IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 132/2002

In the matter between:

MUTUAL AND FEDERAL INSURANCE LIMITED **APPELLANT**

and

MANUELLE GOUVEIA **RESPONDENT**

CORAM: **HARMS, FARLAM and MTHIYANE JJA**

HEARD: **6 MARCH 2003**
DELIVERED: **25 MARCH 2003**

Summary: Interpretation of an exception clause in a policy of insurance

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JUDGMENT

MTHIYANE JA:

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[1] This is an appeal from the judgment of Mlambo J sitting in the Witwatersrand Local Division. The appeal is concerned with the proper interpretation of an exception clause in a policy of insurance.

[2] On 9 June 2000, an Isuzu motor vehicle belonging to the respondent ('the plaintiff') and comprehensively insured by the appellant ('the Company') under a policy of insurance was hijacked in Houghton, Johannesburg, whilst it was driven by a Mr Eduardo Cumbe with the plaintiff's permission. At the time of the incident the plaintiff was aware that Cumbe was not licensed to drive. He claimed indemnity arising out of the loss and, not surprisingly, the claim was repudiated. The Company relied for its repudiation on an exception clause the effect of which was that liability would not follow if the loss occurred whilst the vehicle was being driven by an unlicensed driver. The plaintiff instituted action for compensation against the Company for the loss of the vehicle. The Court *a quo* ruled that the exception clause was inapplicable and found the Company liable. The appeal is against that decision and it is before us with leave of this Court.

[3] By agreement between the parties the question of liability was dealt with first and the other issues stood over for determination at a later stage in terms of Uniform rule 33 (4). The trial judge was requested to decide this question by way of a stated case and on the basis of certain agreed facts in terms of rule 33 (1).

[4] The following facts are common cause and formed the foundation of the stated case in the Court below:

'1.1 At the time the loss occurred there was in existence a valid insurance agreement (policy) ('the insurance agreement') containing the terms as set out at annexure 'A' to the plaintiff's particulars of claim;

1.2 In terms of the said agreement of insurance the defendant undertook to indemnify the plaintiff against the risks set out in the agreement of insurance;

1.3 The risks included inter alia the risk of loss in respect of an Isuzu KB 280 DT ('the vehicle')

1.4 The vehicle was hijacked on 9 June 2000 at the intersection of 4th Avenue and 11th Avenue, Houghton;

1.5 At the time of the hijacking the vehicle was being driven by one Eduardo Cumbe with the general knowledge and consent of the plaintiff;

1.6 At all times material hereto and in particular at the time of the hijacking to the plaintiff's knowledge, the said Mr Cumbe was not in possession of a valid driver's licence;

1.7 The vehicle has not been returned to the plaintiff;

1.8 The defendant has repudiated the plaintiff's claim on the basis that Mr Cumbe was not in possession of valid driver's licence.'

[5] In section 1 of the policy

the company agreed to indemnify the insured against 'loss of or damage to the vehicle'.

This obligation was subject to a number of exceptions the relevant one being para 2 (b) (i) ('the exception clause'). It deals with 'Vehicle Use' and it reads:

'The Company shall not be liable in respect of:

1. . . .

2. Any accident, injury, loss, damage or liability caused, sustained or incurred whilst any vehicle insured under the policy is being:

(a) . . .

(b) driven by the insured or with his general knowledge or consent, by any person;

(i) unless he is licensed to drive such vehicle in accordance with the legislation of the territory in which it is being used . . .'

[6] In repudiating the claim the Company invoked the exception clause which, it claimed, entitled it to avoid liability on the ground that at the time of the hijacking the vehicle was driven by Cumbe who was, to the plaintiff's knowledge, not licensed to drive the vehicle in accordance with the laws of the territory in which it was driven.

[7] The plaintiff's *riposte* was that the absence of a driver's licence was irrelevant where the vehicle was lost in a hijacking because the absence of such licence was not the cause of the loss. He maintained that the Company would only be able to avoid liability where the loss was causally related to the driver having been unlicensed. It was contended in the alternative that the loss had not occurred at the time of the hijacking, but only after the thief had driven away with the vehicle. This latter argument was rejected by the Court *a quo* who held that 'once a hijacking incident occurs, loss is occasioned thereby'.

[8] According to the learned Judge the real issue in the case was whether the loss was 'causally connected to the lack of a driver's licence on the part of the person who was driving the vehicle'. After examining certain exceptions referred to in the

policy, he came to the conclusion that liability would only be excluded if the loss is 'caused' by the situation set out in the exception. The specific situations mentioned by him are where the loss was caused by 'wear and tear, mechanical or electrical breakdowns, failures or breakages' and cases where death had occurred or personal injury sustained. He held that what was contemplated in the exception clause was a 'loss' occasioned by or directly attributed to the lack of a valid driver's licence on the part of the person driving the motor vehicle. Because the hijacking had nothing to do with the lack of a valid driver's licence on the part of the driver, he found that the exception clause was inapplicable.

[9] With respect I do not agree. I fail to see how the instances cited by the judge *a quo* provide a basis for reading causation into the exception clause. This approach is not borne out by the clear words used in the clause which, in my view, connote a temporal connection rather than a causal connection. This is especially so if regard is had to the introductory conjunction 'whilst' used in the clause. The clause speaks of a 'loss' which is incurred 'whilst' the vehicle is being driven. If during that time (hence the use of the word 'whilst') the driver is unlicensed, the exception applies. The proper approach to be adopted in interpreting a policy of insurance has been authoritatively stated to be the following:

'The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and

popular meaning unless the context indicates otherwise (*Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464-5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (*Auto Protection Insurance Co Ltd v Hanmer-Strudwick* 1964(1) SA 349 (A) at 354 C-D); for it is the insurer's duty to make clear what particular risks it wishes to exclude . . . .'[1]

[10] There can be no question that if the ordinary meaning of the words in the exception clause is given effect to, the plaintiff and Cumbe fell squarely within the terms of the exception clause. Reading causation into the exception clause is not justified by its wording. I agree with the submission that such an approach may have the effect that even in the case of an accident involving an unlicensed driver the insurer would still not be able to rely on the exception clause, because it would have to prove, not only the absence of the licence, but also that the lack thereof caused the accident. The practical effect would be that the company would only be exempted if the unlicensed driver's lack of skill in driving the vehicle caused the accident. That would mean that not only causation but also negligence on such a driver's part is required and that clearly, is not the intention conveyed in the clause. It is true that the exception clause *in casu* must be restrictively interpreted but equally true is the fact that the ordinary meaning of the words must be given effect to.

[11] The clause must then be applied to the facts agreed to by the parties in the stated case. At the time of the loss the vehicle was being driven by Cumbe, with

[1] *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 AD at 38 B-C

the plaintiff's general knowledge and consent. Cumbe was, to the plaintiff's knowledge, not licensed to drive such vehicle in accordance with the legislation of the territory with which it was being used. It does not assist for the plaintiff now to say that the loss occurred only after the vehicle was driven away by the thief. The agreed facts in the stated case stand in the way of that argument. When the stated case was formulated it would appear that the parties regarded hijacking as a composite process involving both the hijack and the theft. That much is clear from paragraph 1.5 of the stated case which refers only to the vehicle being driven 'at the time of the hijacking'. Nowhere in the stated case is there reference made to 'at the time of the loss'. On an overall conspectus of the terms of the policy and the agreed facts in the stated case, I do not think it is open to the plaintiff now to argue that the 'loss' was not caused by the 'hijacking' and thereby unilaterally enlarge the scope of the stated case. The loss post-hijack approach on which the plaintiff now seeks to rely appears to be an afterthought. In the context of this case there is no merit in the argument and it was correctly rejected by the judge *a quo.*

[12] Accordingly the appeal succeeds with costs. The order of the judge *a quo* is altered to read:

'The plaintiff's claim is dismissed with costs.'

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KK MTHIYANE
JUDGE OF APPEAL

CONCUR:
HARMS JA
FARLAM JA