

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE Number: A236/2023

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

2024

In the matters between: -

**KING PRICE INSURANCE COMPANY
LIMITED**

APPELLATE

And

RENDANI MUAMBADZI

RESPONDENT

JUDGMENT

BAQWA, J et NKOSI AJ CONCURRING

Introduction

[1] This is an appeal against the order granted by the regional court directing the appellant to make payment to the respondent for the damages he has suffered.

[2] The appeal revolves around the crisp issue of whether the respondent had proved the quantum claimed in the regional court against the appellant, his erstwhile insurer, after the appellant repudiated the respondent's claim for indemnity flowing from a motor vehicle accident.

The respondent's case before the court a quo

[3] The respondent's claim in the particulars of claim was stated as follows. He had paid a sum "...of R213 792.00 being the reasonable and necessary repair cost of his motor vehicle to its pre-collision condition", and this is the amount claimed from the insurer.

[4] *Ex facie* the pleadings it is evident that proving that the amount that paid was reasonable or necessary was an intrinsic part of the plaintiff's claim.

[5] The particulars of claim are in compliance with Rule 18(4) in that they plead the "material facts upon which the pleader relies for his claim".

[6] It was agreed between the parties that there would be no separation of the merits and quantum and the plaintiff accepted the onus to begin.

[7] It was therefore necessary for the respondent to tender evidence to establish the vehicle's reasonable repair costs besides proving that the merits were in his favour.

[8] Having accepted that the onus was on him and while under cross-examination, the respondent stated that he would not be calling any witness to testify or who would be capable of testifying on what was necessary to repair a motor vehicle to its pre-collision condition.

[9] In responding to the question "will you be presenting any evidence in what is the reasonable and necessary costs of the motor vehicle?" he replied "the answer is no".

[10] Consequently, he never presented any evidence regarding whether the amount claimed was reasonable or necessary for the repair of the vehicle.

[11] More importantly, however, was the concession he made that the amount he paid for the repair was not necessarily the reasonable expense to repair the motor vehicle. This concession was also made during cross-examination.

[12] More specifically and upon being referred to his particulars of claim where he claims for the vehicle's reasonable and necessary repair costs he stated that those were the only damages he was claiming from the appellant and that he would not be able to testify regarding whether the amount he paid was reasonable or necessary for the repairs. He further stated that the amount he paid to the panel beater did not equate nor was it the same as the reasonable and necessary repair costs of a damaged vehicle.

[13] The concessions made by the respondent were not dealt with in re-examination and were therefore not rectified or explained as an incorrect submission by the respondent. They therefore remain as part of the record as originally testified by the respondent.

Quantum

[14] It is common cause that the respondent did not testify as an expert. He could therefore not testify regarding a motor vehicle's necessary and reasonable costs of repair. Had he tried to do so, that would have constituted hearsay evidence.

[15] It was imperative for the respondent to call an expert due to the latter's knowledge and skill and the fact that he would be better qualified to draw inferences than the parties themselves, their legal representatives or even the judicial officer. See *Holthauzen v Roodt* ¹.

[16] An expert witness was necessary to enable the court a quo to make a finding to sustain the material facts pleaded by the respondent, that "the reasonable and necessary repair costs of the motor to its pre-collision condition" is the amount claimed by the appellant.

The law

[17] Section 3(1)(c) of the Law of Evidence Amendment Act² provides that subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless the court, having regard to –

- I. The nature of the proceedings;
- II. The nature of the evidence;
- III. The purpose for which the evidence is tendered;
- IV. The probative value of the evidence;
- V. The reason why the evidence is not given by the person upon whose credibility the probative value for such evidence depends;
- VI. Any prejudice to a party which the admission of such evidence might entail;
- VII. Any other factor which should in the opinion of the court be taken into account is of opinion that such evidence should be admitted in the interest of justice.

¹ 1997 (4) SA 766(W)

² Act 45 of 1988

[18] The respondent was not prohibited by any factor from calling an expert to testify about the repair to his vehicle. In fact, the onus was on him to present such evidence in order to discharge such onus and prove his case on a balance of probabilities.

[19] Counsel for the respondent submits that the most compelling justification for the admitting the hearsay evidence by the respondent in the present case is the numerous pointers to its truthfulness.

[20] In my view, the submission is not sustainable in law. A failure or omission to tender a critical element of one's case cannot be condoned by imbuing the evidence of a person who is not an expert with "truthfulness" which is not supported by real evidence. The provisions of the Law of Evidence Amendment Act are imperative and not permissive save in exceptional circumstances. Such circumstances do not exist in the present case. None were considered by the court a quo.

[21] It was not necessary for the court a quo to interpret the contract of insurance as the facts relating thereto were common cause between the parties. What was necessary was for the respondent to provide expert evidence regarding the necessary and reasonable repair costs to his motor vehicle.

[22] It is not disputed that the respondent paid the amount he testified to and presented bank records in that regard. However, the act of payment could not be equated to constitute a reasonable amount as the probative value of whether the amount is reasonable depends on the credibility of the panel beater, a person other than the plaintiff. Absent the evidence of such a person, the plaintiff's claim was doomed to fail.

Misdirection by the court a quo

[23] The onus of proof never shifted to the appellant since by the respondent's concession, he never tendered evidence the reasonable repair amount. The finding by the court a quo that the reasonable repair costs had been proven was a misdirection by the court a quo as it was inconsistent with evidence evinced under cross-examination.

[24] A party to an action may effectively prove his case by means of cross-examination, instead of calling witnesses himself because what he brings forth is evidence.³

[25] It is possible for a cross-examiner to establish a formal admission by means of cross-examination.⁴

[26] The appellant may therefore justifiably rely on the respondent's admissions and that ought to have brought the matter to a close before the court a quo. Regrettably, it did not.

[27] The failure to refute the evidence by means of re-examination its conclusive proof that the respondent's pleaded version was not sustained through the evidence presented at court.

Order

[27] In the circumstances, the appeal stands to succeed and in the result I propose that the following order be made:

³ Law of Evidence Chapter 9: Means of Proof: Witnesses, 9[2] CWH Schmidt et al 5120

⁴ S v W 1963 [3] SA 516 A, S v GOUWS 1968 (4) SA 354 (G) 357 H, S v GOPE 1993 (2) SACR 92 (CK)

27.1 The appeal is upheld with costs;

27.2 The order of the Court a quo is set aside and is replaced with the following

27.3 The action is dismissed, including the costs of Counsel.

SELBY BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I concur

N. NKOSI

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 12 March 2024

Date of judgment:

Appearance

On behalf of the Applicants

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