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

CASE NO: 48046/20

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

....
DATE

In the matter between:

WYNO CONSTRUCTION AND PROJECTS (PROPRIETARY LIMITED Applicant

and

MIWAY INSURANCE LIMITED (Licence No: 33970) Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 10 June 2022.

JUDGMENT

MALINDI J:

Introduction

[1] The applicant, Wyno Construction and Projects (*"Wyno"*) seeks the following order:

"1 The Respondent's policy (attached to the founding affidavit as annexure **"FA2"**) of excluding liability arising from loss or damage to a policy holder in circumstances of where it is caused by theft or attempted theft of a vehicle by any employee of the policy holder is declared unconstitutional in that it is contrary to public policy and unenforceable.

2 The Respondent's decision to reject the Applicant's claim on the basis described in paragraph 1 above, is declared unconstitutional in that it is contrary to public policy and unenforceable.

3. The Respondent is liable to indemnify the Applicant in terms of the contract of insurance (attached to the founding affidavit as annexure **"FA2"**) concluded between the Applicant and the Respondent in respect of the Applicant's loss of its vehicle MAN TGS 33.440 BBS L 6x4 T/T C./C, with registration number HN32MMGP (the truck).

4. Alternative to prayers 1 – 3:

4.1 the Respondent's decision to not pay the Applicant's claim on the ground of the alleged theft or attempted theft by the Applicant's employee (detailed in the founding affidavit) is set aside on the ground that the theft or alleged theft was not proved.

4.2 the Respondent is liable to indemnify the Applicant in terms of the contract of insurance (attached to the founding affidavit as annexure **"FA2"**) concluded

between the Applicant and the Respondent in respect of the applicant's loss of its vehicle MAN TGS 33.440 BBS L 6x4 T/T C./C, with registration number HN32MMGP (the truck).

5. Costs of suit."

[2] The respondent, MiWay Insurance Limited (*"MiWay"*) offers short-term insurance and Wyno has subscribed to the insurance in respect of its truck which disappeared on or about 4 October 2019. The issue in this case is that MiWay has repudiated a claim of Wyno on the basis that the insurance policy (*"the policy"*) excludes *"loss or damage due to theft or attempted theft of the vehicle by any employee of the policy holder"*.

[3] Wyno contends that such a provision in an insurance policy contravenes public policy as its enforcement would be unjust or unfair, and that the provision be declared unconstitutional. If it does not succeed on this point, that it has not been proven that the disappearance of the truck was as a result of theft by its employee and therefore that the clause has not been triggered.

[4] MiWay opposes the application on the following grounds;

4.1 A real and factual dispute between the parties' versions has arisen and therefore the application must be dismissed.

4.2 The policy affords the insured an option of excluding or including loss arising out of driver dishonesty and therefore that the policy clause is not unconstitutional.

4.3 The theft of the vehicle by Wyno's own employee has been proven and therefore the relevant clause triggered.

Background

[5] It is common cause that Wyno is the owner of the truck which it uses commercially to transport coal and that it was insured by MiWay. It is also common cause that the truck remains unaccounted for since 4 October 2019.

[6] The respondent has set out the background and sequence of events from 4 October 2019 in its answering affidavit. This is the version that the Court must accept, together with additional admitted facts in the founding affidavit.[1]

[7] The facts establish that Wyno's employee driver conjured reasons why he could not load the truck on the ordinary designated day of Friday and that it would be convenient to do so on the Sunday although it was known that the coal depot was closed on Sundays. He then connived to drive the truck to the truck stop (where the trucks would always be parked when not in use) but not to enter the premises. It was later dismantled of the tracking devices of both the truck horse and its trailers, which were found outside the truck stop on Tuesday, 8 October 2019 on the side of the road.

[8] The applicant's driver has since been sighted in a township in Swaziland. The applicant has submitted that this double-hearsay evidence not be admitted. It is admitted on the basis that the deponent to the founding affidavit has given reasons why they believe it to be true. The Court has given weight to the hearsay evidence taking into account the probabilities in this case. The driver would not have disappeared had he been innocent.

[9] The deponent to the founding affidavit, and owner of Wyno, challenges the respondent's repudiation based on, *inter alia*, her *"baseless suspicion"* that her

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1 Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (AD)

own employee stole the truck. However, her suspicions were not baseless. She was so suspicious of her driver's conduct that she made calls to him to ensure that the truck was safe over the relevant weekend and caused further investigations into its whereabouts when it disappeared without trace on 4 October 2019. She repeated her suspicions in detail to the police.

[10] These are civil proceedings. It is trite law that whether the disappearance of the truck was as a result of theft will be decided on a balance of probabilities, not beyond reasonable doubt as required in criminal proceedings. There is no evidence or basis to suspect that the driver was disposed of the truck by any other person. The movements of the truck indicate that it was at all times within his control. Had such an unfortunate event occurred he would not have hesitated to report it to his employer. His conduct of disappearing in the circumstances that are common cause can only point to him having stolen the truck or colluded in its theft. Wyno opted not to take cover in circumstances where its own employee commits the act of dishonesty such as theft. MiWay's repudiation of the claim was therefore triggered. Theft by Wyno's employee is the most reasonable inference to draw under these facts.[2] This leads to the next enquiry.

Unconstitutionality of the policy

[11] MiWay's response to this claim is as follows:

"2.3 The policy:

2.3.1 under the heading summary of cover included the truck at a premium of R2 846.63 per month;

2.3.2 Under "The Cover" had the option for and included cover for theft and hi-jack;

[2] *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614.

2.3.3 Under "Optional Add-On Cover" had the option for "vehicle loss of use" and "driver dishonesty", however this option was excluded by the applicant;

2.4 The applicant deliberately elected to exclude driver dishonesty. The respondent's policy is designed that by default all the optional add on cover is included or "ticked" and it was for the applicant (to) exclude or "untick" these options.

2.5 The option was excluded as it influences the monthly premium. The applicant would have paid R3 350.09 per month as opposed to R2 846.63 had it "ticked" the driver dishonesty box.

2.6 The heading in the policy titled "Driver Dishonesty" which start on page 15 of the policy wording stipulates the following:-

*"**Driver dishonesty***

Cover against loss, damage, injury and liability which would otherwise have been excluded due to one of the exclusions listed below.

…

- *Loss of damage due to theft or attempted theft of the vehicle by any employee of the policyholder.*

…

WHAT IS NOT COVERED UNDER BUSINESS VEHICLES?

…

- *Loss of damage due to theft or attempted theft of the vehicle by any employee of the policyholder.*

…

The above exclusions will not apply if driver dishonesty cover is selected and if the conditions of cover explained further under the driver dishonest section were met …"

2.7 From the policy wording, it is therefore clear that contractually the applicant was well capable of selecting and benefiting from the driver "dishonesty cover" that would have included cover for theft or attempted theft by one of its employees."

[12] The policy was accompanied by a covering letter which, in relevant parts, reads as follows:

"Dear Wendy Mchunu

…

The Policy Wording, Coversheet (Policy schedule) and all relevant attachments confirm the details of this insurance policy. Please read through all the documentation to ensure that your insurance needs are met and that you are familiar with the details regarding the cover and any amendments thereto, including the cover exclusions, condition of cover and applicable excesses.

It is important to confirm that the information noted on the Coversheet is correct, as the premium is based thereon. …

We are confident that your policy provides you with real value for money, combining the widest cover and benefits.

Kind regards"

[13] The applicant relies on *Beadica 231 CC & Others v Trustees for the time being of the Oregon Trust & Others*[3] and *AB & Another v Pridwin Preparatory*

[3] 2020 (5) SA 247 (CC).

School & Others[4]. In *Beadica* the following is stated:

"[72] It is clear that public policy imports values of fairness, reasonableness and justice. Ubuntu, which encompasses these values, is now also recognised as a constitutional value, inspiring our constitutional compact, which in turn informs public policy. These values form important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy.

[73] While these values play an important role in the public policy analysis, they also perform creative, informative and controlling functions in that they underlie and inform the substantive law of contract. …"

[14] It then submits that the principle enunciated in *Bafana Finance Mabopane v Makwakwa & Another*[5] that a Court may not enforce an agreement or clause in a contract whose objective is contrary to public policy. In *Makwakwa* the appellant had entered into a loan agreement with a clause in which he purported to waive his statutory right to apply to a Magistrates' Court for an order placing his estate under administration, the right to do so being conferred on a debtor in terms of section 74(1) of the Magistrates' Courts Act, 32 of 1944. The principle was stated as follows:

"In my opinion, the applicant's conduct in having purported to stipulate for these rights was, and remains, unconscionable. It purported to empower itself, in the event of any relevant default by the respondent, to deprive him of his status as a solvent person, an inevitably to subject him to all the onerous obligations and extensive restrictions which bind an insolvent in terms of the Act … without his being in any event able to defend

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4 2020 (5) SA 327 (CC).
5 2006 (4) SA 581 (SCA).

himself. This conduct offends my, and in my opinion would offend any reasonable person's, sense of … justice."

[15] The submission is that first, the clause is unreasonable to the extent that it attributes action of one person to another, especially where in this case the applicant will suffer financial prejudice as a result of the inability to claim under the insurance. Secondly, and in the event that the Court does not find the clause to be so unreasonable as to be rendered unenforceable, it should not be enforced in light of the circumstances which prevented compliance.

[16] The two-stage inquiry[6] requires that the Court first inquire into whether it was the objective of the impugned contract or clause thereof to prejudice unfairly or unjustly or unreasonably the other party. The second enquiry, which is only engaged in when the contract or clause is not against public policy, requires scrutinising the individual circumstances of the contract in question and in particular of the party that is unable to comply in order to exonerate it from compliance.

[17] The impugned clause is one that applies in many circumstances when an insured applies for insurance. Parties opt for varying options depending on their personal needs or requirements and often the premiums payable determine their options. Subscribers cut their coat according to their cloth. It is therefore reasonable for the respondent to have this general policy and not unreasonable to have accepted the applicant's choice to exclude the right to claim for loss arising out of its own employee's theft. Wyno clearly trusted its employees not to do so or to collude with any other person intent on doing so. It unticked the default option to include this cover and ticked the exclusion option.

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6 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at [56].

[18] Wyno was aware of the import of the relevant clause. The covering letter to the policy pertinently invited the respondent to familiarise itself with the policy and alerted it to the cover exclusions and conditions of cover. The applicant is not contending that it had no option but to accept the exclusion clause. The clause does not attribute fault or guilt on the part of the applicant but merely excludes a claim under those circumstances – an option that Wyno embraced voluntarily when it could have opted for the inclusion clause with a higher premium.

[19] As was stated in *Barkhuizen*:

"Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity."[7]

[20] There is no suggestion that Wyno was coerced into giving up its freedom and dignity. It was its exercise of its self-autonomy that has unfortunately resulted into its own detriment.

[21] As to the next stage of inquiry there is nothing that suggests that the *"necessity to do simple justice between individuals"*[8] requires to be invoked. The deponent to the founding affidavit, Ms Mchunu, is not pleading any disadvantage when entering into the contract voluntarily. The Court can assume that she manages and owns a thriving business with enough resources to attend to its legal matters such as entering into contracts with the assistance of appropriately qualified persons.

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7 *Ibid* at [57].
8 *Ibid* at [33].

[22] The second inquiry put differently, was it unreasonable for MiWay to enforce the repudiation by invoking the exclusion clause in the circumstances of this case? The onus is on Wyno to prove the unreasonableness.[9] As stated herein the objective terms of the impugned clause are not manifestly unreasonable. The applicant has done little, if anything, to discharge its onus in this regard.

Conclusion

[23] For the reasons stated above the application is dismissed. The respondent's *"driver dishonesty"* clause which excludes payment for loss or damage *"due to theft or attempted theft of the vehicle by any employee of the policyholder"* is reasonable and therefore not against public policy. This is a type of clause that is common place in insurance policies, not only on the specific subject matter in this case but in many other instances. Such optional clauses do not coerce a policyholder to choose them but gives them an option to choose from more than one with the commensurate premium to be paid. It is constitutional.

[24] As to whether the exclusion clause should be enforced in these circumstances the applicant has failed to discharge the onus as to why it should not. There are no individual circumstances or factors pertaining to both parties that manifest an uneven bargaining power. None were argued by the applicant who seeks relief from the clause being invoked.

[25] For these reasons the following order is made:

1. The application is dismissed.

2. The applicant is ordered to pay the costs of the application on the scale as between party-and party.

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9 *Ibid* at [58].

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G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

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DATE OF THE HEARING:	27 JULY 2022
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