IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: 3910/2018

In the matter between:

MORENA STERLING MARUMO **1st Plaintiff**

KS MARUMO **2nd Plaintiff**

And

R & T BROKERS **1st Defendant**

STATUS BROKERS **2nd Defendant**

HEARD ON: 2 FEBRUARY 2021

DELIVERED ON: 25 FEBRUARY 2021

MOLITSOANE, J

[1] The Plaintiffs are a married couple. They instituted an action against the Defendants for the replacement value of the Second Plaintiff's motor vehicle, a Mercedes Benz AMG(the vehicle), which was involved in an accident on 30 March 2017. The Plaintiffs' case is based on the alleged failure of the Defendants to exercise a duty of care when they (Defendants) negligently failed

to insure the Second Plaintiff's vehicle and thereby acted in breach of their duties.

[2] There was no order made for the separation of the merits and the quantum in terms of Uniform rule 33(4).

[3] The Plaintiffs testified in their case and did not call further witnesses. The First Plaintiff's testimony is briefly as follows:
He is the First Plaintiff and Second Plaintiff is his wife. He does not know the First Defendant. He knows the Second Defendant, an insurance broker, as a company of a certain Mr Van Niekerk (Van Niekerk). He has known Van Niekerk for about 36 years. His mother used to work for Van Niekerk as a domestic worker.

[4] Van Niekerk handled all his short term insurance. This included the insurance in respect of his wife's motor vehicle, the AMG. He paid the premiums for the insurance cover of this vehicle but it belonged to the Second Plaintiff. The vehicle was involved in an accident on 30 March 2017. This is essentially his evidence in chief.

[5] In cross examination by Counsel for the First Defendant he confirmed that he did not know the First Defendant. He confirmed further that he was not present when the First Defendant was mandated by the Second Defendant to handle the insurance cover of the vehicle. He further confirmed that it was his case that the vehicle was irreparably damaged. He confirmed that the said vehicle had not been sold.

[6] In cross examination by Counsel for the Second Defendant he confirmed they were claiming the replacement value of the vehicle. He further confirmed that the AMG had been repaired. It was put to him that Van Niekerk, in his personal capacity approached the First Defendant to handle the insurance of the parties after Nugen had cancelled the insurance of the vehicle. The witness confirmed that in the middle of January he received a quotation from Van Niekerk in respect of the vehicle. The quotation was from Santam Insurance. This quotation was addressed to his wife. The quotation was, however, obtained by the First Defendant from Santam. He confirmed that Santam debited his bank account for various premiums of his various vehicles and household contents.

[7] The testimony of the Second Plaintiff was briefly as follows:
She is the owner of the vehicle. She bought it in Johannesburg in terms of a Mercedes finance scheme known as Agility. She knew the Second Defendant through Van Niekerk.

[8] On 30 March 2017 she was involved in a collision while driving the vehicle from a fellowship gathering. She called her husband. Upon his arrival the latter tried to call Van Niekerk as the person who handled their short term insurance to no avail. They then called Santam but were informed that the vehicle was not insured. This came as a surprise as premiums for the insurance of this vehicle had been paid from January 2017. It is her testimony that Van Niekerk had been dealing with the insurance cover of all their cars. According to her, Van Niekerk had a legal duty to ensure that the

vehicle was insured as they had mandated him to do so. She testified that the vehicle was later repaired on their instruction.

[9] In cross examination she confirmed that the Agility plan was within its 72 months period when the collision occurred. Ownership of the vehicle was disputed. It was put to her that she could not deal with the vehicle as she wished. On the question by the court she confirmed that they never confronted Santam regarding the fact that her vehicle was not insured although they were paying premiums. At this stage the Plaintiffs closed their cases. The Defendants also closed their cases without leading evidence.

[10] During cross examination two issues were crystallised as the main issues in contention. Firstly, that ownership of the vehicle was not proven. Secondly, that the Plaintiffs' claim as pleaded differed materially to the evidence in court. It is the contention of the defendants that the Plaintiffs' case as pleaded is for the replacement value of the AMG while in testimony it appears that the vehicle had been repaired.

[11] In paragraph 5 of the Plaintiffs particulars of claim the following allegation is made:

"*The Second Plaintiff, was at all material times, the owner of a Mercedes Benz C300 vehicle with register number […W], engine number […] and Registration number […FS] (hereinafter 'the vehicle'), please find attached copy of the vehicle registration certificate attached annexure A."*

[12] The certificate of registration attached as Annexure A to the particulars of claim indicates '*Mercedes Benz Finance'* as the title holder of the vehicle and the Second Plaintiff is depicted as the owner. It is undisputed that the vehicle was financed by Mercedes Benz Finance through a scheme known as Agility Plan. It appears that this scheme entails the title holder leasing the vehicle to a lessee. The lessee has an option to buy the vehicle upon completion of the lease period. At the time of the collision, the vehicle was still subject to the lease.

[13] The certificate of registration attached to the particulars of claim was issued in terms of the National Road Traffic Act, 93 of 1996. (the NRTA). According to section 1 of the NRTA: "'**owner**', in relation to a vehicle means-

a) The person who has the right to the use and enjoyment of a vehicle in terms of the common law or a contractual agreement with the title holder of such vehicle;
b) ……
c) ……"

[14] As indicated above, it is undisputed that the Second Plaintiff had a contractual relationship with Mercedes Benz Finance for the use of the vehicle. Over and above, she enjoyed the right to the use and enjoyment of the vehicle in terms of the common law. In my view the Second Plaintiff falls squarely within the definition of **'owner'** as envisaged in s1 of the NRTA. She is, therefore, the owner of the vehicle as pleaded. The attack on the question of ownership is unwarranted and stands to be dismissed.

[15] It is necessary to briefly touch on the purpose of pleadings before I deal with the discordance between the case of the Plaintiffs as pleaded and their evidence.

[16] Uniform Rule 18(4) provides that:

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

The plaintiff must thus plead clearly a complete cause of action which identifies the issues upon which he relies, and on which the evidence would later be led. In this way, the defendant would know the case he has to meet and to plead thereto.

[17] Pleadings not only define the issues for the parties but also for the Court. The object of the pleadings is thus to enable each side to come to trial prepared to meet the case of the other side and to eliminate the other side being taken by surprise. It is thus impermissible to plead a cause of action and lead the other party to a particular direction only to lead evidence later not on the cause of action pleaded but also to a different direction. **In Jowell v Bramwell- Jones and Others** 1998(1) SA 836(W) at 913 B-G the court said the following:

"….. The plaintiff is required to furnish an outline of its case. This does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled asymmetrically and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a

clear idea of the material facts which are necessary to make a cause of action intelligible, the plaintiff will have satisfied the requirements."

[18] In the particulars of claim the Plaintiffs pleads thus:

"[13] *On or about 30 March 2017, the Second Plaintiff was involved in a motor vehicle collision, involving the said Mercedes vehicle, where such vehicle was irreparably damaged."*

[19] The Plaintiffs in evidence, however, confirmed that the vehicle had been repaired. The First Plaintiff confirmed in cross examination that the sheriff had been at his current address twice and on both occasions the vehicle had been parked outside and had not been sold. The version of the Plaintiffs is that they still have the vehicle and were still using it.

[20] It is clear from the papers that the Plaintiffs are claiming the replacement value of the vehicle in the amount of R477 000. In evidence, notwithstanding that they allege in the particulars of claim that the vehicle was irreparably damaged, which is the basis for claiming the replacement value, they confirmed that it was actually repaired. In this way it is clear that the factual situation led in evidence is not the case before the court as pleaded. The Plaintiffs cannot claim the replacement value when the car was repaired. It is clear from the evidence led that the Plaintiffs ought to have claimed the repair costs of the vehicle. This they did not do.

[21] As alluded to above, I did not order the separation of the issues of liability and quantum. I take note that no expert notices were filed

in terms of Rule 36(9) by the Plaintiffs. During the address Counsel for the Plaintiffs urged me to grant the Plaintiffs the full replacement value claimed despite the fact that the vehicle had been repaired.

[22] The Plaintiffs bear the onus to prove both the damages they suffered as well as the quantum thereof. The court in **Monumental Art Co v Kenston Pharmacy (Pty) Ltd** 1976(2) SA 111 (CPD) at 120 C-D said:

"The onus rests upon the plaintiff to prove not only that its goods have been damaged, but also the amount of the damages thereby sustained. I apply with respect the *dicta* of MULLER,A.J.A., as he then was, in *Erasmus v Davis* case at p.19A where he said:

'*It is for the plaintiff to establish not only that he has suffered damage but also the quantum thereof. Consequently it is for the plaintiff to show that the method which he employs is appropriate to the particular circumstances; in other words that the evidence produced by him establishes the quantum of damage which he has suffered*.'**"**

[23] The difficulty the Plaintiffs face is that the damages as pleaded cannot stand as the vehicle was repaired. This poses the insurmountable hurdle the Plaintiffs face in this matter. Further no evidence was led to prove the damages as well as the quantum thereof. It is impermissible for the Court to venture into speculation as to the damages a Plaintiff sustained. Damages must be proven. Failure to claim damages is fatal to the Plaintiffs' case. This hurdle stands in the success of the claim of the Plaintiffs and I consequently have to find in favour of the defendants. For this reason it is unnecessary even to examine the evidence in greater detail.

[24] The defendants urged me to dismiss the Plaintiffs' case with costs. As can be seen in the discussion above, I found in favour of the plaintiff on technical grounds. I did not deal with the merits of the case. In the particulars of claim the impression created is that the applicant is unsure on whom to put the blame. In its plea the First Plaintiff pleads that before the accident involving the vehicle of the Plaintiffs, he was only mandated to insure the First Plaintiff's Toyota Hilux and Kia with Santam. According to the particulars of claim he performed in terms of the mandate. The First Defendant further in the particulars of claim pleads that on 31 March 2017 Van Niekerk mandated Roux to insure the vehicle with Santam.It was put to the First Plaintiff that Van Niekerk, in his personal capacity, after the Nugen insurance was cancelled, mandated the First Defendant to insure the vehicle. It may be necessary for these allegations to be probed.

[25] If this court dismisses this claim that would bar the Plaintiffs from pursuing their claims on the merits. However, granting an absolution from the instance would allow the Plaintiffs to pursue their claims afresh, although prescription would be a consideration to be taken into account. For this reason I am of the considered view that dismissing this action would not be appropriate. I accordingly make the following order:

ORDER

1. Absolution from the instance is granted with costs.

_____
P.E. MOLITSOANE, J

On behalf of the Plaintiffs:	Adv. Dlavane Instructed by: **Phatsoane Henny Attorneys** BLOEMFONTEIN
On behalf of the 1st Defendant	Mr Du Toit Instructed by: Symington & De Kok BLOEMFONTEIN
On behalf of the 2nd Defendant	Adv. Van Rooyen Instructed by: Du Plooy Attorneys BLOEMFONTEIN