

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2021/01686

In the matter between:

PETRINE IYALOO KANDALI MUTUMBULWA

PLAINTIFF

and

**ALEXANDER FORBES INSURANCE
COMPANY NAMIBIA LIMITED**

DEFENDANT

Neutral citation: *Mutumbulwa v Alexander Forbes Insurance Company Namibia Limited* (HC-MD-CIV-ACT-CON-2021/01686) [2023] NAHCMD 66 (17 February 2023)

Coram: USIKU J

Heard: 14 – 17 November 2022

Delivered: 17 February 2023

Flynote: Practice – Absolution from the instance – Court applying the trite test – Court holding that the plaintiff has failed to place before court evidence upon which a court could or might find for the plaintiff – Application for absolution from the instance upheld.

Summary: The plaintiff was insured by the defendant against damage to her motor vehicle. During the subsistence of the policy, plaintiff's vehicle was involved in a collision with another vehicle. The plaintiff submitted a claim form to the defendant for indemnification. In the claim, it is indicated that the driver of the plaintiff's vehicle refused to submit to a test to determine the level of alcohol or drugs in his blood. The defendant repudiated the claim on the basis that the insured has no cover for loss or damage in the instance where the driver refused to submit alcohol or drugs test. Plaintiff instituted action against the defendant for breach of contract. At the close of the plaintiff's case, the defendant applied for absolution from the instance. The court upheld the application.

ORDER

1. The application for absolution from the instance is granted.
 2. The plaintiff is ordered to pay the costs of the defendant.
 3. The matter is removed from the roll and is regarded finalised.
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JUDGMENT

USIKU J:

Introduction

[1] This is an application by the defendant for absolution from the instance, made after the plaintiff closed her case.

[2] The plaintiff owned a 2014 Volkswagen Polo motor vehicle. The plaintiff and the defendant (an insurance company) concluded a contract of insurance, in terms of which the defendant undertook to insure the plaintiff's motor vehicle. The parties agree that the plaintiff had paid all her premiums when they became due and payable.

[3] On 19 September 2020, at Onhuno, the plaintiff's motor vehicle, then being driven by Sidney Paulus, was involved in a motor vehicle collision with another motor vehicle, as a consequence of which the plaintiff's vehicle was damaged beyond economical repair.

[4] The plaintiff lodged a written claim with the defendant for indemnification.

[5] On or about 27 October 2020 the defendant informed the plaintiff that it would repudiate the claim on the ground that the driver of the plaintiff's vehicle refused to allow the police to have his blood drawn for the purposes of an alcohol or drugs test.

[6] On or about 4 February 2021, the defendant informed the plaintiff that her insurance cover policy will be cancelled with effect from 1 March 2021, due to excessive loss ratio.

[7] Following the repudiation of the claim and the cancellation of the insurance policy cover, the plaintiff instituted the present action, in which she claims:

- (a) payment of N\$140 500, being the insured value of the plaintiff's vehicle at the time of the collision;
- (b) interest on the aforesaid amount at the rate of 20% p.a. calculated from the date of judgment to the date of final payment;
- (c) reinstatement of the insurance cover; and;
- (d) Costs of suit.

[8] The defendant entered notice to defend and filed a plea to the plaintiff's particulars of claim. In its plea, the defendant asserts that:

- (a) the plaintiff applied for insurance cover in respect of damage or loss to her vehicle, on 8 July 2015, as appears in Annexure "A1" annexed to the plaintiff's particulars of claim;
- (b) the plaintiff's application was approved by the defendant on 17 July 2015;
- (c) upon approval of the application, the plaintiff was provided with a Policy Schedule and Wording, called 5 Star Personal Insurance Policy (Green Unam). The Policy Wording formed part of the Policy Schedule and had to be

read in conjunction with the Policy Schedule and all subsequent Renewal schedules, which documents all together constitute the written insurance agreement between the parties;

(d) in terms of section 5 of the 5 Star Personal Insurance Policy, the insured will have no cover for loss, damage or liability in the instance where the driver of the insured vehicle refuses to submit to the test to determine the level of alcohol or drugs in his/her blood when reasonably requested to do so by the authorities;

(e) in her claim form, dated 23 September 2020, submitted by the plaintiff to the defendant, the plaintiff declared that the driver refused to have his blood drawn for testing alcohol or drugs;

(f) the defendant was entitled to reject the claim as there was no cover in terms of the policy;

(g) the quantum of damages claimed by the plaintiff needs to be quantified and cannot merely be accepted as the sum insured at the time of the collision;

(h) the defendant was entitled to cancel the cover, in terms of the Policy Wording, page 7, by giving 30 day's written notice to the plaintiff, if the plaintiff is regarded as a high loss ratio. The plaintiff's loss ratio at 28 January 2021, was 221.19%, which is regarded a high loss ratio by the defendant. A favourable loss ratio should be below 50%.

The trial

[9] At trial, the plaintiff gave evidence and called two witnesses, namely: Sidney Paulus and Emanuel Paulus.

[10] In her testimony the plaintiff stated that:

(a) on 18 July 2015, she took out a short-term insurance with the defendant, for her vehicle;

(b) on 21 September 2020, she informed her broker that her vehicle was involved in an accident and relayed the sequence of events to the broker, telephonically. The broker emailed the plaintiff a claim form for her completion. The claim form required details of a third party and the investigating officer who attended to the scene of the accident;

(c) she and her husband (who was the driver of the vehicle at the time of the accident) went to the police station to obtain the details of the third party and of the investigating officer. At the police station, the investigating officer completed the police report and insisted to also complete the claim form. On the claim form, the investigating officer indicated that the driver of the plaintiff's vehicle refused to have his blood drawn for the purposes of alcohol test. The driver of the plaintiff's vehicle informed the investigating officer that such information was not true;

(d) after the form was completed, it was handed to her and her husband, for signature, and they signed it. The plaintiff explained that even though she knew that the claim form contained incorrect information, she signed it as her claim form, since she was confident in the fact that she had already reported the accident to her insurer and further that the truth would come out at the conclusion of the then pending criminal case;

(e) she submitted her claim on 25 September 2020 and that;

(f) on 27 October 2020, she was informed that the claim was rejected due to the fact that the driver of her vehicle refused to have his blood drawn.

[11] In regard to the cancelation of the insurance cover, the plaintiff states that:

(a) she had submitted her first and only claim to the defendant on 19 November 2018, when her vehicle was involved in an accident with an animal. The repair quotation amounted to N\$35 189.97;

(b) on 30 September 2020, the plaintiff submitted her second claim, in respect of which her vehicle was damaged beyond economical repair; and;

(c) on 4 February 2021, the defendant notified the plaintiff that her cover will be cancelled with effect from 1 March 2021 due to excessive loss ratio.

[12] Mr Sidney Paulus testified to effect that:

(a) he was the driver of the plaintiff's vehicle on 19 September 2020 when it was involved in an accident;

(b) after the accident, the investigating officer arrived at the accident and after sometime, told him that they have to go to the hospital with him. Mr Paulus asked the investigating officer whether the other driver was also going

to the hospital. The investigating officer responded that the other driver does not need to come with them because he did not cause the accident;

(c) the investigating officer took Mr Paulus to the police station, where three more officers got into the police vehicle and said they were taking him to Engela Hospital to get blood sample from him;

(d) at the hospital, Mr Paulus again asked the investigating officer why the other driver was not going to give his blood samples drawn. The officer said he was not going to force Mr Paulus if he was not comfortable with it. Mr Paulus responded that he would feel comfortable giving a blood sample where an independent laboratory can give results. Then the investigating officer ordered Mr Paulus back to the police van. Later Mr Paulus was informed that he was under arrest and was later taken back to the police station;

(e) he never refused to give his blood sample, but only sought clarification from the investigating officer;

(f) the investigating officer, when he completed the insurance claim form, indicated that Mr Paulus refused to have his blood drawn for alcohol or drugs test. Mr Paulus pointed out that what the investigating officer had written was not true, but a superintendent intervened and said the investigating officer should complete what he observed and if Mr Paulus was aggrieved, he can lay a complaint against the investigating officer; and;

(g) thereafter the plaintiff and Mr Paulus signed the claim form as completed by the investigating officer, and the plaintiff submitted it to the defendant.

[13] Mr Emmanuel Paulus testified that:

(a) on 19 September 2020, he received a call from his mother, that his cousin, Sidney Paulus, was involved in an accident at Onhuno. After the call he drove to the accident scene, where he found his cousin in a state of shock and distress;

(b) he enquired from Sidney Paulus what happened and the latter recounted what had transpired. After sometime the police officers arrived and one of them told Sidney to get into a police van to go and have his blood drawn. Sidney enquired where the other driver was and the officer replied that the other driver was not required because he did not cause the accident;

(c) after the police left with Sidney, Emmanuel followed them up to Engela Hospital;

(d) he further states that Sidney did not refuse to give his blood sample, but it was simply that the investigating officer did not want to be asked questions. Sidney kept asking about the whereabouts of the other driver and why the other driver was not offering his blood sample. Then Sidney was arrested.

[14] After Emmanuel Paulus gave his evidence, the plaintiff closed her case. At the close of the plaintiff's case, the defendant applied for absolution from the instance. The plaintiff opposes the application.

Application for absolution from the instance

[15] The defendant applied for absolution from the instance, on account that:

(a) the plaintiff failed to prove that the defendant has unjustifiably repudiated her claim and that;

(b) the plaintiff failed to prove her quantum of damages.

[16] The plaintiff, on the other hand, submitted that the defendant should give evidence that it was justified to repudiate the plaintiff's claim. The *onus* is on the plaintiff to prove that plaintiff has breached the agreement.

Analysis

[17] The test to be applied in an application for absolution is whether, at the end of the plaintiff's case there is evidence upon which a court could or might find for the plaintiff.¹ This implies that a plaintiff has to make out a *prima facie* case, in the sense that there is evidence relating to all the elements of the claim, to survive absolution, because without such evidence, no court could find for the plaintiff. The underlying reason is that, it is ordinarily in the interest of justice to bring the litigation to an end in such circumstances.²

¹ *Chombo v Minister of Safety and Security* (I 3883/2013) [2018] NAHCMD 37 (20 February 2018) para 4.

² *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 at 970A.

[18] In the present case there is only one claim submitted by the plaintiff to the defendant, in respect of the motor vehicle accident that took place on 19 September 2020. In that claim form, the plaintiff has declared that the information provided therein is true in every respect. Furthermore, in that claim form, it is stated that the driver of the plaintiff's vehicle had refused to have his blood drawn for an alcohol or drugs test. On the evidence before court, there is no other claim that was submitted by the plaintiff correcting the information contained in the claim that was submitted by the plaintiff on 25 September 2020.

[19] It appears that, the evidence that the plaintiff breached a term of the insurance agreement (namely, that the driver of the plaintiff's vehicle refused to have his blood drawn) comes from the plaintiff herself. In the circumstances, the application for absolution on the basis that the evidence available points in the direction that the plaintiff breached a term of the insurance policy, and therefore the defendant was justified in repudiating the claim, is to be upheld.

[20] In addition, the quantum of damages that the plaintiff claims, is based solely on the allegation that the vehicle was insured for amount of N\$140 500. In the present matter there is no evidence adduced on behalf of the plaintiff regarding the reasonable pre-collision value of the plaintiff's vehicle, less the salvage value thereof.

[21] I agree with the defendant's submission that the plaintiff has failed to prove the quantum of the damages she has suffered. In my opinion without such evidence, no court could or might find for the plaintiff.

[22] In regard to the claim concerning the cancellation of insurance cover, the plaintiff does not allege the term of the contract upon which she found her claim. Furthermore, the plaintiff did not give evidence to the effect that by cancelling the insurance cover, the defendant acted in breach of a certain term of the insurance contract. I am of the opinion that there is no evidence upon which a court could or might find for the plaintiff in respect of this claim.

[23] Insofar as the issue of costs is concerned, I am of the view that the general rule that costs follow the result, must find application.

[24] In the result, I make the following order:

1. The application for absolution from the instance is granted.
2. The plaintiff is ordered to pay the costs of the defendant.
3. The matter is removed from the roll and is regarded finalised.

B USIKU
Judge

APPEARANCES

PLAINTIFF:

M Tjiteere

Of Dr Weder, Kauta & Hoveka Inc., Windhoek

DEFENDANT:

M Rix

Of Delpport Legal Practitioners, Windhoek