



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1067/2019

In the matter between:

KING PRICE INSURANCE COMPANY LTD

APPELLANT

and

CONCISE CONSULTING SERVICES (PTY) LTD

RESPONDENT

Neutral citation: *King Price Insurance Company Ltd v Concise Consulting Services (Pty) Ltd* (1067/2019) [2021] ZASCA 42 (13 April 2021)

Coram: MBHA, ZONDI and MOLEMELA JJA and KGOELE and ROGERS AJJA

Heard: 15 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 13 April 2021.

Summary: Contract – insurance – repudiation – claim of indemnification – whether false and misleading information provided by the respondent's employee to the insurer was attributable to the respondent – whether such information was material to justify the repudiation of the claim and cancellation of the contract. Held – the appellant failed to acquit itself of its onus to justify the repudiation and cancellation of the contract of insurance – appeal dismissed with costs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Louw J and Joyini AJ sitting as the court of appeal):

The appeal is dismissed with costs, which costs shall include the costs of two counsel, where employed.

JUDGMENT

Mbha JA (Zondi and Molemela JJA and Kgoele and Rogers AJA concurring)

[1] This appeal concerns a repudiation by an insurance company of a claim for indemnification under a contract of insurance, on the ground that an employee of the insured had submitted false, untrue and misleading information, during the claims process. It is against a judgment and order of the full bench of the High Court, Gauteng Division, Pretoria (Louw J and Joyini AJ), given on appeal to it from the Magistrate's Court of Pretoria, in terms of which the insurer (the present appellant, which was the successful defendant in the trial court and the unsuccessful respondent in the full bench appeal) was held liable to indemnify the insured (the present respondent, which was the unsuccessful plaintiff in the trial court and the successful appellant in the full bench appeal) in terms of a contract of insurance between the parties, for damages sustained to the insured's motor vehicle in an accident on 1 January 2014. The appeal is with special leave of this Court.

[2] It is necessary to set out, briefly, the factual matrix against which the dispute arose and its litigation history. The respondent, a company registered in terms of the Companies Act 71 of 2008, was insured in terms of a contract of insurance (the contract), concluded with the appellant, a company which conducts business as a short-term insurer in terms of the Short-term Insurance Act 53 of 1998. This contract was in full force and effect from June 2013 until its cancellation by the appellant on 17 January 2014 retrospectively with effect from 1 January 2014.

[3] The respondent was the owner of a 2008 Toyota Yaris motor vehicle bearing registration letters and numbers BSY 487 L (the motor vehicle) which was comprehensively insured by the appellant in terms of the contract. On 1 January 2014 during the early hours of the morning this motor vehicle sustained damage during a collision with a wall. The driver at the time of the collision was Mr Sibusiso Ngobese (Mr Ngobese), an employee of the respondent who was also registered in terms of the contract of insurance, as being the regular driver of the said motor vehicle. Mr Paolos Tripani (Mr Tripani), the respondent's managing director, reported the incident and lodged a claim telephonically with the appellant on 1 January 2014. Mr Tripani also instructed Mr Ngobese to report the incident to the South African Police Services, which he did.

[4] On 8 January 2014 the appellant's Ms Beverley-Ann Marais contacted Mr Ngobese to obtain a description of the events about the incident. The call was made to Mr Ngobese after Mr Tripani had explained to the appellant that details regarding the incident had to be obtained from Mr Ngobese, as he was the only person who knew how the accident had occurred. The appellant's assessor, Mr Charl

Victor, conducted further telephonic interviews with Mr Ngobese on 14 and 16 January 2014, when the latter's version was probed in greater detail.

[5] On 17 January 2014 the appellant repudiated the respondent's claim and cancelled the contract retrospectively from the date of the incident. Its ground for doing so was that during the validation of the claim it had come to the appellant's attention that Mr Ngobese had supplied the appellant with dishonest information.

[6] In repudiating the claim and cancelling the contract retrospectively, the appellant referred specifically to two different portions of the policy wording on pages 9 and 10, which state the following:

'Be honest

Always provide us with true and complete information. This also applies when anyone also acts on your behalf.

...

Keep your promises

You need to give us:

...

- True and complete information to us and the authorities. We act on the information you provide, therefore any information which is misleading, incorrect or false will prejudice the validity of your claim.'

[7] On 21 July 2014 the respondent issued a summons in the Magistrate's Court, Pretoria, against the appellant claiming payment of the amount of R75 000, being the fair and reasonable costs required to repair the respondent's motor vehicle to its pre-collision condition.

[8] By the time the appellant pleaded, it no longer relied on page 10 of the policy wording of the contract. Over and above the policy wording appearing on page 9,

reliance was also placed on the policy wording appearing on page 16, bearing the heading 'Fraud or dishonesty. . . Honesty is always the best policy'. The appellant then pleaded reliance on the following policy wording in the relevant paragraph of the plea:

'Fraud or dishonesty. . . Honesty is always the best policy...

If you, or anyone acting on your behalf submits a claim, or any information or documentation relating to a claim, that is in any way fraudulent, dishonest or inflated, we will reject the entire claim and cancel your policy retrospectively, from the date on which the incident has been reported, or from the actual incident date, whichever date is earliest.'

[9] The appellant pleaded further that either at the time or after the respondent's claim was lodged with the appellant, and during the investigation process conducted by the appellant's assessors, Mr Ngobese being the regular driver of the motor vehicle, and acting on behalf of the respondent, supplied the following information to the appellant: that he arrived at his home in Klipfontein View, Midrand from Soweto at around 02h00 on 1 January 2014 and went to bed; that while he was sleeping he was woken up by his brother 'Mpho' at around 04h00 to 05h00 asking him to assist because Mpho's wife was going into labour, whereafter he took Mpho and his wife to Tembisa Hospital where he dropped them off at the entrance of the hospital; that the collision occurred because the motor vehicle spun out of control and crashed into the wall after he pulled the handbrake because he had no brakes due to the motor vehicle being in neutral; that he was not drinking alcohol prior to or at the time of the collision; and that he was alone in the motor vehicle at the time of the collision.

[10] The appellant then averred that the aforementioned information was untrue and dishonest thus entitling the appellant to repudiate the claim and avoid the contract in that: during the period that Mr Ngobese was allegedly sleeping, he was

in fact driving around the Soweto area; according to the records from Tembisa Hospital, Mpho's wife was not treated there on 1 January 2014; and Mr Ngobese was not alone in the motor vehicle at the time of the collision. Furthermore, he had consumed alcohol prior to or at the time of the collision and the collision did not occur as alleged by him.

[11] At the trial, the appellant led evidence to show that the spot where the accident had occurred was along a straight stretch of road. This was in contrast with Mr Ngobese's version that he lost control as he was approaching a turn at the end of that particular road.

[12] On 7 November 2017 the learned magistrate (Mr Tjale) handed down judgment dismissing the respondent's claim with costs. He found, *inter alia*, Mr Ngobese was dishonest and that the information or representations made by him formed part of the claim that was lodged by the respondent; the information or representations made by Mr Ngobese were material; Mr Ngobese was acting on behalf of the appellant when he made the representations and that the appellant was accordingly entitled to avoid the contract of insurance.

[13] The respondent's subsequent appeal to the full bench yielded positive results. The full bench upheld the respondent's appeal and set aside the magistrate's judgment in its entirety. The full bench's reasons may be summarised as follows:

- (a) The appellant as insurer bears the burden of proof to establish on a preponderance of probabilities whether the respondent made the false statement or fraudulent representation with the wilful intention to defraud and this was common cause. The clauses in the contract relied upon by the appellant to limit its obligation to indemnify required to be interpreted strictly

with proper regard to the main purpose, general nature and object of the contract of insurance. *In casu*, the appellant had failed to discharge the burden to establish dishonesty or fraud on the part of the respondent with the intention to deceive and defraud the appellant in order to get a benefit it knew it was not entitled to.

- (b) When Mr Ngobese provided the dishonest information to the appellant, he was clearly not acting on behalf of the respondent. He was merely providing information at the request of the respondent. The respondent itself did not know what the facts were.
- (c) The false statements or misrepresentations made by Mr Ngobese were insignificant and could not materially affect the assessment of indemnity.

[14] The appellant's case in this Court is pivoted, as it was in the court below, on three main grounds namely:

- (a) First, that Mr Ngobese was acting on behalf of the respondent when submitting the false information to the appellant as contemplated in the contract of insurance.
- (b) Secondly, that the respondent was obligated in terms of the agreement not to supply false and misleading information.
- (c) Thirdly, that the misrepresentations and untruths perpetrated by Mr Ngobese were of a material nature such as to entitle the appellant to both repudiate the respondent's claim and avoid the contract of insurance retrospectively with effect from 1 January 2014.

[15] The respondent's defence, as appears from the heads of argument, can be summarised as follows:

- (a) The appellant failed to discharge the onus it had to prove facts pleaded in its plea, all relating to the false information submitted by Mr Ngobese, including Mr Ngobese's whereabouts during the period before the accident; that his brother's wife was never treated at Tembisa Hospital on 1 January 2014 and so forth. Alternatively, such false statements were not material to the appellant's liability to compensate the respondent.
- (b) Whatever Mr Ngobese told the appellant's investigator, Mr Victor, about how the accident occurred, is not attributable to the respondent, with the consequence that the respondent has not contravened any of the terms of the contract of insurance; and
- (c) If it is found that Mr Ngobese provided untrue and misleading information and if it is found that the information was provided in the process of the respondent filing a claim as opposed to in the appellant's validation or investigation process, the contract of insurance is ambiguous about what precisely is meant with 'acting on behalf of the insured'. Consequently, any reasonable interpretation of that phrase by the respondent should triumph above the appellant's interpretation as the appellant is the author of the contract of insurance.¹

[16] During argument before us, the issue about the truthfulness of Mr Ngobese's statements was rightly not seriously pursued by the respondent. Indeed, it was not even dealt with by the full court. The main focus of the debate turned on the two issues of the materiality of Mr Ngobese's untrue statements, and whether or not Mr Ngobese was acting on behalf of the respondent when he gave the information to the appellant's investigator during the claims validation process.

¹ *Van Zyl NO v Kiln Non-Marine Syndicate NO 510 of Lloyds of London* [2002] ZASCA 120; 2003 (2) SA 440 (SCA) para 6.

[17] At the outset, I need to dispel outright any notion that at the time Mr Ngobese gave his statement to the appellant he was submitting the insurance claim in terms of the contract. Mr Tripani's uncontested evidence is that after speaking to Mr Ngobese on the day of the incident, he personally contacted the appellant and both reported the incident and then registered a claim telephonically. The policy made provision for all claims to be lodged telephonically by calling a specified number. Clearly, Mr Ngobese's statement was given during the validation process, well after the claim had already been duly lodged.

[18] In my view, the evidence and facts of this matter, viewed holistically, show conclusively that when Mr Ngobese told the appellant's investigator, Mr Victor, how the incident occurred, he was not acting on behalf of the respondent. Mr Tripani's uncontested testimony bears this out undoubtedly. Mr Tripani's evidence in this regard was as follows:

'. . . Mr Boot:

. . . And you are happy that [Mr Ngobese] when he gives [sic] the information to the assessor is acting on behalf of the Company in the finalisation of that claim?--- I would not agree with the words "acting on behalf of the Company".

. . . Mr Boot:

Well, he is representing the Company as the Insured Driver. --- He is relaying the information, the nature of the incident, answering questions.'

[19] Also of importance is that there was no examination or cross-examination of Mr Ngobese directed to the question whether he was or was not supplying information 'on behalf of' the respondent. The appellant's legal representative never put to him in cross-examination that he was acting 'on behalf of' the respondent.

[20] In cross-examination, Mr Tripani testified that as Mr Ngobese was the only person who knew or had information about how the accident occurred, he was the person the appellant would have had to contact to get a full picture of the accident. Thus, the appellant was the party that initiated contact with Mr Ngobese. Mr Tripani only facilitated that to happen. And, in doing so, Mr Tripani never ever asked Mr Ngobese to fabricate anything that was not true. Clearly, he was not even aware of what Mr Ngobese was going to say to the appellant's investigator.

[21] Importantly, sight must not be lost of the fact that the validation exercise conducted by the appellant, through its investigator Mr Victor, was not a requirement for the institution or lodgement of a claim in terms of the contract. It was thus something that was done entirely at the election of the appellant.

[22] It is also important to note that ordinarily 'acting on behalf of' must denote the concept of agency, which undoubtedly Mr Ngobese was not. There is thus no cogent reason why Mr Ngobese, who was clearly a witness as to how the incident occurred, should be elevated to an agent for, and thus acting on behalf of, the respondent in this case.

[23] Although the words 'on the behalf of' can in an appropriate case have the broader meaning of acting for the benefit or in the interests of another, even though not as an agent,² I consider that any ambiguity in this respect should be resolved against the appellant. It would not be in keeping with the drastic consequence of forfeiture of claims for an insured to be penalised for fraudulent or dishonest information emanating not from the insured (which would include conduct by an

² See, for example, *South African Warehousing Services (Pty) Ltd and Others v South British Insurance Co Ltd* 1971 (3) SA 10 (A) at 20D-F; *Premier Milling Company (Pty) Ltd v Van der Merwe and Others* 1989 (2) SA 1 (A) at 8C-E.

agent authorised to convey fraudulent or dishonest information) but a third party. However, and even if one applied the broader meaning, the evidence does not show that Mr Ngobese perceived himself to be acting for the benefit or in the interests of the respondent. His purpose in providing dishonest information was almost certainly to shield himself from adverse consequences, whether at the hands of the insurer or the respondent.

[24] As I have found that Mr Ngobese was not acting on behalf of the respondent when he gave his statement to the appellant, no fault or culpability of any sort whatsoever can be attributed to the respondent. It follows that the appeal falls to be dismissed. Furthermore, in light of my finding in this regard, I do not deem it necessary to further consider and determine any other issue raised in the appeal.

[25] In the circumstances, the following order is made:

The appeal is dismissed with costs, which costs shall include the costs of two counsel, where employed.

B.H MBHA
JUDGE OF APPEAL

APPEARANCES:

For appellant: P G Cilliers SC (with him B Boot SC)

Instructed by: Weavind & Weavind Attorneys, Pretoria
Matsepes Incorporated, Bloemfontein

For respondent: T A L L Potgieter SC

Instructed by: Savage Jooste & Adams Attorneys, Pretoria
Honey Attorneys, Bloemfontein