THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 243/06
Reportable

In the matter between:

MUTUAL & FEDERAL INSURANCE CO LTD **APPELLANT**

and

JAF DA COSTA **RESPONDENT**

CORAM: FARLAM, LEWIS et MLAMBO JJA

HEARD: 5 MAY 2007

DELIVERED: 6 JUNE 2007

SUMMARY: Insurance – misdescription of year and model of motor vehicle – whether material – whether best evidence led on quantum of indemnification.

Neutral citation: This judgment may be referred to as *Mutual & Federal v Da Costa* [2007] SCA 89 (RSA).

FARLAM JA

[1] The respondent in this matter, a Pretoria businessman, who is a partner in a firm of panelbeaters, sued the appellant, an insurance company, in the Pretoria magistrate's court for indemnification in respect of damage caused to a motor vehicle which, the respondent contended, was covered under an insurance policy issued by the appellant. His action was successful, the trial court granting judgment in his favour in an amount of R48 050, with interest from 24 July 1996 (the date the appellant repudiated liability in respect of the claim) and costs.

[2] The appellant's appeal against this judgment was dismissed on 15 November 2005 by De Vos and Legodi JJ, sitting in the Pretoria High Court, and it appeals to this court with the leave of the court *a quo.*

[3] In argument before us counsel for the appellant raised three points in support of the appeal, *viz:*

(1) the respondent had not proved what he called 'the insured event' (damage to a vehicle in an alleged collision);

(2) the respondent had not proved that the vehicle in respect of which he had claimed was in fact a vehicle insured in terms of the insurance policy issued to him by the appellant; and

(3) that, if he had proved 'the insured event' and that the claim was brought in respect of a vehicle insured under the policy, the quantum of his damages had not been proved.

[4] It was common cause at the trial that from about June 1991 an agreement of insurance (which I shall call in what follows 'the policy') existed between the appellant and the respondent in terms of which a number of motor vehicles belonging to the respondent were insured. From time to time this policy was amended by the addition or removal of motor vehicles as they were acquired or disposed of by the respondent.

[5] In January 1996 the respondent acquired a further vehicle from the brother of one of his employees by exchanging it for a Porsche. The respondent was under the impression that this vehicle was a 1991 model

Mercedes Benz 230E. It was duly added to the list of vehicles covered by the policy and was described as a 1991 model Mercedes Benz 230E. The registration number was originally recorded by the appellant as TBA 111 but it appeared from the evidence that this was what might be described as a temporary description because the correct number was not at that stage known. 'TBA' standing for 'to be advised'.

[6] The respondent testified that at the relevant time he only owned one Mercedes Benz, namely the vehicle in question. Its registration number was PNH 609 T, which was the number found on the vehicle inspected by the appellant's assessor during his investigations pursuant to the respondent's claim. It was also indicated on the licence disc found by the assessor on the vehicle.

[7] It was clear on the evidence that the parties intended the addition relating to the Mercedes Benz to which I have referred to apply to the vehicle which the respondent had recently acquired and which he wanted to have added to the cover under the policy.

[8] Although the respondent was, as I have said, under the impression that the vehicle he had acquired was as described in the list of vehicles covered by the policy, it was in fact, as the magistrate found, a built-up vehicle, being a combination of a 1988 200 and a 1990 230 Mercedes Benz. The appellant contended that it was only liable under the policy in respect of a car answering to the description contained therein and no other. It contended further that the description of the vehicle amounted to a warranty which had been breached. The difficulty I have with this contention is that the appellant never raised a breach of warranty as a defence in its plea. It relied instead on denials, most of which were not persisted in at the trial, and a series of defences based on the fact that the vehicle in question was a built-up vehicle, combining a Mercedes Benz 200 model body and a Mercedes Benz 230E model engine, which it stated entitled it to avoid the agreement between the parties on the basis of material misrepresentation, alternatively non-disclosure on the part of the respondent. It specifically pleaded that the facts on which it relied were

material to its decision to insure the vehicle, alternatively to the terms on which it was to be insured. In the circumstances I do not think that the appellant should be permitted to raise the defence of breach of warranty. (On this aspect of the case I do not think that the 'indulgent approach' to the pleadings adopted in *Labuschagne v Fedgen Insurance Ltd* 1994 (2) SA 228 (W) at 237, on which reliance was placed, can be supported.)

[9] In regard to the issue as to whether the defence based on misrepresentation or non-disclosure can be upheld, the question to be considered at the outset is whether the appellant proved the allegation in its plea that the facts it relied on were material. It led no evidence in support of this allegation and, as the magistrate found, it did not prove it. Counsel for the appellant contended, however, that evidence on this point was unnecessary. He relied on *Labuschagne v Fedgen Insurance Ltd, supra,* at 238D-G. That case concerned a 1986 Mercedes Benz motor car which was represented to an insurer in 1989 as being a new motor car. It appears from the reported judgment (at 238D) that in that case the insurer undertook to replace the insured vehicle with a brand new vehicle. The court found (at 238F-G) (and counsel for the appellant in this case relied on this finding), that 'the description of the year of manufacture or model year and the age of a motor vehicle are material aspects of the description of the risk which the insurer is assuming'. It referred to an English case decided in 1924, *Santer v Poland* [1924] 19 Ll LR 29 KB, where the year of manufacture of the vehicle in question was given as 1918 whereas the correct date was 1916. In that case no reasoned judgment was given. It appears from the report that after some evidence had been led (the nature of which does not appear) the judge said to the plaintiff's counsel that he could not do anything for him, whereupon he gave judgment for the defendant underwriters, having said that he was sorry that the plaintiff had not accepted the amount offered to him, which the underwriters might still give him, which they did. The case cannot on the facts reported be regarded as authority for the proposition that without any evidence on materiality a court can assume that a misstatement as to the year of manufacture of a motor vehicle is *per se* to be regarded as material.

[10] It is true that in some cases a conceded or misstated fact will be held to be material without any evidence having been led on the point. But this is where, as it was put in *Fire v The General Accident, Fire and Life Assurance Corporation Ltd* 1915 AD 213 at 220, 'the fact speaks for itself'. That case concerned the failure by an applicant for fire insurance to inform the insurer that a policy on the same property had been cancelled by another insurer before the expiration of the term on return of the rateable proportion of the premium for the unexpired term. Solomon JA said (at 221) that the true test for materiality appeared to be: 'would a reasonable man consider that the fact was one material to be known by the insurer or a fact that in the words of Lord Blackburn "might influence the underwriter's opinion as to the risk he is incurring".' He continued: 'And if that be the test, can there be any doubt that a reasonable man would consider the fact, that there had been a cancellation of a previous contract, material, unless at the same time a satisfactory explanation had been given of that fact.'

[11] I do not think that one can say, without any evidence having been led on the point, that the fact with which we are presently concerned 'speaks for itself'. I see in this regard that according to John Alan Appleman and Jean Appleman, *Insurance Law and Practice,* revised volume 4A, 1969, section 2630, it was held in what were described as 'older cases' that

'a misrepresentation as to the year of manufacture of the insured automobile or the model is material to the risk and will relieve the insurer of all liability, even though the insured may have acted in the highest good faith, and the representation was innocently made.'

Appleman points out, however, that other states 'have refused to regard such a matter as material particularly where no inquiry as to model year had been made, no intent to deceive was shown, or the value of the vehicle was approximately that represented.'

He refers (in footnote 43) to a Texan decision *St Paul Fire & Marine Ins. Co v Huff.* Tex Civ App 1915, 172 SW 755 at 756, where the following was said:

'If the fact untruly represented was something not found to be material to the risk, then the policy should not be avoided. Generally stated, a fact would be material to the insurance risk which would induce the insurance company to decline the insurance altogether, or not to accept it unless at a higher premium. Taking this as a fair test, in a general way, of the

materiality of a fact in regard to insurance, it is believed that reasonably careful and intelligent men might have regarded the answers complained of as facts not materially affecting the insurance contract.'

Appleman continues:

'The strict result was undoubtedly justified in the early development of automobile insurance law, when the rate fluctuated violently depending on the age of the car both as to liability and property coverages, and valued form policies were in vogue. Now, when the liability rate is constant regardless of the make or age of the car, that can be no factor. And since actual value policies have superseded valued form contracts almost without exception, the only effect of representing the car to be newer than it is would be to require the insured to pay a higher premium than he would otherwise have to pay. In the event of loss, he would receive no more than had the year been correctly stated. Since the insured could never profit by such a misrepresentation, and might actually penalize himself by so doing, there is no longer any sound reason for the courts to add additional penalties.'

It is not necessary to decide whether this passage of Appleman correctly states our law on the point. What it does do is to provide support for the view that evidence of materiality is required in a case such as this.

[12] In the circumstances of the present case, in the absence of evidence indicating that a reasonable insurer in the position of the appellant, if it had known the true facts, would have refused to extend the cover of the respondent's policy to the vehicle presently under consideration or would have only accepted it at a higher premium, I do not think we can hold that the misrepresentation relied on was material. It follows that the first point argued on behalf of the appellant cannot be upheld.

[13] I am also of the view that there is nothing in the second appellant's second point, that the respondent had not proved what it referred to as the insured event. On this aspect of the case the appellant's counsel submitted that the respondent had not proved the collision which allegedly gave rise to the loss. He pointed out that the respondent only testified that he had heard from his partner, José Ferreira (who had taken his car home on the evening of 15 February 1996 and was to bring it back the next morning), that he had been involved in a collision and that Ferreira himself had not been called as a

witness, although he was available. Counsel submitted further that the respondent had failed to prove the time, place and manner in which the damage arose so as to put himself within the four corners of the policy.

[14] The cover provided by the policy was in respect of loss of or damage to the vehicles covered thereby: it was not limited to damage caused in a collision. Although respondent did not have to prove that the vehicle was involved in a collision, in my opinion he succeeded in doing so, at least on a *prima facie* basis. The expert whom he called, Mr van Rooyen, who had examined the vehicle at the appellant's request, stated that it appeared to him that the vehicle had been involved in a collision.

[15] Counsel for the appellant advanced two further submissions on this part of the case. The first was that the respondent had to prove that the vehicle was damaged within the territory referred to in clause 3.1.1 of the policy, which provided that the insurer would not be liable for loss sustained or damage caused beyond the territorial boundaries of the Republic, Namibia, Botswana, Lesotho, Zimbabwe and Swaziland. The evidence was that Ferreira took the vehicle from the workshop of the partnership in Pretoria West. The next day the respondent had the vehicle fetched from the police pound and taken back to the partnership's workshop where he looked at it and concluded that it was not financially viable to repair it. It is accordingly clear that it must have been damaged in or near Pretoria, in the territory covered by clause 3.1.1 of the policy.

[16] The appellant's counsel's second submission on this part of the case was that the respondent had to fail because he failed to prove that the damage to the vehicle was not caused by political unrest. Clause 13.4, the provision excluding liability on the part of the insurer if the insured property was destroyed or damaged and such destruction or damage was caused by or occurred in connection with various forms of political unrest listed in the policy, was described as an exclusion and followed immediately on exclusions of liability in respect of any claim which was in any respect fraudulent or in respect of loss, damage or physical injury which was deliberately caused by

the policy holder or anyone acting in collusion with him. At the end of clause 13.4 it was specifically provided that if the insurer alleged on the basis of the exclusions set out in the sub-clause that the destruction or damage or physical injury was not covered by the policy then the onus would rest on the policyholder to prove the contrary. It is clear in my opinion that until the insurer pleaded that the circumstances giving rise to the claim were covered by one or other of the forms of disturbance set out in the sub-clause it was not incumbent on the insured to prove that they did not exist.

[17] In the circumstances I am satisfied that a proper construction of the relevant clause in the policy exclusion must first be raised as a defence by the insurer in its plea before it becomes incumbent on the insured to prove that on the facts of the particular case it does not apply.

[18] I turn now to consider the appellant's contention that the respondent did not prove the *quantum* of the indemnification to which he was entitled. In this regard the appellant's counsel argued that the respondent did not present any evidence to the effect that the vehicle had been damaged beyond economic repair. I do not think that this argument can be accepted. The respondent's witness, Mr Scrimgeour, who saw the vehicle both before and after it was damaged stated in his expert's report, which he confirmed in his evidence, that he was of the opinion that as a result of the damage sustained by the vehicle it was uneconomical to repair the vehicle. This evidence was not challenged in cross-examination.

[19] Counsel for the appellant also argued that the pre-collision value of the vehicle had not been established and the magistrate had erred in adopting the robust approach to the assessment of *quantum* set out in such cases as *Hersman v Shapiro & Co* 1926 TPD 367 and approved by this court on numerous occasions: see, eg, *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) and *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A).

[20] The robust approach set out in *Hersman v Shapiro* by Stratford J, with

whom Tindall J concurred, (at 379-380) is this:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. *It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.* (The emphasis is mine.)

[21] Counsel submitted that the robust approach should not have been adopted because, as he put it, 'good evidence to prove the actual damages was readily available but not adduced'.

[22] Counsel's main point in this regard was that the pre-collision value of the vehicle could have been established by proving the market value of a 1988 200 Mercedes Benz at the relevant time by reference to an information system used by the motor industry. The system indicates the trade and retail prices of second hand vehicles of specified models and years of manufacture. It was argued that from the market value indicated by the system there had to be deducted an amount estimated by expert evidence because the vehicle was rebuilt.

[23] I do not think that this submission is correct. The vehicle in question consisted of the engine from a 1988 200 model Mercedes Benz, the body from a 1990 230E model Mercedes Benz and what was described as an AMG kit comprising non-standard bumpers, grilles, interior trim, door panels, seats and a steering wheel. The AMG kit which had been fitted to the vehicle was worth at least R62 000. Mr Scrimgeour said that a purchaser who purchased a rebuilt vehicle would reduce the price he was prepared to pay by approximately R20 000 to take into account the fact that the vehicle was a rebuilt model. He stated that when he saw the vehicle before it was damaged he formed the impression that it was a 1991 model with an AMG kit. (The body of a 1988 model is the same shape as that of a 1991 model, the only

difference between the two models being the outside trimmings and interior appointments.) He took the value of a 1991 model from the trade publication to which I have referred, deducted R20 000 from it because the vehicle was rebuilt and arrived at a figure of R69 000. He was criticised in cross-examination because, as it was put to him, he was dealing with a 1988 200 model, fitted with an AMG kit and a 230 E engine and he agreed with the proposition that his estimation of the vehicle's value was, as it was put, 'in pieces'.

[24] In my opinion the magistrate was correct in adopting a robust approach to the assessment of the value of the vehicle. Counsel for the appellant contended that she should not have done so because the best evidence available had not been adduced. In this connection it was argued that the market value of a 1988 200 model Mercedes Benz at the relevant time should have been proved by reference to the publication to which I have referred. I do not agree that that would have been the 'best evidence'. What had to be valued was a vehicle built up in the way set out above. The value of such a vehicle was not dealt with in the publication referred to. Indeed when it was pertinently put to Mr Scrimgeour in re-examination that the vehicle comprised the components which went into the rebuilt vehicle and he was asked to put a value on it he said he could not.

[25] In the circumstances the magistrate in my view was entitled to adopt the approach that the best estimate of the value of the vehicle on the material before her be accepted. That estimate took into account the fact that the vehicle was rebuilt, and that it was less than the amount for which the vehicle was insured.

The following order is made:
The appeal is dismissed with costs.

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IG FARLAM
JUDGE OF APPEAL

CONCURRING
LEWIS JA
MLAMBO JA