THE SUPREME COURT OF APPEAL

REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 410/08

In the matter between:

GARRY OWEN WALKER **APPELLANT**

and

SANTAM LIMITED **1st RESPONDENT**

MUTUAL & FEDERAL INSURANCE COMPANY LTD **2nd RESPONDENT**

ALEXANDER FORBES INSURANCE COMPANY LTD **3rd RESPONDENT**

Neutral citation:	*Walker v Santam* (410/2008) [2009] ZASCA 56 (28 May 2009)
Coram:	Nugent JA, Kroon and Griesel AJJA
Heard:	13 May 2009
Delivered:	28 May 2009
Summary:	*Indemnity insurance – repudiation by insurers –sufficiency of proof of loss.*

ORDER

On appeal from: High Court, Grahamstown (Leach J and Nduna AJ, sitting as a court of appeal from a magistrate's court):

Order:

> The appeal succeeds with costs. The order of the High Court is set aside and substituted with the following:
>
> 'The appeal is dismissed with costs.'

JUDGMENT

GRIESEL AJA (NUGENT JA and KROON AJA concur):

Introduction

[1] On 7 August 2002 the appellant's motor vehicle, a 1996 BMW 323i, was hijacked in East London and damaged beyond repair. The appellant was insured against events of this nature with a 'co-insurance panel' comprising the three respondents herein jointly and severally, namely Santam Limited, Mutual & Federal Insurance Company Limited and Alexander Forbes Insurance Company Limited. (The policy in question was issued and administered on behalf of the panel by Alexander Forbes). The appellant duly lodged a claim for compensation in terms of the policy, but the respondents repudiated liability. After selling the wreck of the vehicle to a local scrap dealer for an amount of R21 000, the appellant instituted action against the respondents in the magistrate's court in East London, claiming the difference between the insured value of the car in its undamaged condition (R98 100) and the value of the wreck, less the compulsory excess, being five percent of the difference. The

respondents defended the action, but the magistrate granted judgment in favour of the appellant for payment of R73 245 together with interest at the prescribed rate and costs.

[2] On appeal to the Eastern Cape High Court in Grahamstown, the court below (per Leach J; Nduna AJ concurring) reversed the judgment of the magistrate, holding that 'the evidence that was placed before the court was insufficient to enable the court to determine the value of the motor vehicle in its damaged condition'. In the result, so it was held, the plaintiff had failed to prove the quantum of his damages. The judgment of the magistrate was accordingly set aside and substituted with one of absolution from the instance with costs. Leave to appeal against this judgment was refused by the court below, but was subsequently granted by this court on petition.

Factual background

[3] The appellant has been employed in the motor vehicle industry for more than 30 years. At the time of the incident he was the senior sales manager of Ronnies Motors in Nahoon, East London. On 26 July 2002 he bought the BMW in question from his employer for use by his wife and insured it under his existing policy with Alexander Forbes. Less than two weeks later, while being driven by one of the appellant's sons, the car was hijacked and damaged beyond repair.

[4] Some time after lodging his claim, the appellant was informed by Mrs Photenhauer, manager of the Eastern Cape Region of Alexander Forbes, that 'it had all been sorted out, the cheque was on her desk, it would be going into [his] account the next day'. Apparently the amount was calculated on the basis of the insured value of the car less the excess of five percent, such value having been ascertained by the assessor appointed on behalf of the respondents.

[5] A few days later, however, by letter dated 27 September 2002, Alexander Forbes advised the appellant 'that the insurer had stopped settlement of your motor claim and requested that further investigation be effected'. At a later stage, according to the appellant, Mrs Photenhauer informed him tele-

phonically that ‘there’s been another issue now’ and that the matter ‘was now going to go into dispute’. She did not, however, elaborate as to what the other ‘issue’ was and the appellant was not informed of the reason for the decision.

[6] After repeatedly pressing them for reasons for their repudiation, the appellant was informed by Alexander Forbes by letter dated 29 October 2002 that the insurers were ‘not able to entertain [his] claim’, based on ‘*inter alia’* certain clauses in the policy, which were then quoted verbatim. The clauses in question deal with ‘general conditions relating to your insurance cover’, including the definitions of ‘you’ and ‘we’ in the policy; the duty on the insured to comply with the terms of the policy; to inform the insurers of any increase of risk; to give information that is ‘complete and truthful’; and to take reasonable care to prevent loss, damage and accidents. The letter failed to inform the appellant, however, in what respect(s) he is alleged to have breached any of those general duties.

[7] After receiving notice of repudiation of his claim, the appellant took urgent steps to dispose of the wreck so as to avoid incurring storage charges. A further reason for urgency was the fact that the appellant needed to settle the purchase price of the vehicle with his employer. He accordingly approached ‘the two main scrap-yards in East London that buy accident damaged vehicles’ for quotations. The one company, *Hillbank Motor Consultants*, offered to pay him R21 000, whereas the other, *Heine & Strydom*, offered some R5 000 less. His evidence in this regard reads as follows:

‘What happened with the wreck is I got a price, a value for it from it’s called *Hillbank Motor Consultants*, they generally buy wrecks. I think they’re contracted to most of the insurance companies. And they gave a value against percentage of book [value], I think, I’m open to correction, I think it’s 22 or 23 percent of book value that they pay, which is a standard contract to the amount of most of the insurance companies. So I asked them for a price on the car which they duly gave me.’

Later he testified as follows:

'Did you consider that you could have done things differently and obtained a higher or better amount? --- I don't think so. I fought quite hard to get that much for it.
Do you think that you did everything that was reasonable in the circumstances? --- I do believe I did.'

[8] The appellant thereupon contacted Mrs Photenhauer and informed her of the offer obtained and his intentions in that regard. He testified as follows:

'And I actually phoned Mrs Photenhauer, although technically [it] didn't have anything to do with them, but I said to her I would like to place it on record that I'm getting so much for the wreck, so that in case down the road if we have to end up fighting about this claim, it is recorded, which I did do. And they were in agreement, that's what they would [have] sold the wreck for, you know, had the claim been settled in the normal way.
[. . .]
The only reason I discussed it with her, that I said to her that we're going to go into a dispute about my claim. We're going to go and fight about it, so I said I am asking you and informing you that I'm going to sell the wreck, and this is what I have been offered. Are you in agreement with me that this is a fair value, I don't want you to come down the road and say that I gave the thing away or something. And that is where we got – she said to me it's not really her business to agree or disagree, but she said yes, the value that you're getting is acceptable.'

[9] After disposing of the wreck, the appellant sent a letter, dated 6 November 2002, to Mrs Photenhauer, confirming the telephone conversation and the sale of the wreck to Hillbank for R21 000 inclusive of VAT, to which she responded the next day:

'We acknowledge receipt of your fax dated 6 November 2002 confirming that you have sold the wreck to Hillbank Motors in amount of R21 000 inclusive of VAT. We will keep a copy of the fax on file for record purposes. Due to the repudiation of the abovementioned claim by the insurer, your action is acceptable.'

[10] At a later stage, shortly before action was instituted, the appellant's attorneys in a letter of demand pointed out that their client had not yet been

informed of the respondents' reasons for repudiating the claim, to which Alexander Forbes replied enigmatically:

'The underwriter is not obliged to commit to one single reason for repudiation if more than one reason exists.'

[11] The plea filed in the magistrate's court in opposition to the plaintiff's claim likewise failed to shed light on the nature of the respondents' defence: the appellant's averments relating to the occurrence of the insured event; the damage to the vehicle beyond economical repair; his compliance with all his obligations in terms of the policy; and the damage suffered by him were all met with bare denials. During the trial, the appellant's evidence went largely unchallenged and as the trial progressed the initial disputes disappeared one by one. The respondents closed their case without adducing any evidence. By the time it came to judgment, the only 'defence' that remained alive, was the argument advanced on behalf of the respondents that the appellant had failed to establish the value of the insured vehicle in its damaged state. (In fairness to the respondents it should be pointed out that this very argument was foreshadowed during the opening address of the appellant's counsel, when the respondents' attorney drew attention to the fact that the appellant had not filed any expert summary in respect of the post-collision value of the vehicle.)

[12] The respondents' opposition to the claim was based almost entirely on the decision of this court in *Erasmus v Davis*,[1] where the majority held that evidence based on a percentage of the pre-collision value of a vehicle was insufficient to establish the post-collision value of such vehicle. Referring to the evidence of the appellant that I have quoted above, the respondents argued that the same conclusion should follow in this case.

[13] The magistrate, however, distinguished *Erasmus v Davis* on the basis that the relationship between the appellant and the respondents in this case is 'contractual rather than delictual'. He accordingly granted judgment in favour of the appellant.

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[1] 1969 (2) SA 1 (A).

Judgment of the court below

[14] In its judgment on appeal, the court below rejected the magistrate's attempt to distinguish *Erasmus v Davis* and said the following:

'It was argued, as I understood the argument, that in the light of the fact that this was an insurance claim, there should be a lighter onus which had to be applied, which distinguished the present claim from the decision in *Erasmus v Davis* which dealt with a delictual claim. However, it is quite clear that this is a civil claim, and the onus remains the same in a civil claim whether it is delictual or based in contract, even if the contract is one of insurance, and that is proof on a balance of probabilities of the amount of damages suffered. Even if there was a somewhat lighter onus it would still require evidence to be led, and there was no evidence to establish the value of the vehicle in its pre-damage [sic – should be "post-damage"] state.'

[15] I respectfully disagree with this approach. Our law recognises a clear distinction between claims based on contract and those based on delict.[2] *Erasmus v Davis* dealt with an ordinary delictual claim for damages arising out of a motor collision. This case, on the other hand, is based squarely on a contract of indemnity insurance, as counsel for the respondents rightly pointed out. This fact, in my view, has important consequences – not only with regard to the onus of proof, but also to the *facta probanda* required in order to succeed.

[16] In terms of basic principles of indemnity insurance the insured is entitled to recover the actual commercial value of what he has lost through the happening of the event insured against. The ordinary rule is that an insured must prove that his claim falls within the primary risk insured against, whilst the onus is on the insurer seeking to avoid liability to prove the application of an exception.[3] In the case of total loss of the insured item, the insurer acquires a right to salvage in whatever remains and is of value in respect of the item once the insurer has fully indemnified the insured.[4] There is a corresponding duty on

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[2] See eg *Trotman v Edwick* 1951 (1) SA 443 (A) at 449A–B.
[3] *Van Zyl NO v Kiln Non-Marine Syndicate No 510 of Lloyds of London* 2003 (2) SA 440 (SCA) para 7.
[4] Cf eg 12 Lawsa (1st reissue) paras 403–405 and the authorities referred to therein.

the insured to surrender the remains of the insured item as salvage. Furthermore, there is an implied duty on the insured to minimise his loss. [5]

[17] Applied to the facts of the present case, the respondents were liable in terms of the policy in question to compensate the appellant 'if the vehicle or any part of it (including accessories) is lost or damaged'.[6] The 'maximum amount payable' would be the lower of 'the sum stated in the Policy Schedule, or the retail value (adjusted for mileage and condition) . . .' The sum stated in the Policy Schedule in this case was R98 100 and the appellant's unchallenged evidence established that this sum equalled the retail value of the vehicle. His evidence further established conclusively that the vehicle was damaged beyond repair. He has accordingly succeeded in bringing himself within the primary risk insured against, with the result that the respondents were contractually bound to indemnify him in an amount of R98 100, less the 'first amount payable' amounting to 5% of the agreed loss, unless the respondents could establish some valid excuse for refusing to pay.

[18] Had the respondents complied with their contractual obligations, the value of the wreck would not have been an issue between the parties when the claim was made (a) because the wreck had not yet been disposed of and (b) because the respondents would in any event have been entitled to the wreck of the car in accordance with their right to salvage. In all probability the respondents would have disposed of the wreck to the same scrap dealer that bought it from the appellant and probably at the same price (as Mrs Photenhauer admitted to the appellant).[7]

[19] Instead, the respondents repudiated liability for reasons that, to this day, remain unknown. The conclusion is irresistible that the respondents had no valid excuse for repudiating liability. Faced with such repudiation, it was incumbent upon the appellant to take reasonable steps to minimise his loss. His own evidence that he did everything reasonable in order to get the best price

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[5] D M Davis *Gordon & Getz The South African Law of Insurance* 4ed (1993) p 251–252.
[6] The term 'compensate/compensation' is defined in the policy as '[the respondents'] liability to settle your approved claim either by payment, by repair or by replacement (at out choice).'
[7] Para 8 above.

available went unchallenged. Thus, it was not suggested to the appellant that the wreck could or should have been sold in a market other than the one in which it was eventually sold – a market, I may add, that has been established by the respondents themselves, as members of the short-term insurance industry. Nor was it suggested to the appellant that the price obtained for the wreck was in any way unreasonable, or that a better price could have been obtained if the wreck were to have been disposed of elsewhere or in some other manner, eg, by advertising in the local press; by public auction or by approaching other scrap dealers in East London.

[20] Can the respondents in these circumstances avoid liability simply because the appellant has failed to adduce expert evidence as to the post-collision value of the wreck where they have failed to show that there was anything more that he could have or should have done so as to minimise his loss? The answer must clearly be no. It is not necessary for purposes of this case to decide whether the onus rests on the appellant to prove that he took reasonable steps to minimise his loss, or whether it is for the respondents to prove that he has failed to do so. It is sufficient to hold, as I do, that on the evidence in this case the appellant has proved – at least prima facie – that he has taken reasonable steps to minimise his loss and the respondents have failed to rebut such prima facie case.

[21] It follows from the foregoing that the reliance on *Erasmus v Davis*, both by the respondents and by the court below, was entirely misplaced. It is accordingly not necessary for this court to consider whether or not the evidence adduced on behalf of the appellant as to the value of the vehicle in its post-damage state was sufficient.

[22] It follows that the judgment of the court below cannot stand. In the result, the appeal succeeds with costs. The order of the court below is set aside and is substituted with the following:

'The appeal is dismissed with costs.'

B M GRIESEL
Acting Judge of Appeal

APPEARANCES:

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