THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE

CASE NO: 24/2003

In the matter between :

CERTAIN UNDERWRITERS OF LLOYDS OF LONDON Appellants

and

THERESA HARRISON Respondent

Before: **ZULMAN, MTHIYANE, NUGENT, LEWIS JJA & MLAMBO AJA**

Heard: **9 SEPTEMBER 2003**

Delivered: **18 SEPTEMBER 2003**

Summary: **Insurance policy – non-disclosure – vehicle imported unlawfully**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] The appellants are the underwriters of a policy of motor insurance that was first issued to the respondent on 20 September 1999, and then renewed a year later. In terms of the policy the appellants undertook to indemnify the respondent in the event that a certain Toyota Land Cruiser was lost or stolen or damaged.

[2] The respondent alleges that on 23 September 2000 the vehicle was damaged when it overturned accidentally while being driven by a certain Mr Xaba on the instructions of the respondent's husband. Her claim to be indemnified under the policy was declined by the appellants and she sued them in the High Court at Pretoria for recovery of the alleged loss.

[3] The action was tried by Basson J, who separated the question whether the appellants were liable to indemnify the respondent from the remaining issues relating to the *quantum* of the claim. The learned judge concluded that the appellants were indeed liable to indemnify the respondent and he issued a declaratory order to that effect. The appellants now appeal against that order with leave granted by this Court.

[4] Numerous matters were in issue at the trial but it is necessary to deal with only one of them. It is well established that an insured has a duty to disclose to the insurer, prior to the conclusion of the contract of insurance, 'every fact relative and material to the risk … or the assessment of the premium … of which (the insured) had actual knowledge or constructive

knowledge prior to the conclusion of the contract of insurance', and that a breach of that duty entitles the insurer to avoid the contract (*Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 432E-F). That applies equally if material facts are withheld by an agent who has been appointed by the insured to negotiate the insurance on his behalf (*Randbank Bpk v Santam Versekeringsmaatskappy Bpk* 1965 (4) SA 363 (A) at 368H-369A. See too the discussion in the judgment of the court below reported at 1965 (2) SA 456 (W) esp. at 457E-459B). The general principle in that regard is expressed as follows in Spencer Bower, Turner and Sutton: *The Law Relating to Actionable Non-Disclosure* 2nd ed at par 4.16:

'For the purposes of the law of disclosure, as for other purposes, it may be stated generally, though perhaps somewhat elliptically, that the knowledge of the agent is the knowledge of the principal. This means that, with certain qualifications and exceptions to be discussed presently, [none of which is relevant for present purposes] the law imputes to any party to a contract or transaction knowledge of all facts and circumstances of which any agent of his *for that purpose,* and in that contract or transaction, is actually or presumptively cognizant.'

[5] The appellants allege that before the policy was issued the respondent, or her husband (who arranged the insurance on her behalf), knew, and failed to disclose, that the vehicle that was to be insured had been imported into this country unlawfully. That fact, so it is alleged by the appellants, was material to the risk they were called upon to insure, and the failure to disclose it entitles them to avoid the claim. (The issue was not expressly encompassed by the pleadings but was introduced – rather elliptically – by agreement at the pre-trial conference and was thereafter fully canvassed in the course of the trial).

[6] The somewhat perfunctory evidence presents an incomplete picture of the circumstances in which the vehicle was acquired. Nevertheless, what emerged is that early in 1999 the respondent, an air-hostess who ran various small businesses in her spare time, decided to acquire a vehicle of the type that is now in issue. On making enquiries she found that it would be too expensive to acquire the vehicle from an authorised Toyota dealer

and, besides, the model she wanted was in short supply, so she approached a firm known as Moto City in Randburg and was put in touch with another firm known as J&H Holdings. (It seems that there was some relationship between Moto City and J&H Holdings but what that relationship was did not emerge from the evidence).

[7] The respondent said that she was told by J&H Holdings that in order to acquire the vehicle she would need to pay directly to the manufacturer in Japan the sum of £15 000 and she understood that to be what she described as a 'holding deposit'. She duly paid that sum into the manufacturer's London bank account from funds that were available to her in England. The vehicle was delivered to her in September 1999 but only after she concluded an instalment sale agreement with Stannic pursuant to which Stannic purported to sell the vehicle to her for R452 000. An invoice amongst the documentary evidence purports to reflect the sale of the vehicle to Stannic by Moto City for an equivalent amount. The respondent said that she then recovered her 'holding deposit' from Moto City.

[8] Those financial arrangements are rather curious but they are not directly material, for what is in issue is not the manner in which the vehicle was purchased but rather the circumstances in which it entered the country. The evidence in that regard is even more curious.

[9] It is not disputed that after the vehicle was acquired from the manufacturer it found its way to Swaziland where it was registered in the vehicle registry of that country. Documents purporting to have been issued by the authorities in that country during April 1999 certify that Swaziland's Customs, Excise and Sales Duties Act 21 of 1971 had been complied with, and that no tax was owing by J&H Holdings.

[10] According to the evidence of a certain Mr Collins, a deputy director in the Department of Trade and Industry, which was not disputed, it is unlawful to import into this country a vehicle that has been registered in Swaziland unless an import permit has been issued. It was also not disputed that if the vehicle was imported into this country without an import permit having been issued it was liable to be forfeited to the State. (Whether that

requirement and its consequence have their source in the Import and Export Control Act 45 of 1963 or in the Customs and Excise Act 91 of 1964 was not explored in the evidence but because that evidence was not disputed it is not necessary to examine that question).

[11] The vehicle must have entered this country from Swaziland and it found its way onto the register of motor vehicles. According to the records of the registration authorities, which were not placed in dispute, the vehicle was first issued with a registration number in Butterworth in the Transkei on 30 June 1999. That registration number was drawn from a registration system that was discontinued in 1994. (According to the evidence that former registration system did not require an import permit to be produced in order for a vehicle to be registered.) On the same day the vehicle was transferred to the computerised register of the Eastern Cape under a new registration number (how that occurred was left unexplained) and from there it was transferred during July 1999 to the register for Gauteng.

[12] According to the evidence it is a requirement for registration of a vehicle in this country (contrary to the requirements of the disused Transkei system) that the import permit be produced where appropriate. Thus, it was submitted on behalf of the respondent, because the vehicle was registered in this country, it follows that there must have been an import permit for the vehicle.

[13] That reasoning found favour with the court *a quo*. The learned judge found that the fact that the vehicle was registered made out a *prima facie* case that the vehicle had entered the country lawfully, or at least left it uncertain as to whether or not it did so, with the result that the appellants had failed to discharge the onus that they bore of establishing as a matter of probability that the vehicle was imported unlawfully.

[14] The reasoning adopted by the court *a quo* assumes that the ordinary requirements for registration of a motor vehicle are ordinarily met in practice: I see no reason to make that assumption, particularly in this case in which it is clear that the vehicle entered the registration system irregularly (in that the particular registration system had long been discontinued) and moreover, that the discontinued system itself did not require the production of an import permit.

[15] But in any event the evidence warrants a more direct approach than inferential reasoning from a dubious factual premise. According to Collins the Department of Trade and Industry keeps a record of all the import permits that it issues in respect of motor vehicles. He examined the records of his department and found no record of an import permit having been issued in respect of the vehicle that is now in issue. That evidence, which

seems to have been overlooked by the court *a quo*, for it was not dealt with in the judgment, was not disputed. In the absence of any evidence to the contrary it establishes inferentially that an import permit was probably not issued.

[16] It is also probable, in my view, that the respondent's husband (if not the respondent) was well aware of that fact. According to the respondent her husband, who had been an importer of motor vehicles himself and must have known that an import permit was required, was closely involved in the acquisition of the vehicle. That he played an active role in arranging for the registration of the vehicle is apparent from the documentary evidence, which reflects that the vehicle was submitted to a roadworthy test in Pretoria, and a police clearance certificate was issued in respect of the vehicle, at the instance of the respondent's husband, on 24 May 1999. In the absence of a contrary explanation by the respondent's husband (who was not called to give evidence notwithstanding that he was present during the trial) the inference is warranted that he participated in arranging for the import and registration of the vehicle and thus must have known that there was no import permit. Whether or not the respondent was made aware of that fact is not material for it was her husband who applied for the insurance on her behalf and he was bound to disclose facts that were known to him that were material to the risk.

[17] In *Oudtshoorn Municipality, supra*, at 435F-I, it was held by this Court that the test of materiality is an objective one, to be determined by asking, upon a consideration of the relevant facts of the particular case,

‘whether or not the undisclosed information or facts are reasonably relative to the risk or the assessment of the premiums’. In *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en ‘n Ander* 1989 (1) SA 208 (A) at 216D-G Van Heerden JA expanded upon what that meant as follows:

‘[D]ie vraag (is) dus nie of na die oordeel van 'n redelike man die betrokke inligting wel die risiko beïnvloed nie, maar of dit redelikerwyse 'n effek mag hê op ‘n voornemende versekeraar se besluit om al of nie die risiko te aanvaar of 'n hoër premie as die normale te verg. Anders gestel, is die toets of die redelike man sou geoordeel het dat die inligting oorgedra moes word sodat die voornemende versekeraar self tot 'n besluit kan kom. En so 'n oordeel sou hy bereik het indien die inligting na sy mening die voornemende versekeraar redelikerwyse kon beïnvloed het.’

[18] The fact that the vehicle was imported unlawfully, and was thus liable at any time to be forfeited to the State, was in my view a material fact that was required to be disclosed. In *Geismar v Sun Alliance and London Insurance Ltd and another* [1977] 3 All ER 570 (QBD), in which it was held that it is contrary to public policy to enforce a contract of insurance in respect of smuggled goods, the court repeated a submission that was made to it in the following terms, which aptly expresses one of the reasons why such disclosure is material (at 573j):

‘(A) smuggler who insures the value of his smuggled goods has a positive interest in their loss, theft or destruction as a means of converting his impeachable title to an unimpeachable title to a sum of money. This … might induce a degree of carelessness and an attitude inconsistent with that which would be required of an insured person.’

[19] Quite apart from that, an insurer generally has an interest in the salvage of the goods that have been insured. Clearly that interest is

compromised if the goods concerned are liable to be confiscated by the State.

[20] For both those reasons, in my view, the fact that the vehicle was unlawfully imported was material to the risk that was sought to be insured, and ought to have been disclosed before the insurance was effected. While it is true, as pointed out by the respondent's counsel, that the questions that are asked by an insurer in the proposal form might in some cases have the effect of limiting the facts that are required to be disclosed (*AA Mutual Life Assurance Ltd v Singh* 1991 (3) SA 514 (A) at 522 E-G) I do not think the proposal form in this case warranted the conclusion that the appellants were indifferent to whether the vehicle was lawfully imported. There is no dispute that no such disclosure was made, and in the circumstances the appellants were not obliged to meet the claim.

[21] The appeal is upheld with costs. The order of the court *a quo* is set aside and the following order is substituted:

"The plaintiff's claims are dismissed with costs."

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NUGENT JA

ZULMAN JA)
MTHIYANE JA) CONCUR
LEWIS JA)
MLAMBO AJA)