learned Judge's remark should be read in the light of the "issue" with which he was specifically concerned when he made it, for, immediately after making it, he went on to say: "It was not claimed that any of them had communicated with the insurance company (save for the signature of the proposal forms). The relevant communication, if it

was made, was made by Bosch". While it may therefore be said that Weber might have given evidence which could, perhaps, in an indirect way have thrown light on the question whether Bosch made a disclosure to van Stryp as alleged by Bosch, I do not think that it can be said that the learned Judge's observation, read in the context in which it was made, was an error of any real importance.

(iv) It was submitted that the Court a quo (I quote from counsel's heads of argument) "appears to have overlooked the significant fact that appellant had in its possesion various documents expected to be therein, despite the looseness of documents in the file", and it was argued that the absence of Bosch's letter from appellant's file suggested that it was never received by van Stryp. I do not think that there is any reason to suppose that the trial Court overlooked the fact that certain documents were found in appellant's possession, even although the point is not specifically mentioned in the judgment. And the

trial...../45

trial Court was, of course, fully aware of the fact that Bosch's letter could not be found by Ogden.

(v) It was contended that the Court a quo (I quote from counsel's heads of argument) "appears to have paid little attention to the fact that such documents as Bosch himself was able to produce, made no mention of any such past history" (i.e., accident history). I do not think there is any substance in the point. Bosch was cfoss-examined at great length as to the fact that no copy of his letter could be found, and it is inconceivable that the learned Judge did not have full regard to his evidence and to the arguments that were addressed to him in regard thereto.

(vi) It was submitted, also, that the Court a quo "does not appear to have had proper regard to the fact that at the top of each of the three proposal forms there was a disclosure as to no-claim bonuses, but none as to the past history, which is contrary to what is to be expected if there had been proper disclosure". The

point...../46

point is not dealt with specifically in the trial Court's judgment, but Bosch was cross-examined thereon, and I am not prepared to hold that the learned Judge did not have proper regard thereto.

Appellant submitted, finally, with regard to the fact that van Stryp did not give evidence, that the ultimate question is whether appellant has discharged the onus, without regard to any inference to be derived from the failure to call van Stryp. It seems to me to be clear from the trial Court's judgment that it did not draw any unfavourable inference, or any inference at all, for that matter, from the fact that van Stryp was not called to give evidence. The learned Judge said:

> "In the present case in my view it is not necessary to go so far as to infer that van Stryp's evidence would have been unfavourable to the defendant. Van Stryp was a person, and possible the only person, who might have —

been...../47

> been able to state positively, if such was the case, that no communication of the material information was made to the defendant. As he has not said so, it remains unsaid, and the defendant has been forced to discharge the onus in a round-about way, without being able directly to contradict the evidence of Bosch".

This view of the matter cannot be faulted. The position is that there was direct evidence from Bosch that van Stryp was given notice of the vehicles' accident and claims history, and the absence of any evidence from van Stryp, whatever the reason therefor, tends to strengthen respondent's case in the sense that there is no evidence to gainsay Bosch, and, therefore, less occasion or material for doubting him. (See S. v. Snyman 1968 (2) S.A. 582 (A.) at p. 588 G).

In view of all the aforegoing I am of the opinion that it has not been shown that the trial Court erred in the conclusion to which it came, and that the appeal cannot succeed.

The ...../48

The appeal is dismissed with costs.

P.J. Rabie

P.J. RABIE
Judge of appeal.

Holmes, JA.)
Wessels, JA.)
Hofmeyr, JA.) Concur.
Miller, JA.)