REPUBLIC OF SOUTH AFRICA

Case No: 146/97

IN THE SUPREME COURT OF APPEAL OF
SOUTH AFRICA

In the matter between

COMMERCIAL UNION INSURANCE COMPANY

OF SOUTH AFRICA LIMITED Appellant

and

LOTTER, FRANCOIS CARL Respondent

Coram : Vivier, Scott, Zulman, Streicher JJA et Farlam AJA

Date of hearing : 3 November 1998 Date of delivery : 26

November 1998

JUDGMENT

FARLAM AJA

This is an appeal, with leave from the court a quo, from a judgment of Daniels J, sitting in the Witwatersrand Local Division, in terms of which the appellant was ordered to pay the amount of R467 500,00 to the respondent, together with interest and costs.

The respondent's claim was based upon the provisions of an insurance policy issued by the appellant in favour of the respondent in which the appellant undertook, inter alia, to indemnify the respondent against the loss of or damage to a 1993 model Mercedes Benz 500 SL motor car which the respondent had hired from the Standard Bank of South Africa Ltd in March 1994. (In what follows I shall refer to the bank as "Stannic" and to the motor car the respondent hired as "the vehicle").

The lease agreement between Stannic and the respondent provided that the respondent would hire the vehicle for just under five years during which the respondent would make 58 monthly payments, which were described as "rentals",

of Rl0 334,03 each, commencing on 1 April 1994, and a 59 th payment, described as a "final rental", of R361 800,00 on 30 January 1999.

The lease agreement provided that:

Stannic would at all times remain the owner of the vehicle;

that the risk in the vehicle, as between Stannic and the respondent, would pass to the respondent and would remain with him until the vehicle was returned to Stannic;

the respondent would insure the vehicle with an insurer of his choice "against such risks of loss, damage, destruction or mechanical breakdown as property of the nature of the goods is ordinarily insured";

and on the expiry of the agreement at the end of the contract period the respondent would either return the vehicle to Stannic, at his expense, to enable it to sell the vehicle or would, if so directed by Stannic, sell the vehicle on Stannic's behalf and cause the proceeds of the sale to be paid

directly to Stannic, the proceeds of the sale to be refunded to the respondent

as an abatement of rentals (after the deduction of the cost of the sale to

Stannic and the book value if any).

It also provided that if these options were granted to the respondent by statute he might upon the expiration of the agreement "choose to purchase [the vehicle] or enter into [a] new lease".

After the vehicle was delivered to him the respondent had it insured as he was obliged to do in terms of the lease agreement.

Before letting the vehicle to the respondent, Stannic purchased it, at the respondent's request, from a motor dealer in Randburg known as Sutherlands Executive after the respondent had seen it in February 1994. At that stage the vehicle was relatively new with a milometer reading of about 12 000 miles. The price at which Sutherlands Executive sold it was about R100 000 less than that of a new vehicle.

Despite the fact that it was agreed at the time of the purchase that the vehicle would be registered in the respondent's name this only happened in August 1994.

Although the respondent was not aware of it when the vehicle was purchased from Sutherlands Executive, the vehicle had in fact been stolen in England from a financial institution known as Lombards North Central PLC and brought to South Africa where it came into the possession of Sutherlands Executive.

During July 1994, before the vehicle was registered in his name, the respondent was told by members of the South African Police that the vehicle was stolen. After his attorney had spoken to the police and found out that they were not in possession of documents proving that the vehicle was stolen the police left the vehicle with the respondent. The next day he spoke to someone at Sutherlands Executive, who told him that he had no cause for worry as Sutherlands Executive

had all the necessary documentation relating to the vehicle. The respondent also telephoned the Motor Vehicle Theft Branch Unit of the South African Police at Brixton and was informed that the vehicle was not listed as stolen on the SAP Computer Network.

The respondent thereafter consulted his attorney, who told him to keep the vehicle in his possession and that he, the respondent's attorney, would obtain the necessary documentation and investigate the matter further. The respondent's attorney advised him that he could take no steps against Stannic or Sutherlands Executive while the vehicle was still in his possession.

In October 1994 the members of the South African Police contacted the respondent again. This time they were armed with a warrant issued by the local magistrate and they wished to seize the vehicle but the respondent's attorney managed to persuade the local magistrate to cancel the warrant, apparently on the ground that the police were not in possession of the original documentation

proving that the vehicle was stolen in England.

Shortly thereafter the respondent again contacted Sutherlands Executive. This time he spoke to one Nathan Blumenthal, whom he described as the owner of Sutherlands Executive, who told him that his attorneys were investigating the matter and that they would send him documents proving, as he put it, that the vehicle was lawful and that there was nothing strange about the matter.

The respondent also telephoned Stannic and reported what had happened. He was told that there was nothing he could do about the matter while the vehicle was still in his possession but that he should inform Stannic of any further developments.

Despite Blumenthars promise to the respondent that Sutherland Executive's attorneys would send him documentary proof regarding the ownership of the vehicle he never received any such documentation.

On 23 March 1994 the respondent was again contacted regarding the

vehicle, this time by two British police officials who were accompanied by a member of the South African Police.

One of the British police officials who came to see the respondent, Detective Constable Jane Conie, who was employed by the Stolen Motor Vehicle inspection squad at Scotland Yard as a motor vehicle examiner, inspected the vehicle and positively identified it as a vehicle which had been stolen in the United Kingdom. The other British police official, Detective Inspector Wayne Smith from the National Criminal Intelligence Service in England, told the respondent that:

(1) the vehicle had been positively identified as stolen from the United Kingdom;

(2) he should not sell or dispose of it as he had no title to it;

(3) the owner of the vehicle was Lombards North Central PLC whom he should contact; and

(4) he should inform his insurer that the vehicle had been identified as stolen

and that he had no title to it.

In May 1995 the respondent decided to change insurers so as to obtain the benefit of lower premiums. On 5 May 1995, one Elize Strydom, who was attached to the firm of insurance brokers of which the respondent was a client, signed an assurance proposal form on his behalf, which was submitted to the appellant. Before she signed the proposal form, on which the vehicle was listed, the respondent did not tell her that the vehicle was possibly stolen and of his dealings with the police in regard thereto. He explained in evidence that he did not do so because he did not regard this information as relevant and added that eviction by the true owner of the vehicle was not one of the risks against which he was insuring.

In the proposal form which the respondent's agent filled in on his behalf provision was made for information to be furnished regarding the identity of the

registered owner of the vehicle to be covered by the insurance sought, who would not necessarily be the real owner thereof (cf the definition of "owner" in s 1 of the Road Traffic Act no 29 of 1989). Above the portion of the form on which general information was sought appeared the following :

> "Beantwoord asseblief al die vrae en merk die gepaste blokkie.
>
> Die versekering berus daarop dat 'n korrekte en volledige antwoord op elke vraag gegee word.
>
> Selfs al word dit nie gevra nie moet wesenlike inligting onthul word."

The respondent's agent did not disclose in the proposal form that the respondent had been informed that the vehicle was stolen, that it was subject to recovery by the true owner and that he had no title to the vehicle and could not sell or dispose of it without the true owner's permission.

The insurance policy which formed the basis of the respondent's claim was issued by the appellant pursuant to the proposal form to which I have referred.

On 16 August 1995 the respondent parked the vehicle at the Lanseria Airport before going away for the weekend. On his return on 18 August 1995 he discovered that the vehicle had been stolen.

He claimed indemnification for the loss of the vehicle from the appellant, which repudiated liability on a number of grounds, two of which were persisted in at the trial in the court a quo, viz

(3) that, as the vehicle was a stolen vehicle and the respondent was at all material times aware thereof, he had no insurable interest in the vehicle; and

(4) that the facts to which I have referred above, which were not disclosed to the appellant, materially affected the risk, alternatively the assessment of the premiums by the appellant, as a result of which it was entitled to repudiate the contract.

In his judgment in the court a quo Daniels J held that the appellant was not

entitled to repudiate its obligations under the policy on either of the grounds advanced and he accordingly gave judgment in favour of the respondent in the amount which it was agreed would be owing to the respondent if the appellant's two defences failed.

In addition to contending in this court that either or both of the grounds on which the appellant relied should have been upheld, Mr Wise, who appeared on behalf of the appellant, also contended that the learned judge in the court a quo had erred in ruling inadmissible certain expert evidence which the appellant had intended to lead for the purpose of establishing what disclosures and non-disclosures the appellant, as insurer, considered to be material.

As I am of the opinion, for reasons which are set out below, that the trial judge should have upheld the appellant's defence based on material nondisclosure, it is unnecessary for me to say anything about the defence based on an alleged lack of insurable interest or on the correctness or otherwise of the

appellant's attack on the trial judge's ruling on the inadmissibility of expert

evidence tendered by the appellant.

The test of materiality for non-disclosure in our insurance law (which was considered in Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality, 1985(1) SA 419(A) at 435 G-I and President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk 1989(1) SA 208(A) at 216 E-G) is : whether a reasonable man would consider that the information in question, which was not disclosed, should have been disclosed to the insurer so that he (or she) could form his (or her) own view as to its effect.

Mr Wise contended, inter alia, that the fact that the vehicle was stolen compromised the appellant's rights of subrogation under the contract of insurance because it would enjoy no rights to the vehicle vis-a-vis the true owner, Lombards North Central PLC.

It is trite law that an insurer under a contract of indemnity insurance who

4 has satisfied the claim of the insured is entitled to be placed in the insured's position in respect of all rights and remedies against other parties which are vested in the insured in relation to the subject matter of the insurance. This is by virtue of the doctrine of subrogation which is part of our common law. See, eg, Ackerman v Loubser 1918 OPD 31, Teper v McGees Motors (Pty)Ltd, 1956(1) SA 738 (C) and Avex Air (Pty) Ltd v Borough of Vryheid, 1973(1) SA 617(A) at 625 H.

Mr Wise contended that in a case such as the present where the insured vehicle was a stolen one an action instituted by the appellant against a negligent third party who had damaged the vehicle could be successfully resisted by such third party in view of the fact that the insured had no title to the vehicle.

A similar contention was advanced on the appellant's behalf in the Court a quo but it was rejected by Daniels J who dealt with it as follows :

"Die eerste punt van belang is dat dit uit die aansoekvorm blyk dat die verweerder slegs belanggestel

het in die identiteit van die geregistreerde eienaar, dit was die eiser en dit is so op die aansoekvorm aangedui. Paragraaf 12 van die aansoekvorm onder die opskrif "Motor Afdeling". Dit is terselfdertyd van belang om daarop te let dat die huurooreenkoms in paragraaf 4 daarvan voorsiening maak dat eiendomsreg in die voertuig in die verhuurder vestig. By beëindiging van die ooreenkoms was die eiser verplig om die voertuig aan die verhuurder te lewer wat op sy beurt daarmee kon handel ooreenkomstig die afspraak tussen die partye. Sien in hierdie verband paragraaf 19 van die huurooreenkoms.

Ingevolge paragraaf 19.2 van die huurkontrak het die eiser die reg verkry om die voertuig te koop. Op geen stadium sou die eiser ingevolge die bepalings van die kontrak eiendomsreg verkry of daarop kon aandring nie. Uit hoofde van die leerstuk van subrogsie verkry 'n versekeraar wat die versekerde skadeloos gestel het, die reg om in die plek van die versekerde op te tree. Die versekerde het nie 'n keuse in die aangeleentheid nie. Sien in hierdie verband ,Schoonwinkel v Galatides 1974 (4)SA 388(T)op 390 G.

Sodra dit vasstaan dat daar 'n geldige versekeringskontrak tot stand gekom het, in hierdie geval dat die eiser 'n versekerbare belang gehad het, het die verweerder die reg om in die eiser se naam of dan in sy plek op te tree, om, waar toepaslik, skade van 'n derde te verhaal. Gordon en Getz The South African

> Law of Insurance, 4de uitgawe op 457, verduidelik die begrip soos volg:
>
> Subrogation means the substitution of one person for another, so that the person substituted or subrogated succeeds to the rights of the person whose place he takes. It expresses the insurer's right to be placed in the insured's position so as to be entitled to the advantage of all the seller's rights and the remedies against third parties.'
>
> Dit is duidelik dat die verweerder se regte in hierdie verband onaangetas bly. Byvoorbeeld in die geval van 'n eis vir die herstelkoste van die voertuig sou hy in die eiser se naam aksie kon instel teen 'n derde wat regtens vir die skade verantwoordelik is. Die vraag of die eiser die ware eienaar was en of Stannic die eienaar was, kan daardie reg nie ongedaan maak of andersins affekteer nie."

I cannot agree with the learned judge's statement that it was clear from the proposal form that the appellant was only interested in the identity of the registered owner. It was indicated in terms on the form that all material information had to be provided even if no questions were asked on the topic in question.

Mr Roos, who appeared on behalf of the respondent, endeavoured to support the judge's reasoning in the last paragraph of the passage just cited. When asked on what legal basis the respondent (or the appellant suing in his name under its right of subrogation) could rely in support of a claim for, eg, repair costs brought against a third party who had negligently damaged the vehicle he submitted that reliance could be placed on the fact that the risk had passed under the agreement of lease from Stannic to the respondent. The difficulty with this submission is that Stannic was not the owner of the vehicle. In terms of the adage res perit domino the risk of an object's being damaged normally rests with the owner. It can pass from the owner to another by virtue of some legal rule or by contract (eg in the case of sale when the sale is perfecta) but I cannot see how it can pass from a non-owner to someone else merely by virtue of a contract between them as against a third party who was not a party to the contract.

It may well be (I state this as a possibility without deciding the point) that

the respondent in such a hypothetical case might have had a claim of some sort against a third party who negligently damaged the vehicle but such a claim would not necessarily extend to the full extent of the repair costs but only (if the respondent had a claim) to the extent of the limited interest he had in retaining the vehicle until it was vindicated by the true owner ("voor soo veel hy door hem is verkort" — to use the expression used by De Groot in his Inleiding, 3.37.5 : cf Smit v Saipem, 1974(4) SA 918(A) at 932 F-G).

But even if the respondent had such a right of action, which the appellant could exercise by virtue of its right of subrogation, it might well be that the amount recoverable by virtue thereof would fall far short of the amount expended by the appellant in repairing the vehicle.

The fact that the vehicle was stolen, with the result that the appellant would not be able to recover all or some of the repair costs from a negligent third party, was in my view a factor which a reasonable man would consider should have been

disclosed to the appellant so in order to enable it to form its own view as to its

effect, so that it could either decline to insure the vehicle or load the premium.

I am accordingly satisfied that Daniels J erred in holding that the respondent had not been guilty of a material non-disclosure

which entitled the appellant to repudiate.

The appeal is accordingly allowed with costs. The order made by the court a quo is set aside and replaced with an order

in the following terms:

"The action is dismissed with costs, including those occasioned by the employment of

two counsel."

I G FARLAM Acting
Judge of Appeal

Concur

Vivier JA Scott JA
Zulman JA Streicher
JA