47593
NvH

FEDGEN INSURANCE LIMITED Appellant

and

PETER RONALD LEYDS Respondent

SMALBERGER, JA :

47593
NvH

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

FEDGEN INSURANCE LIMITED Appellant

and

PETER RONALD LEYDS Respondent

CORAM: HEFER, SMALBERGER, FH GROSSKOPF,
NIENABER et VAN DEN HEEVER, JJA

HEARD: 9 MARCH 1995

DELIVERED: 27 MARCH 1995

JUDGMENT

SMALBERGER, JA:

The respondent ("Leyds") successfully sued the appellant ("Fedgen") in the Transvaal Provincial Division for the loss he suffered consequent upon the theft of a vehicle owned by him and comprehensively insured by Fedgen under a policy of insurance.

Leave to appeal was refused by the trial Court (HEYNS, J), but was subsequently granted by this Court. The outcome of the appeal depends upon the proper interpretation of the policy in question.

On 14 December 1990 Leyds applied to Fedgen for insurance in respect of a 1983 Mercedes Benz 280 EA sedan valued at R27 000,00 ("the Mercedes"). At the request of Fedgen, Leyds completed a "Fedstatus - Application Form" ("the application"). In section 7 of the application, which deals specifically with vehicles, Leyds was asked to "indicate the scope of cover" required. He was given a choice of "Comprehensive", "Third Party, Fire and Theft" and "Third Party only". He opted for comprehensive cover. In a separate sub-section Leyds was required to indicate the "Class of Use" applicable to the Mercedes. He selected class 1 out of three available classes. What class 1 comprehends is not immediately apparent. About half a page further on, however, under a sub-section headed specifically "Class of Use" the following is found

under (b):

> "[T]he individual Classes of Use otherwise cover use for social domestic and pleasure purposes and in addition for
>
> Class 1 - Journeys between home and business provided no business calls are made and use for applicants business as a farmer
>
> Class 2 - Business and professional purposes other than insurance and commercial travelling."

(There is no reference to a class 3.) In the original application this particular sub-section has a line ruled through it (which would prima facie signify that it does not apply). At the foot of the application there appears a "Declaration" which provides in (d):

> "I have not withheld any material fact and I accept this application and declaration form the basis of the contract between myself and Fedgen Insurance Limited."

The application was signed by Leyds.

On 17 December 1990 Fedgen issued a "Fedstatus Personal Insurance Policy" ("the policy") in favour of Leyds. Clauses 2 and

3 of the Preamble state:

"2. SCHEDULE

The Schedule - which must be signed on behalf of the Company - indicates the Sections and sub-Sections under which the Policyholder is insured……

3. PAYMENT OF PREMIUM AND OCCURRENCE OF INSURED EVENTS

In consideration of the Premium having been paid the Company will indemnify the Policyholder against loss damage death injury or other event giving rise to a claim under any Insurance Section specified in the Schedule provided such event shall occur during a Period of Cover or renewal thereof."

Section 7 of the policy deals with motor vehicle insurance.

Under the heading "SCOPE OF COVER" the following appears:

"The Schedule indicates whether the cover by this Section is Comprehensive which means that sub-Sections 1 to 3 apply and that sub-Section 1 covers loss or damage other than (i) damage to tyres except as the result of an accident causing other damage (ii) wear and tear or other depreciation or mechanical or electrical breakdowns failures or breakages (iii) consequential loss other than loss of use if specifically

insured (iv) theft of motor cycle accessories and spare parts unless the motor cycle is stolen at the same time including loss or damage by Malicious Damage as defined by paragraph 7 of the Preamble

Third Party Fire and Theft.....
Third Party only....."

Sub-section 1, which appears on the next page reads, to the extent

that it is relevant:

"Each vehicle described in the Schedule (including its accessories and any spare parts in or on it) is insured against loss or damage in accordance with the indicated Scope of Cover."

Immediately below "SCOPE OF COVER" there appears:

"Description of Use

1. use for social domestic and pleasure purposes including use by the Insured for journeys between his home and his permanent place of business provided that business calls are not made on the journey but

excluding

use in connection with any business or profession the

carriage of goods or samples for trade purposes hiring carriage of passengers for hire or carriage of fare-paying passengers commercial travelling driving instruction for reward racing speed or other contests rallies trials or use for any purpose in connection with the motor trade

2. use for social domestic pleasure business and professional purposes

excluding

hiring carriage of passengers for hire or carriage of fare paying passengers commercial travelling driving instruction for reward racing speed or other contests rallies trials or use for any purpose in connection with the motor trade."

The relevant Schedule ("the Schedule") provides details of the Mercedes, indicates the "Scope of Cover" as "Comprehensive", fixes a maximum indemnity of R27 000,00 and provides for a basic premium of R221-44. No reference is made in the Schedule to any applicable "Description of Use". The only reference thereto is to be found in the "SPECIFIC EXCLUSIONS TO SECTION

SEVEN AS A WHOLE" to which I shall revert.

Leyds is a cabinet maker by trade. At the relevant time he owned his own carpentry business. It is not in dispute that on 11 February 1991, during the currency of the policy, Leyds handed over the Mercedes to one Steven Mohlala. Leyds claimed in evidence that Mohlala was a friend of his whom he occasionally employed to do odd jobs. He testified that Mohlala asked to borrow the Mercedes to go to a funeral in Harare. Leyds agreed to lend him the Mercedes on condition that it was returned within seven days and that Mohlala would, while in Harare, collect some samples of wood from a friend of Leyds and bring them back with him. It appears from the evidence that Mohlala never went to Harare, but to Swaziland and then to Maputo. He never returned the Mercedes to Leyds, and it ultimately became common cause between the parties that he had stolen it. It was this theft that gave rise to Leyds's claim under the policy. Fedgen claims that the Mercedes,

at the time it was stolen, was being used for business purposes contrary to the provisions of the policy and that it is accordingly entitled to avoid liability for Leyds's loss.

A number of factual and legal issues were debated on appeal in relation to Fedgen's defence. These included matters such as when did Mohlala form the intention of stealing the Mercedes; for what purpose was it being used, or to be used, at the time; whose purpose determined such use - that of Leyds or that of Mohlala? However, it is not necessary to reach a conclusion on these issues. In my view the appeal can be decided on the basis that, on a proper interpretation of the policy, liability on the part of Fedgen exists for the loss resulting from the theft of the Mercedes irrespective of the purpose for which it was being used at the time it was stolen.

The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such

intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd 1934 AD 458 at 464/5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (Auto Protection Insurance Co Ltd v Hanmer - Strudwick 1964(1) SA 349(A) at 354C-D); for it is the insurer's duty to make clear what particular risks it wishes to exclude (French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd 1931 AD 60 at 65; Auto Protection Insurance Co Ltd v Hanmer-Strudwick (supra) at 354D-E). A policy normally evidences the contract and an insured's obligations, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the

contra proferentem rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy (Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd 1961(1) SA 103 (A) at 108C).

Whether the effect of clause (d) of the "Declaration" (quoted above) is automatically to incorporate the whole of the application into the contract of insurance between Leyds and Fedgen is a matter open to some doubt. However, I am prepared to accept, for the purposes of the present appeal, that clause (d) does have that effect. I shall also accept that the sub-section "Class of Use", despite being ruled through, is part of the application. That being so, on a proper interpretation of the application Leyds warranted that the Mercedes was to be used for social, domestic and pleasure purposes as well as journeys between home and business, but not for business calls or farming.

It was always open to Fedgen to decide what cover to grant and what liability to exempt itself from. Nothing precluded it from granting indemnity for loss occasioned by theft irrespective of the circumstances (for, after all, there need not be any correlation between use and theft, as the risk of theft would not ordinarily depend upon the purpose for which a vehicle is being used), while limiting liability in the case of collision damage to a particular class of use. The issue is therefore what did the policy cover, for Leyds, by paying the premium, accepted the cover offered by the policy. The answer depends upon the proper interpretation of the relevant provisions of the policy, having regard to the principles enunciated above.

Clause 3 of the Preamble (quoted above) states in clear terms that Fedgen will indemnify Leyds against loss giving rise to a claim "under any Insurance Section specified in the, Schedule ...."

Turning to the Schedule, one finds that it applies to motor vehicles

under section seven of the policy. In the Schedule the "Scope of Cover" is given as "Comprehensive". On a proper reading of section seven "Scope of Cover" only relates to the three categories "Comprehensive", "Third Party Fire and Theft" and "Third Party only". In my view it neither expressly nor by necessary implication incorporates "Description of Use" which follows immediately upon it. Confirmation of this, if required, is to be found in the application where "Scope of Cover" clearly relates only to the three categories in question. In terms of section seven "Comprehensive" means that sub-sections 1 to 3 apply and that subsection 1 covers "loss or damage" other than that excepted (none of which exceptions is of application in the present matter). Subsection 1 confirms that the vehicle (the Mercedes) is insured against "loss or damage". No qualification attaches to those words in subsection 1 so they must mean (in the context of the present matter) all loss or damage (including theft) subject to the stated exceptions.

Such loss or damage is not coupled to any description or limitation of use. Nor does the Schedule in any way qualify or limit liability with reference to any description of use. On a proper interpretation of the policy, and subject only to any restriction on liability expressed elsewhere in the policy, Fedgen would thus be liable to compensate Leyds for the loss of the Mercedes, if stolen, irrespective of the purpose for which it was being used immediately before or at the time of the theft.

The position in the present matter should be contrasted with that in Samuelson v National Insurance and Guarantee Corp Ltd [1986] 3 ALL ER 417(CA). The limitation of use in the policy there under consideration was:

> "Use only for social, domestic and pleasure purposes EXCLUDING use for hiring or in connection with any trade, business or profession."

Paragraph l(a)(i) of that policy provided:

> "The Corporation shall not be liable in respect of 1. any

accident injury loss or damage occurring whilst any motor vehicle in connection with which insurance is granted under this Policy is (a) being used otherwise than in accordance with the 'Limitations as to use' described in the Schedule ..."

In Samuelson's case the "Limitations as to use" were apparently described in the Schedule, and liability for loss (which would include theft) was specifically coupled to them. That, as I have pointed out, is not the case here.

Faced with this situation Mr Mullins, who appeared for Fedgen, was obliged to resort to the exclusionary provision contained in sub-section 3, where the only qualification of liability in relation to description of use is to be found. It is headed

"SPECIAL EXCLUSIONS TO SECTION SEVEN AS A WHOLE"

and provides as follows:

"This Section does not insure any loss damage liability medical expenses or compensation resulting from an accident occurring

(i) outside the territorial limits of the Republic of South Africa or Lesotho Botswana Swaziland

Namibia Zimbabwe or any homeland or state formerly within the border of the Republic of South Africa that has been or may in the future be granted independence by the Republic of South Africa except while the Insured vehicle is in transit between any of these territories

(ii) as the result of the Policyholder being under the influence of intoxicating liquor or drugs

(iii) in connection with the use of any vehicle by the Policyholder or of an insured vehicle by anyone else with the Policyholders permission if not properly licensed to drive such vehicle in accordance with the laws of the territory concerned but this exclusion shall not apply if any law or regulation applicable to learner drivers is being observed or if the licence is not valid at the time purely because of a failure to renew it provided that the driver concerned has held a valid renewable licence and is not disqualified from renewing it

(iv) in connection with the use of an insured vehicle by the Policyholder or by any one else with his or her permission otherwise than in accordance with the description of use

> (v) while the vehicle involved is being used with the Policyholders permission by anyone known by him/her to be under the influence of intoxicating liquor or drugs." (My emphasis.)

This exclusionary provision only applies to loss, damage, etc resulting from "an accident". No reference is made to theft. In order to bring the present matter within the exclusionary provision Mr Mullins was compelled to argue that an "accident", in the context in which that word is used, includes theft. There are cogent arguments against this being so.

As a perusal of Stroud's Judicial Dictionary : 5th Ed : pages 18-22 will show, the word "accident" is one of very wide definition. Its meaning depends to a large extent upon the precise context in which it is used. The Concise Oxford Dictionary : 6th Ed, defines "accident", inter alia, as "1. Event that is without apparent cause or unexpected .... 2. Unintentional act, chance, misfortune; unlucky event, esp. one causing injury or damage". Black's Law

Dictionary :5th Ed, at 14 defines "accident", in relation to accident insurance policies, as "a more comprehensive term than 'negligence', and in its common signification the word means an unexpected happening without intention or design" (cf Fenton v J Thorley & Co Limited 1903 AC 443 (HL) at 453). It follows that an accident does not encompass a deliberate act causing loss or damage (cf Griessel NO v SA Myn en Algemene Assuransie Edms Bpk 1952(4) SA 473(1) at 477H). Given that theft is an intentional act it would not fall within the ordinary and popular meaning of "accident".

The context within which the word "accident" appears also militates against an interpretation which includes theft. The terms of the exclusionary provision (especially (ii), (iii), (iv) and (v)) strongly suggest that the word "accident" refers to a collision or an event arising from, or directly related to, the driving of a motor vehicle.

In any event, at best for Fedgen the word is ambiguous. In keeping with the relevant principles of interpretation, it falls to be interpreted against Fedgen, within whose power it lay, as drafter of the policy, to make its meaning clear. It must therefore be construed not to apply to theft. This renders it unnecessary to consider whether the Mercedes, when it was stolen, was being used "otherwise than in accordance with the description of use" in terms of (iv) of the exclusionary provision. Fedgen's liability to indemnify Leyds for the theft of the Mercedes was not linked to any limitation of use or otherwise excluded under the provisions of the policy. Leyds was accordingly legally entitled to be indemnified by Fedgen for his loss arising from the theft of the Mercedes.

At the commencement of the trial the parties agreed that the value of the Mercedes at the time it was stolen was R25 500,00 and that, if held liable under the policy, Fedgen would compensate Leyds in that amount subject to any amounts which fell to be

deducted in terms of the "Table of Deductibles" ("the Table") which forms part of the policy. Leyds conceded that an amount of R300,00 fell to be deducted. The only remaining issue was whether there should be a further deduction in terms of clause 2(vi) of the Table. The learned trial judge held that Fedgen was not entitled to any further deduction. He accordingly awarded Leyds the sum of R25 200,00.

Clause 2(vi) of the Table provides for a deduction equal to "10% of the gross claim with a minimum of R400" in respect of "loss or damage caused by or resulting from theft or attempted theft of the insured vehicle unless fitted with an anti-theft device approved by the Company ...." At the time of the theft the Mercedes was not fitted with an anti-theft device of any description. This emerges clearly from the following passage in the evidence of Leyds under cross-examination:

> "Dalk kan u dan behulpsaam wees om te se, was hierdie Mercedes Benz met 'n teendiefstalmiddel voorsien?

> Nee, nie op daardie stadium nie.
>
> En op 11 Februarie 1991, toe mnr Mohlala uit die erf uitry met die Mercedes, net dit op daardie stadium 'n teendiefstalmeganisme opgehad? — Nee."

The preconditions for the application of clause 2(vi) are therefore present - loss resulting from theft and the absence of an anti-theft device. On the clear wording of clause 2(vi) Fedgen was entitled to the deduction of a further R2 550,00 i.e. 10% of the agreed value of the Mercedes, which constituted the gross claim. The amount awarded to Leyds therefore falls to be reduced to R22 650,00, and the appeal succeeds to that extent.

The only remaining issue relates to the costs of appeal. In view of the reduction in the amount to be paid by it Fedgen has enjoyed some (albeit very limited) success on appeal. However, such success can hardly be termed substantial. Fedgen failed on the main issue to which most of the time on appeal, and virtually the whole trial, was devoted. In fact, the only evidence relevant

to the further deduction issue was that of Leyds quoted above; and no more than about ten minutes in all was spent on appeal debating the matter. It may well be that had Fedgen confined its appeal to the deduction issue, Leyds would have conceded the point. Be that as it may, the measure of Fedgen's success does not justify it being awarded any of its costs of appeal. Indeed it was Leyds who, by successfully contesting what was by far the major issue on appeal, enjoyed substantial success. This entitles him to at least the bulk of his costs. The costs order, however, should reflect some recognition of Fedgen's limited success, so that it should not be ordered to pay all Leyds's costs of appeal. In all the circumstances it would be appropriate to order Fedgen to pay 90% of such costs.

In the result the following order is made:

1. The appeal succeeds to the limited extent that the amount awarded by the trial Court is reduced from R25 200,00 to R22 650,00. The remaining orders of that Court stand.

2. The appellant is ordered to pay 90% of the respondent's costs of appeal.

J W SMALBERGER

JUDGE OF APPEAL

Hefer, JA) FH Grosskopf, JA)
Nienaber, JA) concur Van den Heever,
JA)