


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 83091/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
22 July 2021	
DATE SIGNATURE

In the matter between:

KAONE MONAMETSI

Plaintiff

and

MIWAY INSURANCE

Defendant

JUDGMENT

MOGALE, AJ

INTRODUCTION

[1] This is an application for a specific performance in which the plaintiff has instituted a claim against the defendant (MiWay short term Insurance) seeking an order compelling the defendant to honor its contractual obligations

[2] Parties concluded the agreement of insurance with the commencement date of 19 December 2018, in terms of which the defendant undertook to insure Mazda 3 1.6 Dynamic 2018 subject to the terms and conditions of the insurance agreement.

[3] The defendant further undertook to indemnify the plaintiff for third-party liability arising from a motor vehicle collision he might be involved in, subject to the terms and conditions of the insurance agreement.

ISSUES TO BE DETERMINED

[4] This court has to determine whether the plaintiff failed to comply with the terms and the conditions of the insurance agreement and whether the defendant is contractually obliged to perform in terms of the agreement. Whether the defendant's correctly repudiated the plaintiff's claim. The court needs to determine the issue of merits.

[5] The trial resumed on 19th till 22nd July 2021 and both parties gave viva voce evidence in support of their case.

EVIDENCE

[6] The plaintiff, Mr. Kaone Monametsi testified that he is from Moshana village, Zeerust in the North West Province, that he has entered into an agreement with the Insurance for a Red Mazda 3 1.6 Dynamic 2018 model and further that he complied with the terms and conditions of the contract by honoring the premiums.

[7] 29 December 2018 around 16h00 he traveled from Moshana village to visit a friend in Driefontein village, which is 20km apart. The speed limit on the road he was traveling was 120km per hour. Around 20h00 he drove back from Driefontein to Moshana Village, but before Moshana village, he had to pass through Rietpan Village and it was dark.

[8] As he approached Rietpan, driving to Moshana, there is a speed limit sign indicating 80km per hour, and the next speed limit sign indicates 60km per hour. He passed Rietpan, the patrol filling station then the speed limit sign indicates 100km per hour and as he travels further, the speed limit increased to 120km. From the Index and paginated bundle for discovered documents, pages 131-142 depict photos of speed limits sign the plaintiff testified about.

[9] He testified that after the filling station he passed a curve and immediately saw a herd of cattle on the road. He was driving around 90km per hour at that stage. He tried to apply brakes to avoid collision but a cow and a calf appeared from the other side of the road, entered the road, and ended up colliding with both of them. Airbags came out and affected his view, as a result, he lost control of the vehicle. His Mazda ended up colliding with Ford Figo which was stationary on the other side of the road.

[10] The two cattle he collided with were not part of the herd he saw in the middle of the road. He testified that the road was dark, there are no warning board signs about animals in the area, and further that no one alighted him of the animals on the road. He testified further that he was traveling with speed limit around 90km/h, which is within the maximum speed limit of 120km per hour. The motor vehicle was not in good condition to drive and was assisted to tow it.

[11] He contacted the defendant two days after the accident to lodge the claim. The assessor was appointed to investigate the matter and on 30th January 2019, he received the repudiation letter from the defendant repudiating his claim on the basis that, he failed to adhere to the terms and conditions of the insurance agreement, further that the defendant was not contractually obligated to perform in terms of the contract. He appeals and also referred the matter to the Ombudsman but the repudiation was upheld on 10 July 2019

[12] The plaintiff accepts the findings by the expert, Mr. Walter Pretorius that the plaintiff's vehicle speed at the time of the impact with the cow was in the order of 95-105km/h. He maintained that he was driving the maximum speed limit and the defendant is contractually liable to perform in terms of the contract

[13] During cross-examination, the plaintiff informed the court that the photos 131-141 depicting the road signs speed limit were taken by his Attorney in April 2021. That during the accident, the road surface was not fixed, it was only fixed after the accident. He agrees that the road depicted in the photos is not the same as on the day of the accident. He further confirms that, at the time of the accident, the road conditions were not good, it was parched with some potholes, though driveable.

[14] The plaintiff is adamant that the place from where he joined the main road in Driefontein, leading to Moshana, there is no sign showing a speed limit of 60km/h. He is aware that there is a sign showing a speed limit of 60km/h, but he did not see it on the day in question as he used a different road to join the main road. That the assessor during his investigation uses a different road which might be the road showing a speed limit of 60km/h sign. He did not see any sign indicating the speed limit until at the scene of the accident further agree that the last sign from the accident was 60km/h though he did not see it. Mr. Wiese confronted the plaintiff that the speed limit was 60km/h due to the bad condition of the road but the plaintiff responded that he saw a speed limit sign indicating 120km/h when he was driving from Moshana to Driefontein, the opposite line.

Plaintiff closed their case, then the defendant's also proved their case by presenting viva voce evidence.

[15] The defendant called Walter Pretorius, the accident reconstruction specialist whose duty is to reconstruct, investigate and report on motor vehicle accidents. He testified that he possesses skills, knowledge, and experience that qualify him to be an expert in this field. Mr. Pretorius conducted an investigation and construction relating to the speed at which the plaintiff vehicle was traveling during the accident. His conclusion reads as follows: “ **The speed limit for this section of the road is 60km/h and is indicated so by a speed limit sign in the insured driver's direction of travel. The insured vehicle's speed at the approximate area of impact with the cows was in the order of 95-105km/h. Thus, the speed at which the insured opted to travel was in excess of 65% higher than the speed limit. Had the incident driver opted to travel at the speed limit then he would have been in a better position to observe animals, reduce the vehicle speed and take evasive action**

or bring the vehicle to a complete stop. The high speed at which he opted to travel at resulted in a greater stopping distance. In my opinion, the speed at which the insured opted to travel was the main contributing factor to this collision occurring"

[16] He confirmed that the road conditions were not good, the road was uneven, some parts were cracked, it had some bumps, road shoulder towards the gravel without a yellow line, from tar to gravel as depicted in photo's 078-24 to 078-30 of the defendant's photographs. That there is no other speed limit sign for about 4km between a 60km/h sign and the scene of the accident. Exhibit 1 is a photo depicting a speed limit sign of 60km/h. Based on his evaluation and observation, the claim was correctly repudiated.-

[17] During cross-examination, by Mr. Mfazi the witness agree that the conclusion that the speed limit was 60km/h emanated from his observation. He was further confronted that National Road Traffic Act, 1996, Exhibit B, according to its provisions, the speed limit of 60km/h is not in line with the Act because the accident did not take place in a build-up area, the witness content that the accident occurred between two villages.

[18] Queen Meno stays at Driefontain, Lehurutshe. She is the owner of Ford Figo and on 29 December 2018, she was traveling from Moshana to Driefontain when she saw a taxi in front of her indicating. The area is near the farms and animals are always on the road, as a result, people are aware that when a vehicle indicates on the road, it is a warning. She saw a herd of cattle's crossing the road and she stopped. The taxi also stopped but managed to drive away. She waited for the cattle to cross and saw a red vehicle coming from the front on the opposite line. Suddenly she heard the sound of cattle, then the red vehicle collided with her stationary vehicle. Before the collision, the driver of the red vehicle swift his vehicle towards hers because he was trying to avoid a herd of cattle that were coming from the side of the road. Because the area is known to always be roaming with animals and the fact that it was dark, she drove with a speed limit of 40km/h. During cross-examination, she maintained that the speed limit on that road was 60km/h when the accident took place.

[19] Justice Maluleka confirmed that he is employed by Miway Insurance as an assessor claim investigator. The matters that are referred to him for investigations are those with raising flag validation. He investigated the plaintiff's claim and visited the scene of the accident. The main road where the accident took place had only one 60km road sign, which is 4km away from the scene and he did not see any other road signs. During cross-examination, he was confronted with the contents of the provisions of the National Road Traffic Act, 1996 that 60km/h speed limit was not in accordance with the provisions of the Act but he contended that, the accident took place close to two villages and the speed limit was in line with the Act. He further explains that according to his opinion when one sees a sign of a speed limit, that person must follow that speed limit until he sees a sign showing a different speed limit.

The defendant's closed the case

SUBMISSIONS BY COUNCILS

[20] Mr. Mfazi submitted that the main road in which the accident took place is regulated by provision 292 of the National Road Traffic Act 93 of 1996 and the fact that the accident occurred between two villages which is not an urban area as defined by the act, the speed limit of 60km/h is not in line with the Regulations. The defendant's plea, paragraph 5 thereof, states that "the law of the Republic of South Africa will apply to this contract" therefore the speed limit which is inconsistent with the law misconstrues the insurance policy. In addition, the defendant's witnesses' opinions about the speed limit of 60km/h are inconsistent with the terms Traffic Act. He argued that there is no evidence presented by the insurer to support the allegations that the plaintiff failed to use all the reasonable care and carefulness when he collided with the cows and other vehicles. There is no evidence presented to suggest that the plaintiff was driving at an excessive speed. It has been argued that according to the principle of sudden emergency the plaintiff encountered an unexpected sudden emergency during the time of the accident and cannot be found to be negligent. The plaintiff further submitted that the defendant is liable for the plaintiff's proven and/or agreed damages and the costs of the suit.

[21] Mr. Wiese accepted that the plaintiff's vehicle was damaged in a collision. He argued that the enforceability of the claim by the plaintiff for indemnification depends

upon the plaintiff taking all reasonable care and take all reasonable steps, with the same degree of carefulness which can be expected from the reasonable man on the street to prevent or minimize loss, damage, death or injury. That the plaintiff drove recklessly, exceeded the speed limit of 60km/h, and was involved in a collision that could have been avoided. He argued that driving at night, on a dark unlit road, known to have animals roaming around and bushes around, a reasonable person would have taken all the reasonable steps and care to prevent damage, loss, or injury. It was further submitted that the plaintiff tried to mislead the court by testifying that he saw a 100km speed limit sign on the road he was traveling on, the day of the incident, then later concede that the signs he was referring to were only placed after the road was fixed.

As a result, the defendant submitted that Miway correctly repudiated the plaintiff's claim as the plaintiff was reckless and further that the defendant does not have a contractual obligation to perform in terms of the agreement. The defendant request that the plaintiff's action is dismissed with costs.

TERMS AND CONDITIONS OF THE CONTRACT

[22] Annexure "P2" to the defendant's plea contain the terms and conditions of the insurance agreement entered into by the parties. For the plaintiff to continue being covered and have a valid claim against the insurance, the plaintiff must:

"use all reasonable care and take all reasonable steps, with the same degree of carefulness which can be expected from the reasonable man on the street, to prevent or minimize loss, damage, death, injury, or liability"

Based on the evidence of the defendant's three witnesses that the road where the accident took place the speed limit thereof is 60km/h, and the plaintiff's email indicating that he did not see 60km sign on the road, Miway investigated and repudiated the plaintiff's claim. The plaintiff agrees with the conclusion of Mr. Pretorius that he was traveling at a speed between 95-105km/h when the accident took place. The basis for the repudiation is that the plaintiff failed to comply with the terms and conditions of the contract.

THE SPEED LIMIT AND THE CONDITION OF THE ROAD

[23] The speed limit on the main between Driefontein and Moshana village was 60km/h on 29th December 2018. This was confirmed by three witnesses for the defendant. They corroborated each other that the speed limit was 60km/h and Exhibit A1 depicts a sign showing 60km/h speed limit. The plaintiff is also aware of the same speed limit sign of 60km/h except for the fact that on the night in question he did not see it.

[24] Three defendant witnesses also confirm that there was no other road sign from a 60km sign

to where the accident took place. This aspect was also confirmed by the plaintiff that he did not see any speed limit signs on the road until he was involved in a motor vehicle. The road signs which are depicted on the said road according to photos on pages 131-134 of the plaintiff's discovery were only places after the accident.

[25] Evidence is that the conditions of the road were not in a good state, though driveable. The road had some potholes, patches, the road was bumpy, uneven with no yellow line to demarcate the tar and the gravel. The area is surrounded by farmers, as a result, it is well-known that animals will sometimes be on the road. Because the conditions of the road were not good and the fact that the road was passing through two villages, the speed limit of the road was 60km/h

[26] I would like to emphasize that, the plaintiff was aware of the 60km speed limit sign but he testified that he did not see it as he used a different road to join the main road. From where he joined the road until he collided with cows and a vehicle, according to him, he did not see any other road sign indicating otherwise. The only 120km sign he saw was earlier when he was driving to Driefontein.

LEGAL PRINCIPLE

[27] In **Datacolor International v Intamarket (Pty) Ltd**¹, Nienaber JA, observed that:

'Repudiation has sometimes been said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, "accepting" and thus completing the breach'.

In addition, as pointed out at 294E-H:

"The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach."

[28] In **Barnard v Protea Assurance Co Ltd t/a Protea Assurance**², King J held as follows

"Now it is an accepted principle in interpreting insurance contracts that it is the duty of the insurer to make it clear what particular risks he wishes to exclude. The principle is stated in the following terms: "No rule in the interpretation of a policy is more fully established, or more imperative or controlling than that which declares that, in all cases, it must be liberally construed in favor of the insured so as not to defeat without a plain necessity his claim to an indemnity which in making the insurance it was his object to secure."

¹ 2000] ZASCA 82; 2001 (2) SA 284 para 1

² 1998 (3) SA 1063(C) at 1068B-C

[29] In **Qilingele v South African Mutual Life Assurance Society**³ it was held as follows:

“The object of the enactment is manifest, namely to protect claimants under insurance contracts against repudiations based on inconsequential inaccuracies or trivial misstatements in insurance proposals. An insurer’s right to repudiate liability on the basis of the untruth of a representation made to it, whether elevated to a warranty or not, was curtailed.”

EVALUATION OF EVIDENCE

[30] The issue to be determined by this court is whether the plaintiff had the right to drive with the speed limit between 95km/h-105km/h during the time of the accident. Whether the plaintiff’s common knowledge of the law about the place that it was not an urban area entitled him to drive with the speed limit of 95km/h-.105km/h

[31] I find the plaintiff not to be an honest witness. During evidence in chief, he gave this court an impression that when he was driving approaching Rietpan, he passed a signboard showing 80km, then 60km as he was passing through villages, after passing the filling station, he saw a board showing 100km. He only changed his testimony during cross-examination by the defendant that on the day of the accident there were no signboard in the direction he was traveling. The signs pictures he was testifying about were taken by his Attorney in April 2021, after the road was fixed. He further confirmed that the road on the pictures was new, it is a different road from the road on 29 December 2018 when the accident took place. Three defendants witnesses corroborated each other in all material aspects and the plaintiff also confirms their version. I find that the plaintiff tried to mislead this court to believe that where the accident took place there were road signs. He wants this court to make findings based on the present condition of the road not based on the condition of the accident.

[32] The road is passing through two villages which are surrounded by bushes, animals roaming around from the nearby farms, the road condition were not good, the road has patches, some potholes, uneven and without a yellow line demarcating

³ 1993(1) SA 69(A) at 74B

between the gravel and the shoulder of the tar, that is the reason why the speed limit was 60km/h. I am alive with the provisions of the National Road Traffic Act, 1999 that 100km/h speed limit should apply in respect of every public road or section thereof situated outside an urban area. But if proper consideration is given to the conditions of the said road, the fact that animals roam around and further that the road passes through two villages, I agree with Mr. Wiese argument that Local Authorities can exercise their discretion to determine the speed limit to suit the surrounding circumstances and motorists.

[33] Plaintiff had knowledge of the 60km/h sign. There is no other sign indicating otherwise until at the scene of the accident. I am not persuaded by Mr. Mfazi's argument that the plaintiff is correct to have used his common knowledge that, as he was not driving in an urban area he can drive around 100km/h because that speed limit is consistent with the law. The rules are there to be respected, even if the area is not in an urban area the surrounding circumstances of the place and the conditions of the road warranted the Authorities to place a 60km/h speed limit sign, the plaintiff was obliged to comply, not to use his assumptions. As long as there was a 60km speed limit sign and no other sign indicating otherwise, the plaintiff was obliged to comply with the rule.

[34] Considering the surrounding circumstances of the area, the conditions of the road, the speed limit of 60km/h he knew of, and further that the place was dark, I am of the view that the plaintiff should have taken all reasonable care and take all reasonable steps, with the degree of carefulness which can be expected from the reasonable man on the street to prevent or minimize loss, damage, death, injury or loss. The plaintiff should have foreseen that driving during the night, in an area of those circumstances and without a speed limit sign instructing him otherwise, that he might cause him to be involved in an accident and breach the terms and conditions of the contract. Would the plaintiff opted to travel within the stipulated speed limit, he would have been in a better position to observe animals and take evasive action or control the vehicle.

[35] Considering the evidence in totality, I find that the plaintiff drove recklessly on 29 December 2019 and failed to comply with the terms and conditions of the insurance

agreement by taking all reasonable care and take all reasonable steps, with the degree of carefulness that can be expected from the reasonable man on the street to prevent or minimize loss, damage, death, injury or loss. I also find the defendant is not contractually obliged to perform in terms of the agreement entered with the plaintiff and correctly repudiated the plaintiff's claim

COSTS ISSUE

[36] The defendant requested this court to be award the wasted costs occasion for the incorrect enrolment of the hearing on the 4th May 2021 and the costs of this application. The plaintiff on the other had informed the court that the incorrect enrolment of the hearing on the 4th May 2021 was not on the part of the parties but the Registrar of the court, as a result, the plaintiff cannot be punished for the mistake caused by the Registrar.

[37] The submission by the plaintiff was not disputed by the respondent as a result, I agree with the plaintiff's submission that the plaintiff cannot be punished for a third party mistake

Consequently, the following order is made:

- 31.1. The plaintiff's action is dismissed.
- 31.2. The plaintiff is ordered to pay the cost
- 31.3. No cost order is made for the proceedings of the 4th May 2021



K J MOGALE

Acting Judge of the Gauteng Division, Pretoria

Heard on : 19-22 July 2021
For the Plaintiff : Adv L Mfazi
Instructed by : Z & Z Ngogodo INC
For the Defendant : Adv Maelane E H Wiese
Instructed by : Badenhost
Date of Judgment : 22 July 2021