

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2017/03868

In the matter between:

SET-SON MALAKIA

PLAINTIFF

and

**ALEXANDER
DEFENDANT**

FORBES

INSURANCE

COMPANY

Neutral citation: *Malakia v Alexander Forbes Insurance Company* (HC-MD-CIV-ACT-OTH-2017/03868) [2018] NAHCMD 365 (16 November 2018)

Coram: PARKER AJ

Heard: 10,25,26,27 September 2018, 22 October 2018

Delivered: 16 November 2018

Flynote: Insurance – Contract of insurance – Liability of insurer - Repudiation of – On ground of special stipulation or ‘general exceptions’ or ‘exclusion’ clauses in insurance contract – Court held that the fact that the peril insured against was brought into operation by an act on the part of the insured does not necessarily take away the liability of the insurer for any loss that may be sustained in consequence – The effect of the act depends partly on its nature and partly on the special stipulations or exclusions or general exceptions, if any, of the Policy -The stipulation that insured should give exact time by the hour, minutes and seconds of occurrence of accident is perverse and insensitive – Such stipulation not in accord with common human experience for insured involved in motor vehicle accident to note the exact time of accident – Failure of insured to give exact time by the hour, minutes and seconds not amounting to failure to give complete and true information to insurer- Exclusion of liability based on plaintiff driving in excess of general speed limit not stipulated explicitly and clearly in any exclusion or special stipulations clauses in the Policy – Defendant failed to establish that plaintiff left scene of accident ‘unlawfully’ – Consequently court held defendant not entitled to stand on the two general exception and exclusion clauses to repudiate liability – Accordingly, court entered judgment for plaintiff and ordered defendant to compensate plaintiff in terms of the insurance contract for his loss occasioned by the accident.

Summary: Court found that plaintiff gave three different estimations of time accident happened – That could not amount to not giving full and complete information to enable defendant to assess plaintiff’s claim – Court found further that although plaintiff drove at a speed in excess of the statutory general speed limit no general exception or exclusion clause dealt explicitly and specifically with such infraction – Court found further that although plaintiff left scene of the accident defendant did not establish in what manner his action was unlawful – Statutory provision relied on by defendant to trigger this exclusion is not part of Namibian law – Consequently, court rejected defendant’s reliance on the exclusion clause – Accordingly, court found that defendant failed to justify its repudiation of liability on the basis of reasons defendant gave for the repudiation - Court entered judgment for plaintiff with costs.

ORDER

1. Judgment for plaintiff.
 2. Defendant acted unlawfully in rejecting plaintiff's claim under Claim No. 655102.
 3. Defendant must compensate plaintiff in accordance with the said Policy for damages sustained by plaintiff.
 4. Defendant is to pay plaintiff's costs.
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JUDGMENT

PARKER AJ:

[1] Before us is an indemnification claim made by plaintiff (the insured) under an insurance contract entered into between plaintiff and defendant (the insurer) with policy number I159632-1. These are common cause facts in these proceedings:

- (a) The time of the accident giving rise to these proceedings between plaintiff and defendant.
- (b) The accident happened at the circle situated at the corner of Auas Road and Western Bypass in Windhoek.
- (c) Plaintiff submitted a claim to defendant for compensation in terms of the insurance contract.
- (d) Defendant rejected plaintiff's claim for the following reasons:

- (i) Plaintiff did not give complete and true information as to how and when the accident occurred (Reason 1).
- (ii) Plaintiff left the scene of the accident without permission or certified medical assistance (Reason 2).
- (iii) Plaintiff did not comply with the applicable provisions of the Road Traffic Ordinances or any similar legislation (Reason 3). In terms of Chapter 7 of the Road Traffic and Transportation Act 22 of 1999, no person should drive a vehicle on a public road at a speed in excess of the speed limit indicated by an appropriate road traffic sign, as well as Regulation 323 of the Road Traffic and Transportation Regulations of 2001, which provides that a person may not drive in excess of the general speed limit indicated by an appropriate road traffic sign.

[2] The burden of the court, as Mr Ntinda counsel for plaintiff, submitted is to consider those three reasons in order to determine whether defendant had a valid and good reason for rejecting plaintiff's claim. In weighing the evidence, it is important to rehearse the principles that are now trite. In *DM v SM* 2014(4) NR 1074, para 26, I cited with approval the following principle enunciated by the Supreme Court in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurz* 2008 (2) NR 775 (SC) at 790B-E:

'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even though its so doing does not exclude every reasonable doubt...for, in finding facts or making inferences in a civil case, it seems to me that one may...by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

[3] That is the manner in which I approach the weighing of the evidence in these proceedings. In addition to the common cause facts set out in para[1] above, guided by

DM v SM, I make the following factual findings and conclusions thereon in respect of the individual reasons mentioned in para[1] above.

[4] Defendant justifies its repudiation of liability on the implementation of certain exclusion or general exception clauses in the insurance contract entered into between plaintiff and defendant. 'Exclusion', 'general exception' or 'special stipulations' clauses are common place in insurance contracts, as Ms Rix, counsel for the defendant, correctly submitted. Such clauses are valid and enforceable only if they are stipulated explicitly and clearly in the insurance contract. See E.R.Hardy Ivamy, *General Principles of Insurance Law*, 2nd ed (1970), chapter 29, passim.

[5] Thus, in insurance law, the fact that the peril insured against was brought into operation by an act on the part of the insured does not necessarily take away the liability of the insurer for any loss that may be sustained in consequence. The effect of the act depends partly on its nature and partly on special stipulations, if any, of the policy. (E.R Hardy Ivamy, *General Principles of Insurance Law*, p 226) I note that 'special stipulations' are referred to as 'exclusions' and 'exceptions' in the policy in question (or contract of insurance) in the instant case.

[6] Keeping these principles and approaches in my mental spectacle, I proceed to consider the reasons set out in para[1], above that defendant gave for repudiating liability.

Reason 1 and Reason 2

[7] Reason 1 is based on certain information that plaintiff placed before defendant when he lodged his claim. The first on 'when' based on the three different hours and minutes given by plaintiff the accident occurred. Apart from the fact that the differences in time were not in hours but minutes, the plaintiff prefixed each time with 'about' or +/- indicating that he could not place the time of the accident to the exact hour, minute and seconds. In any case, as Mr Ntinda submitted, what the significance is in giving the

exact time to the hour, minute, and seconds was not sufficiently explained in evidence. And I do not see the significance of it at all. More important, it cannot be part of common human experience that when a person is involved in a motor vehicle accident, he or she would there and then upon the occurrence of the accident look at his or her watch, if she or he has one on her or him, or look at the watch on the dashboard of the vehicle, if the watch is in working order, in order to note the exact time of the accident to the hour, minute, and seconds.

[8] For any insurance company to expect such exercise from an insured is unjust, unfair and unreasonable in the extreme, because it does not accord with common human experience. Such requirement is definitely perverse. Plaintiff's inability to give the exact time of the accident to the hour, minute and seconds cannot amount to failure to give full and complete information. I therefore conclude that defendant cannot stand on plaintiff's failure to give exact the time of the accident to the hour, minute, and seconds to repudiate liability.

[9] The second piece of information under reason 1 is on how the accident occurred; and it relates to plaintiff's version as to how the accident occurred. This is intertwined with Reason 2. Plaintiff's version is that he was driving at a speed of between 60 kph and 65 kph, and when he approached the aforementioned circle, the vehicle swerved and hit the pavement, and in an attempt to control it, the vehicle overturned. Defendant's version put to the court by Viljoen (a consultant on re-construction of motor vehicle accidents and the law on traffic offences) is that plaintiff must have entered the roundabout at an unsafe and high speed, as skid marks could be observed at where the vehicle came to rest on its roof after some 13 'rollovers'.

[10] It ought to be remembered that Viljoen is not an engineer or lawyer. But, according to him, he acquired the expertise through experiential efforts. That may be so, but Viljoen's evidence on the point is hard to accept for these reasons. The accident occurred on 25 June 2017, and Viljoen did his inspection on about 7 September 2017. The locus of the accident is not a street – the only one – in a village somewhere in one

of the Regions in Namibia, where the only motor vehicle that occasionally plies the street is that of the Pastor of the local church who went from the nearby town to the village once every three months. The street in question is in Windhoek. Moreover, at the relevant time, construction works were going on there and so, I cannot accept that the skid marks that Viljoen says he saw were made by plaintiff's motor vehicle. Furthermore, it was a Mr Frans Grobler, who gave no evidence, and who apparently had arrived at the scene of the accident when it had just taken place, and who pointed out to Viljoen where the left front wheel of the vehicle landed after it had broken off from plaintiff's motor vehicle. All this is hearsay evidence. This officious bystander did not give evidence. What Viljoen told the court was therefore inadmissible hearsay evidence.

[11] Mr Neels Koegelenberg's evidence fares no better. He did this inspection on 16 July 2017. His evidence on a temporary road sign indicating a speed limit of 40 kph cannot possibly be true. I rather accept the evidence of plaintiff that the temporary road sign indicating a 40 kph speed limit was installed in July 2017, that is, after the accident had occurred. In any case, on his own version, plaintiff testified that he drove at a speed of between 60 kph and 65 kph. I cannot accept defendant's version that plaintiff was driving at a speed of 143 kph in a 60 kph zone. There is no credible evidence to challenge plaintiff's version. Defendant's version is not based on any clear scientific proof that is safe and satisfactory to accept.

[12] Ms Rix, submitted that since on his own version, plaintiff drove at a speed in excess of 60 kph, which is the general speed limit in urban areas, plaintiff was wrong. Be that as it may, that is not the issue in Reason 1 but in Reason 2. The issue relevant to Reason 1 is that plaintiff did not give full and complete information as to how the accident happened. On the evidence, I do not think defendant has proved that plaintiff did not give full and complete information as to how the accident occurred (Reason 1).

[13] Thus, as respects Reason 1, and based on all these reasons, I find that defendant has not established that plaintiff had a good and valid reason based on Reason 1 to repudiate liability. Nevertheless, I find that the evidence establishes that

plaintiff drove at a speed over the general speed limit of 60 kph (Reason 2). In my view if indeed, plaintiff was doing a maximum speed of 65 kph, the probabilities are that he should have been able to apply the brakes of the vehicle timeously in order to prevent the vehicle from hitting the median leading to the circle and avoid losing control of the vehicle, which resulted in the vehicle rolling several times before coming to rest on its roof. By driving at a speed in excess of 60 kph plaintiff broke the law, namely, s 76 of the Road Traffic and Transportation Act 22 of 1999 and reg. 323 of the Road Traffic and Transportation Regulations.

[14] But that is not the end of the matter. As I have held previously, an 'exclusion' or a 'general exception' or a special stipulation clause is valid and enforceable only if it is explicitly and clearly stipulated in the contract. See for example, this clause, which is stipulated in the contract explicitly and clearly:

'MARIENTAL FLOOD EXCLUSION WITH EFFECT FROM 1/10/2006

Notwithstanding any provision of this policy, including any exclusion, exception or extension or other provision, which would otherwise override a general exception, this policy does not cover any loss, destruction, damage, cost or expense whatsoever or any consequential loss directly or indirectly caused by, arising of, resulting from or in consequence of flooding to any property situated downstream of the Hardap Dam and the lower Fish River and its tributaries within the area downstream of the Hardap Dam.'

[15] MOREOVER, THE POLICY PROVIDES FOR GENERAL EXCEPTIONS:

The following exceptions are applicable to all sections of this policy except as they may be varied by specific exceptions under a particular section.

We shall not be liable for:

- (1) liability to any passenger or third party whatsoever, including third party vehicles, for loss, damage or personal injury;

- (2) any loss or damage caused, sustained or incurred whilst the vehicle is being driven by you or by any other person with your consent, unless duly and fully licensed to drive the vehicle in terms of any applicable legislation, or whilst the concentration of alcohol in your or such person's blood exceeds the statutory limit in force at such time or whilst you or such person is under the influence of alcohol or a drug having a narcotic effect;
- (3) any claim arising out of any contractual liability;
- (4) consequential loss of any nature whatsoever, depreciation, wear and tear, mechanical or electrical breakdowns;
- (5) loss or damage related to or caused by civil commotion, labour disturbances, riot, strike, lock-out or public disorder, war invasion, acts of foreign enemy, hostilities or warlike operations, or any risk which is covered by the policy issued by NASRIA limited. If we allege that the loss or damage is covered by the NASRIA Limited policy the burden of proving the contrary shall rest on you;
- (6) loss or damage caused directly or indirectly by or through or in consequence of or contributed to by nuclear weapons material or by joining radiations or contamination by radioactivity or by any nuclear fuel or waste;
- (7) any claim in terms of this policy, unless you have complied with all the policy terms and conditions;
- (8) any loss or claim arising where there is misrepresentation, non-disclosure or miss-description of any fact or circumstance, whether in connection with: your Underlying Policy; your Underlying Policy claim; this policy; or your claim in terms of this policy;
- (9) more than our ratable proportion of any loss or claim which is covered under another enforceable insurance policy;

- (10) loss, damage, consequential loss or any legal liability arising from the failure or malfunction of any computer, data processing equipment or media microchip, integrated circuit or similar device or any computer software ('the computer equipment') or the inability or failure of the computer equipment to treat any date as the correct data or true calendar date, whether or not the computer equipment is owned by you or in your possession and whether occurring before, during or after the year 2000. Where the loss, damage or liability is attributable to more than one proximate cause, this exception will not apply if any other such cause is an insured event. In the event of the mechanical breakdown of any machinery, equipment or vehicle, we will not pay for the replacement or repair or modification of any part of the computer equipment causing the event but we will pay for any resultant loss, damage or liability covered under this policy;
- (11) loss of damage caused directly or indirectly by or through or in consequence of any occurrence for which a fund has been established in terms of the War Damage Act
- (12) (as amended) or similar Act operative in any of the territories to which this policy applies;
- (13) loss or damage if the vehicle is used at any stage during the Period of Insurance as a taxi.

[16] I find that it has not been stipulated explicitly and clearly in the foregoing 'exclusion' or 'general exception' clauses that there is no cover in situations where an accident occurs as a result of the insured having driven the motor vehicle in excess of the general speed limit in terms of a particular statute. In the absence of an explicit and clear stipulation, it will be unfair and unjust to penalize insured drivers for every traffic infraction imaginable in the statute books. In that regard, I respectfully but firmly reject the ex post facto statements by a Mrs Charnray Forbes in her letter of 25 June 2017 to plaintiffs. Those statements are not clauses forming part of the contract. They are,

therefore, irrelevant for our present purposes. As I have said previously, special stipulations or 'exclusions OA' or 'general exception' clauses must be stipulated clearly and precisely in the contract.

[17] Based on these reasons, I conclude that defendant has failed to establish that it is entitled to repudiate liability on the basis of Reason 2. I pass to consider Reason 3.

Reasons 3

[18] As respects Reason 3, there is this 'not covered' special stipulation or 'exclusion' clause.

'If any person who drives the vehicle:

- i. Is under the influence of alcohol or drugs.
- ii. Has a concentration of alcohol in the blood exceeding the legal limit or fails a Breathalyzer test.
- iii. Refuses to give either a Breathalyzer test or blood sample.
- iv. If the vehicle is involved in an accident and the driver of the vehicle then leaves the scene of the accident *unlawfully*.'

[Italicized for emphasis]

[19] The emphasized word 'unlawfully' is doubtless, critical in the interpretation and application of this 'exclusion' clause, on which Reason 3 is solely based, as Mr Ntinda submitted.

[20] That plaintiff left the scene of the accident is not in dispute. What is in dispute, and which dispute I should resolve, is whether plaintiff left the scene of the accident

'unlawfully'. In her submission, Ms Rix says that plaintiff left the scene of accident unlawfully because he did so in breach of 'section 61 of the National Road Traffic Act 93 of 1996'. But this statute does not apply in Namibia. Put simply, this law is not Namibia's law. It follows irrefragably and inevitably that plaintiff did not leave the scene of the accident 'unlawfully'. Accordingly, I conclude that defendant has failed to establish that defendant had a good and valid reason to repudiate liability on the basis of Reason 3. No unlawful conduct on the part of plaintiff is proved to trigger the special stipulation or exclusion clause that the policy does not cover a situation - 'If the vehicle is involved in an accident and the driver leaves the scene of the accident unlawfully'. That being the case, I conclude that on Reason 3, defendant has not established that it was entitled to invoke the special stipulation or exclusion clause in order to repudiate liability, simply because defendant has failed to establish in what manner and on what legal basis plaintiff is said to have left the scene of the accident 'unlawfully' in terms of the exclusion clause.

[21] Based on the foregoing reasons and conclusions thereon and having rejected all three reasons that defendant has preferred for repudiating liability, I hold that defendant has no good reason to repudiate liability. I find that on the evidence, plaintiff has shown that he is entitled to the relief sought in para 1 and 2 of the prayers in the particulars of claim; whereupon, I order as follows:

1. Judgment for plaintiff.
2. Defendant acted unlawfully in rejecting plaintiff's claim under Claim No. 655102.
3. Defendant must compensate plaintiff in accordance with the said Policy for damages sustained by plaintiff.
4. Defendant is to pay plaintiff's costs.

C Parker

Acting Judge

APPEARANCES:

PLAINTIFF:

M D Rix
of Rix & Company Legal Practitioners, Windhoek

SECOND AND THIRD

RESPONDENTS:

N Ntinda
of Sisa Namandje & Co. Inc., Windhoek