NOT REPORTABLE

**CASE NO.: (P) I4298/2009**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

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| **GERD MATHIAS PISKAY** | **PLAINTIFF** |
| and | |
| **AUTOVERMIETUNG SAVANNA** | **DEFENDANT** |
| **CORAM:** | **SMUTS, J** |
| Heard on: | 18 March 2011 |
| Delivered on: | 29 March 2011 |

**JUDGMENT**

SMUTS J: [1] The plaintiff came with his companion to Namibia as a tourist from Germany. Before departing from Germany, he corresponded with the defendant, a car rental concern based in Windhoek, to rent a 4x4 vehicle for their holiday in Namibia. The plaintiff expressly requested comprehensive insurance and also asked to pay an additional amount to avoid the payment of any excess.

[2] When the plaintiff picked up the vehicle after arrival, he signed the defendant's standard car rental contract.

[3] Whilst traveling around Namibia and near Rundu, the rented vehicle was badly damaged in an accident. The plaintiff's companion, Ms Ines Zahringer, was driving the vehicle at the time. The plaintiff's evidence was that an oncoming vehicle approached them partially on the wrong side of the road and in their lane. In taking evasive action to avoid a head-on collision, Ms Zahringer swerved off the road. Owing to the sloping shoulder of the road, she lost control of the vehicle and it collided with a tree. Fortunately no one was injured. But the vehicle was severely damaged.

[4] On returning to Windhoek, the plaintiff and Ms Zahringer went the defendant's office and were told by its manager, Mr Rene Kronsbein, that they would be held liable for the full value of the vehicle representing the loss sustained by the car rental company. If they did not pay, Mr Kronsbein informed them that lawyers would pursue the matter against them. Assuming that Mr Kronsbein was entitled to claim payment, the plaintiff then proceeded to pay the defendant the sum of €16,875 by transferring the sum telegraphically to an account held in Germany by the owner of the defendant, Mr B Hamm. This was at the instance of the defendant.

[5] The plaintiff was unhappy about this turn of events and raised the matter with his host in Windhoek and was advised to consult a lawyer which he did the next day. He was then advised that the defendant was not entitled to require payment of the sum. The plaintiff then endeavoured to stop the payment. But this was to no avail as the transfer had already been effected in Germany. The plaintiff's lawyers then sent a letter of demand two weeks later to the defendant, reclaiming the amount paid by the plaintiff. When this did not elicit the necessary action, the plaintiff instituted an action.

[6] The main claim was based upon fraudulent or negligent misrepresentation. The misrepresentation contended for was that Mr Kronsbein represented that the plaintiff or Ms Zahringer was liable for the loss and that the damages were not covered by the insurance cover. Ms van der Westhuizen, who represented the plaintiff, moved for an amendment during argument to the effect that the representations (referred to in paragraphs 5.1 and 5.2 of the particulars of claim) were false and induced the plaintiff to pay the sum in question. This amendment was granted as there had already been evidence to that effect by the plaintiff, which had not been objected to.

[7] The plaintiff also advanced an alternative claim based upon enrichment in the form of the *condictio indebiti.* He claimed that the payment was made in the *bona fide* and reasonable but mistaken belief that he or Ms Zahringer owed the defendant the amount in question. He further contended that the sum was not owing and that the defendant nevertheless appropriated it.

[8] In its plea, the defendant raised two special pleas and also pleaded over on the merits. The first special plea raised the point of absence of jurisdiction on the basis of the power of attorney filed by the plaintiff. A further power of attorney was filed and this point was correctly not proceeded with.

[9] The second special plea is one of non-joinder. In it, the defendant claims that the misrepresentation also referred to Ms Zahringer being liable for the damages to the vehicle and that she was consequently a necessary or essential party to the proceedings. But it was common cause that the payment was made by the plaintiff who was also and in any event sought to be held liable by the defendant. The defendant however claimed that Ms Zahringer should be joined to the proceedings. There is no basis for this. The special plea is clearly misplaced as Ms Zahringer would not be an essential or necessary party to these proceedings. In fact, she would not even have a direct or substantial interest in the relief sought, not having sustained any damages. This special plea is accordingly dismissed.

[10] In pleading on the merits, the defendant denied the misrepresentations contended for and stated that the car rental agreement applied. A copy of this agreement was handed in as an exhibit. The defendant admitted payment but denied that the defendant was not entitled to it. In respect of the enrichment claim, the defendant pleaded that the plaintiff was correct in the belief that the sum in question was owed to the defendant. The defendant also denied that it had been enriched by the payment because the damages were caused by the plaintiff's negligent or unlawful act causing the damages to the defendant's vehicle.

[11] The plaintiff gave evidence concerning the collision along the lines already set out. He also stated that he was a passenger at the time and that his attention was divided between a guidebook he was perusing and the road ahead. He did however state that he saw the oncoming vehicle heading in the direction of the rented vehicle partially on their lane and for the need on the part of Ms Zahringer to take evasive action.

[12] The plaintiff explained the preceding correspondence which was directed at securing comprehensive insurance, even to the extent of paying an additional amount to remove the need to pay for any excess. He also gave evidence that when he signed the car rental agreement, he did not read through the terms and conditions contained in relatively small print on the reverse side. As far as he was concerned, he was paying a considerable sum for insurance (some N$24000 for the 19 day rental) and that the accident was covered by the agreement. He completed the form in the presence of an employee of the defendant, Ms Beate Dalton. He also pointed out that he was in any event not conversant with the legal terminology in English used in the terms and conditions. He gave his evidence in the German language with the assistance of an interpreter. He also said that he could not recall if any terms and conditions were specifically pointed out to him.

[13] The plaintiff also stated that the accident occurred at about 14h00 and that visibility was good. He said that the vehicle was traveling at a speed of approximately 90km per hour. He also testified that Ms Zahringer was in possession of a valid driver's license.

[14] On their return to Windhoek after the accident, they went to see Mr Kronsbein. After welcoming them, he informed them that they would bear substantial costs equal to the value of the vehicle which had been extensively damaged in the collision. The plaintiff said that he questioned this by reason of the fact that he had taken out insurance. According to him, Mr Kronsbein replied that the type of accident which had occurred was not covered by the insurance cover and that he would need security in the form of payment or the defendant would engage lawyers to pursue a claim against him and Ms Zahringer.

[15] The plaintiff stated that his dealings with Mr Kronsbein had thus far been cordial. Although he was shocked, he accepted that Mr Kronsbein, being the manager of the concern, was correct as to how the insurance term worked and that he would need to make payment to the defendant to avoid legal action against them in Namibia. As a consequence, he proceeded to instruct his bank in Germany to effect an electronic transfer to an account nominated by the defendant, being one in Germany of its owner, Mr B Hamm.

[16] Being dissatisfied, the plaintiff then raised the matter with his Windhoek hosts and was referred to lawyers and took the matter up with them. As I have indicated, he then unsuccessfully endeavoured to stop the payment. In his evidence, the plaintiff stated that the amount was thus not due or owing to the defendant especially because he had arranged adequate insurance cover. In cross-examination it was put to the plaintiff that the defendant's Mr Kronsbein would testify that he had informed the plaintiff when he met with them after the accident that the plaintiff's insurance cover taken out by the plaintiff would only apply if another moving vehicle or an animal was involved in the collision. The plaintiff replied that he did not recall that this was put to him but did not dispute it. The plaintiff was also cross-examined about the accident but his version was not disturbed. Nor was anything contrary put to him concerning the accident.

[17] The defendant called Mr Kronsbein. He referred to the terms of the car rental agreement. He referred to clause 7. It provides:

> *"The vehicle is insured in terms of provisions of the Motor Vehicle Insurance Act*

*and under an Insurance Policy as hereafter indicated in respect of the said Insurance and as a condition of this agreement the renter warrants that: neither he or any other person who to his knowledge will drive the vehicle has defective vision; ever had a fit, been convicted of any offence connected with the driving of any motor vehicle; had any driver's licence endorsed or cancelled. The lessor has covered the vehicle under the insurance policy for, loss of and/or damage to the vehicle and damage to property of third parties but excluding goods conveyed in the vehicle, subject to the renter or driver not being negligent.*

*Subject to compliance with the warranties in the above and subject to provisions of/3 (above) the renter shall be responsible for a first amount (excess) respect to the vehicle, such amount applicable to the vehicle hired by the renter will be displayed on the current tariff card published by the owner. The benefits will apply provided that the renter or driver; has not breached any provisions of this agreement nor has the vehicle been driven or used in contravention of any provision of this agreement; shall immediately report to the lessor any damage, accident breakdown, or theft involving the vehicle or accessories, immediately delivers to the lessor every demand, notification, summons or process received relating to any claim, action or prosecution in connection with any collision or occurrence involving the vehicle; refrains from admitting liability for any claim or assisting any claimant in regard thereof cooperate with the lessor and its insurer in the investigation and defence of any prosecution, claim or action; has not used the vehicle negligently, shall make reasonable provision for the vehicles safety and security.*

*The said Insurance Policy does not cover or apply to: claims arising from injuries received by passengers of the vehicle; and damage of destruction of destruction owned by rented to, in charge of, or transported by the renter or driver; tyres; damage to the vehicle undercarriages. The renter enter of driver had been negligent the renter enter shall pay the real value of the vehicle. In the case of an accident where only the vehicle stated on this contract is involved the renter shall be liable for recovery costs of the vehicle and also be liable for the full payment of the rental period as initially agreed on this contract****."(sic)***

[18] His evidence centered on the discussion which he had with the plaintiff and Ms Zahringer after the accident. In his view, the plaintiff was liable because of Ms Zahringer's negligence. This was on the basis of his characterisation of the collision as a *"single accident."* This he explained meant where only the renter's vehicle was involved -

and thus not another vehicle or any moving animal. Had another vehicle been involved, then the plaintiff would not have been liable and the excess would have been zero by reason of the additional payment made by him. He confirmed that the plaintiff was shocked when they had the discussion but had agreed to pay. He also confirmed that he pointed out to them that the defendant would engage a lawyer if the plaintiff or Ms Zahringer did not pay.

[19] In cross-examination he pointed out that he held the plaintiff liable because of his view that the defendant's insurers would not cover a collision which did not involve another vehicle or moving animal and where the collision occurred on a straight road. He further stated that he did not have any reason to doubt the version of the plaintiff and Ms Zahringer provided to him concerning the collision. He also confirmed that he decided to hold them liable after talking to them and considering the vehicle accident report. When cross-examined about his approach on a single accident, he could not point to a provision in the car rental agreement which supported the approach he had adopted, except for the last sentence which referred to the renter being liable for recovery costs of a vehicle where only the rented vehicle was involved in an accident. But this portion of clause 7 did not, he correctly accepted, apply. He accepted that there was thus not any provision in the car rental agreement by virtue of which a "single vehicle accident" - as he understood the term - meant that the insurance cover would not apply and which would *per se* result in the liability of the car renter for the damages. He accepted that this was not included in the manifold exclusions in clause 7. Nor could he point to any provision in the insurance agreement between the defendant and its insurer Hollard Insurers for such a clause. He also pointed out that he had not at any stage contacted the defendant's insurers concerning whether the insurers would meet a claim - even after the letter of demand had been sent by the plaintiff's lawyer two weeks after the accident.

[20] The defendant had curiously not discovered its insurance policy with its insurers. Also surprisingly, the plaintiff's legal representatives have not pursued this issue by invoking discovery procedures. The plaintiff's representatives had however sought to secure further particulars relating to this insurance policy by way of a request for trial particulars. This request was made a few days out of time and the defendant had declined to answer the request.

[21] The first question arises as to whether the plaintiff has established the requisites for a negligent misrepresentation. Ms Van der Westhuizen, who appeared for the plaintiff correctly conceded that no case had been made out for a fraudulent unrepresentation. Plainly Mr Kronsbein believed that the defendant was entitled to hold the plaintiff liable

for damages on the basis of what he termed a "single vehicle" accident. But he could not point to any provision in the agreement which authorised this. Nor could he refer to a provision in the policy with the insurers. He did not dispute the plaintiff's and Ms Zahringer's version of the accident which did not render them negligent. The basis upon which he sought to hold them liable was one of deemed negligence when another vehicle or moving object was involved and that this arose contractually. But when pressed could not point to a right contractual provision in support of this exclusion - either in the rental agreement or in the insurance agreement between the defendant and its insurers. There was also no evidence on the part of the defendant as to practices within the insurance industry to support its approach. This is understandable as "cover" taken out by the plaintiff.

[22] Once his basis for holding the plaintiff liable is exposed as without the foundation claimed by Mr Kronsbein on behalf of the defendant, then the plaintiff has in my view established that the representation that the amount was owing by the plaintiff (or Ms Zahringer) to the defendant was incorrect (and false). I also find that the defendant (through its manager) had a legal duty to the plaintiff not to make a misstatement or misinterpretation as to the contractual position to as client had occurred. The representation was thus wrongful and made negligently as Mr Kronsbein should have established the correct contractual position. He stated in evidence that he did not bother to establish the correct contractual position or find out whether the defendants' insurers would cover the damages even after receipt of the letter of demand shortly after the accident - some 2 weeks later. The evidence that the representation induced the payment was not in issue.

[23] The extent of the plaintiff's patrimonial loss is the payment made to the defendant in the sum of £16875.00. This was not put in issue.

[24] It follows that the plaintiff has established his claim against the defendant on the basis of a negligent misrepresentation.

[25] Even if this were not the case, I would find that the defendant would in any event be liable to repay the sum to the plaintiff on the alternative claim of enrichment. The plaintiff has in my view established that requisites for that action as well.

[26] The plaintiff established that the payment was made in the *bona fide* and reasonable but mistaken being that it was owing.[1] He was after all expressly advised by the defendant's manager that this was the case. The plaintiff testified that, although

1 Absa Bank v Leech 2001 (4) SA 132 (SCA)

unhappy about this, accepted that Mr Kronsbein as the defendants manager would be in a position to state that. He found him proficient in the field and upright. I also found that Mr Kronsbein came across as a plausible and upright person. He merely laboured under an incorrect impression as to the exclusion he relied upon. Then there was the threat of legal action which Mr Kronsbein confirmed. This would be a significant factor for the plaintiff as a visiting foreigner. I also find that the error was reasonable and the mistake excusable in the circumstances.[2]

[27] There was furthermore no legal obligation to make the payment for the reasons I have already set out. The defendant advanced no other basis in evidence for the payment than the "single accident" exclusion relied upon by Mr Kronsbein.

[28] The plaintiff was furthermore impoverished by the payment. The defendant enriched by it as it was not entitled to payment of that sum by the plaintiff. The fact that it may conceivably have a claim against its insurers - and may thus not have been enriched was neither raised on the pleadings nor in evidence. This would in any event be *res inter alios acta,* but would not arise on the facts as Mr Kronsbein testified that no claim had been made to the insurer.

[29] As to the question concerning the date from which interest would run, it would seem to me in respect of both the main and the alternative claims that the plaintiff would be entitled to interest from at least the service of summons, as has been claimed.

[30] In the result, I order that the defendant repay the plaintiff the amount of £16875.00 or the Namibian Dollar equivalent upon date of judgment, interest on this amount at 20% per annum from date of service of the summons to date of payment and costs. The costs are to include the costs of one instructing and one instructed counsel.

**SMUTS, J**

ON BEHALF OF THE PLAINTIFF ADV. C. VAN DER WESTHUIZEN

2 Wills Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A)

Instructed by: ETZOLD-DUVENHAGE

ON BEHALF OF DEFENDANT MR. F C BRANDT

CHRIS BRANDT ATTORNEYS