REPORTABLE

CASE NO.: SA 18/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CLAUDIUS STUURMAN **APPELLANT**

and

MUTUAL & FEDERAL INSURANCE COMPANY

OF NAMIBIA LTD **RESPONDENT**

CORAM: Strydom, A.J.A., Chomba, A.J.A. *et* Damaseb, A.J.A.

Heard on: 06/03/2009
Delivered on: 17/03/2009

APPEAL JUDGMENT

DAMASEB, A.J.A.:

[1] This is an appeal against the judgment of the High Court (Mainga J) dismissing the plaintiff's claim with costs. The appellant was the plaintiff in the Court below while the respondent was the defendant. On appeal Mr Murorua represented the appellant while the respondent was represented by Mr Barnard. The same counsel represented the respective parties in the Court *a quo*. In this judgment I will refer to the appellant as the plaintiff and the respondent as the defendant.

[2] The facts and the issue calling for decision in this appeal fall within a very narrow compass. The plaintiff had insured his vehicle with the defendant against the risk of theft. Alleging that the vehicle was stolen, he submitted a claim to the defendant. The defendant refused to pay and the plaintiff instituted an action against it in the High Court. It is common cause that the defendant repudiated the plaintiff's claim on 29 June 2009. The repudiation was sent by the defendant to legal practitioners Fischer, Quarmby and Pfeifer. The insurance policy that governed the relationship between the parties, and which is the foundation on which the plaintiff's action in the High Court was based (it is common cause), incorporated a clause that if the insurer denies liability for any claim made under the policy the insurer would be relieved of liability unless the summons in respect of the proceedings instituted against the insurer is served within 90 days of the repudiation. It is common cause that the action in the High Court was commenced more than 90 days after the repudiation notice of 29 June 2005.

[3] The thrust of the plaintiff's appeal is neatly summed up in his counsel's heads of argument in the following terms:

> ' 'It is respectfully submitted that the defendant failed on evidence to establish communication of notice of repudiation to the plaintiff resultantly the time bar clause has not been triggered and defendant's liability under the insurance contract cannot be avoided on the basis of the time bar clause''.

[4] The Court *a quo* made two crucial findings: the first was that the terms of the governing insurance policy containing the time bar clause was a term of the insurance

policy between the parties. Secondly it stated that the repudiation of the policy was duly communicated to the plaintiff. If the defendant is to prevail in this appeal, the Court really did not need to decide the latter question. The summons not having been served within 90 days after the repudiation of the policy, the Court *a quo* dismissed the plaintiff's claim with costs.

[5] It is common cause between the parties that in order to limit the issues the parties entered into an agreement about the conduct of the case at the start of the proceedings in the High Court. In his judgment Mainga J deals with this aspect as follows:

> ' 'In the light of the questions and admissions above the parties, at the commencement of the trial agreed to ask the Court to adjudicate on the following issues:
>
> 1. Was the agreement between the parties as pleaded by the plaintiff or as pleaded by the defendant?
>
> 2. Whether there was an agreement at all?
>
> 3. If the Court should find that the agreement was as pleaded by defendant or that there was no agreement that would be the end of the matter, the claim should be dismissed with costs.
>
> 4. If the Court should find that the agreement is as pleaded by plaintiff the further issues such as quantum would stand over to be argued at a later stage."

[6] Based on the above, Mr Barnard argued before us that

> ‘’the plaintiff was bound to the admission in the pleadings and the agreement reached on the issues to be decided by the court a quo and could not recant by opening the repudiation issue during the course of the trial. As the repudiation issue was not in dispute and not a point for decision by the court a quo the defendant had not prepared to meet the case of the plaintiff on that issue and was not ready to do so.’’

Mr Barnard’s submission is supported by the record. Mr Barnard pertinently objected when Mr Murorua sought to elicit evidence relating to the ineffectiveness of the repudiation and invited Mr Murorua to amend the pleadings and to apply to retract the agreement limiting issues as the defendant had not prepared to meet a case of repudiation and would consequently be prejudiced.

[7] That there was an agreement in the terms recorded by the Court *a quo* admits of no doubt. I will quote verbatim what transpired in that Court at the commencement of the hearing:

> "**Mr Barnard**: But My Lord I would like to, for the record, note the points of agreement. My Lord, the first issue to be decided is, was the agreement between the parties as pleaded by the Plaintiff or Defendant? And further, My Lord, whether there was an agreement at all. We have further agreed My Lord and I submit as follows that if the Honourable Court should find that the agreement is as pleaded by the Defendant or indeed if the Honourable Court should find that there was no agreement then that is the end of the matter for the Plaintiff, My Lord. And the claim should be dismissed with costs. But My Lord, should agreement was as is pleaded by the Plaintiff, then further

the issues such as the quantum and whether there was a valid claim will stand over to be determined at the next date. My Lord. As the Court pleases My Lord. (Emphasis supplied.)

COURT: Mr Murorua, you confirm the four points?

MR MURORUA: My Lord, **except that my colleague mentioned about the next date,** I am not sure whether he had in mind as agreed to set this case to a further date beyond the time we had in this week. I mean assuming the issues of contracting resolved in favour of the Plaintiff, then obviously the issue of quantum comes into play. Then it is suggested that it can be solved at the next date. ‘’

[8] Immediately after this, Mr Murorua made his opening statement and it is apparent therefrom that he confined it to the agreement stated by Mr Barnard. There is no mention at all in it of the issue of repudiation:

"**MR MURORUA**: My Lord, by way of an opening remark, the Plaintiff brings before you an insurance claim and that he would effectively assert the particular contract of insurance. In contradiction of that the Defendant would assert a substituted version of the contract, essentially relying on the sun set clause which says that the claim should have been instituted within a period of 90 days so that essentially the issues are whether the contract is the one as asserted by the Defendant or the applicable contract is the one as asserted by the Plaintiff so that the evidence would be aimed at establishing what contractual arrangements were obtained between the parties. And I intend calling Mr Stuurman as the first Witness and Mr Jeff Brown as the second Witness to basically cover those areas so that there would be primarily two witnesses.

COURT: Thank you, yes you may proceed. ‘’

(The underlining is mine for emphasis.)

[9] The learned trial judge said the following in paragraph 9 of his judgment:

> "It was unnecessary to decide on the above issues as the evidence led showed clearly, contrary to the plaintiff's denials, that the All Sure policy was mailed to his postal address and he should have received the policy. In actual fact Mr Murorua conceded during his submissions that he could not argue that there was no agreement between the parties. The plaintiff based his claim on that agreement and therefore it is common cause that an agreement existed between the parties. Notwithstanding this concession and the issues agreed upon by both parties, Mr Murorua nevertheless shifted ground when he raised the issue of whether there was repudiation by the defendant of the plaintiff's claim." (My underlining.)

[10] In paragraph 14 of the judgment, the trial judge remarked that Mr Murorua, although offered the opportunity by the defendant to amend plaintiff's pleadings to specifically aver the non-receipt of the repudiation, ignored the offer but continued to argue the point. In paragraph 16 of his judgment, the learned trial judge stated that Mr Murorua conceded that if the Court finds that the time bar clause constituted part of the insurance contract, the defendant could rely on it; as indeed it did.

[11] In her evidence before Mainga J in the Court *a quo*, Ms Lobo, who was the defendant's assistant manager for personal underwriting, testified that the 29 June 2005 letter of repudiation was sent to attorneys Fischer, Quarmby and Pfeifer because they were representing the plaintiff at the time in respect of the claim. Mr Murorua who argued before us that his firm had at all times been the plaintiff's legal practitioners of record, did not dispute that allegation when he cross-examined Ms Lobo. It is trite that a party has a duty to cross-examine on an issue on which it does not agree with the opponent to afford the latter the opportunity to deal with the matter:

President of the RSA v SARFU 2000 (1) SA 1 (CC) at 36DJ-37A-Fet 38A-B (paras 58-65). As Chaskalson CJ put it very aptly (at para 61):

> "The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.''

[12] It is equally trite that a party is bound by its counsel's conduct of pleadings and agreements entered into in the conduct of a case, unless there is a satisfactory explanation for the inference not to be drawn. (Compare *SOS Kinderhof International v Effie Lentin Architects* 1993 (2) SA 481 at490C – E (Nm); *Brummund v Brummund's Estate* 1993 (2) SA 494 at 498C-F (Nm).)

[13] It is indisputable that the defendant in its plea alleged that it had repudiated the claim of the plaintiff on 29 June 2005 and was therefore not liable to the plaintiff because of the repudiation and the plaintiff's failure to have served the summons within 90 days of such repudiation. The plaintiff did not replicate so as to place the ineffectiveness of the repudiation beyond any doubt.

In his request for further particulars for trial, the plaintiff specifically requested of the

defendant:

> "Is it alleged that the defendant repudiated the plaintiff's claim orally or in writing? If in writing, a copy is requested; if orally, full particulars are requested."

The plaintiff also asked the following question:

> "Who acted on behalf of the defendant in allegedly repudiating the claim?"

[14] In reply to the plaintiff's requests above, the defendant answered that the defendant notified the plaintiff of the repudiation on more than one occasion (the first repudiation being communicated in writing on 18 October 2004 and the last notification confirming the earlier repudiation being communicated in writing on 29 June 2005).

[15] The defendant also had its own questions to the plaintiff requesting trial particulars. One of them was:

> "Does the plaintiff admit that the claim was repudiated on 20 June 2005 by means of a letter of the same date attached as annexure PT1 hereto, sent and received by telefax on the same date by the defendant to the attorneys of record of the plaintiff?" (My underlining for emphasis.)

The plaintiff furnished an answer to the above question and said:

"The plaintiff does not dispute defendant's contention that the claim was repudiated on 20 June 2005 by means of a letter of the same date."

[16] From the above it is apparent that:

(i) The defendant was averring that a repudiation was provided to the plaintiff's attorneys of record being Fisher, Quarmby & Pfeiffer.

(ii) The plaintiff acknowledged that a repudiation had taken place but did not raise the issue of the repudiation being ineffective because it was not received by him personally.

(iii) The plaintiff did not dispute that Fischer Quarmby and Pfeifer were attorneys of record for the plaintiff when the repudiation letter was sent. This is significant because, in oral argument before us, Mr Murorua submitted that Murorua & Associates had at all material times been the attorneys of record of the plaintiff. If that were the case, it is curious that he did not specifically deny the defendant's averment that Fisher, Quarmby & Pfeifer were the attorneys of record to whom the notice of repudiation had been sent.

(iv) The plaintiff had not asked the defendant any question raising the ineffectiveness of the repudiation notice on account of it not having been communicated to the plaintiff.

[17] In response to the plaintiff's claim the defendant pleaded that it had denied liability of the claim and that, it having repudiated the plaintiff's claim on 29 June 2005, the plaintiff failed to serve summons on the defendant within 90 days of such denial of liability and repudiation which was a requirement for the liability of the defendant under the policy.

[18] It was against the backdrop of these pleadings that the parties entered into the agreement limiting issues and the trial of the action took place before the Court *a quo*. On appeal Mr Murorua submitted that both in the pleadings and in evidence led in the Court *a quo*, the plaintiff denied receiving the repudiation notice of 29 January 2005 and that the defendant who bore the *onus* of proving that the plaintiff had received it, failed to prove that he did. As I understand Mr Murorua, the averment in the plaintiff's trial particulars that *the plaintiff does not dispute defendant's contention that the claim was repudiated on June 29 2005 by means of a letter of the same date* was wrongly interpreted by the Court *a quo* as an admission that the plaintiff received the repudiation notice.

[19] Mr Murorua further submitted that on behalf of the defendant "no evidence was led as to the *locus standi*" of the legal practitioner of the plaintiff at the time "to receive

a notice of repudiation from the defendant insurance company repudiating the claim". He adds that the defendant also failed to prove that the insurance policy authorised the giving of the repudiation to the plaintiff through the legal practitioner. Mr Murorua readily concedes that the insurance policy as alleged by the defendant contained the time bar provision.

[20] For his part, the defendant relies on the agreement reached between the parties' legal practitioners to limit the issues to be decided by the trial Court and recorded at the commencement of the hearing by Mainga J, and argues that the plaintiff was not entitled *a quo* (and is not entitled on appeal), to raise the issue of the ineffectiveness of the repudiation as that was not an issue before the trial court in view of the agreement limiting the issues.

[21] Parties engaged in litigation are bound by the agreements they enter into limiting or defining the scope of the issues to be decided by the tribunal before which they appear, to the extent that what they have agreed is clear or reasonably ascertainable. If any one of them want to resile from such agreement it would require the acquiescence of the other side, or the approval of the tribunal seized with the matter, on good cause shown. As was held by the Supreme Court of South Africa in *Filta –Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 at 614B-D:

> "To allow a party, without special circumstances, to resile from an agreement deliberately reached at the pre-trial conference would be to negate the object of rule 37, which is to limit issues and to curtail the scope of the litigation. If a party elects to

> limit the ambit of his case, the election is usually binding. (Footnotes omitted)"

In *F & I Advisors (EDMS) PBK v Eerste Nasionale Bank van SA BPK* 1999 (1) SA 515 at 524F-H this principle was reiterated. The judgment is in Afrikaans and the head note to the judgment will suffice (at 519D):

> "a party was bound by an agreement limiting issues in litigation. As was the case with any settlement, it obviated the underlying disputes, including those relating to the validity of a cause of action. Circumstances could exist where a Court would not hold a party to such an agreement, but in the instant case no reasons had been advanced why the plaintiffs should be released from their agreement."

[22] Before us, Mr Murorua not only conceded the existence of the agreement limiting issues, he also conceded that it was binding and that he was not seeking to resile from it. If I understood him correctly, he submitted that the pleadings did not preclude him from raising the issue as the plaintiff must be taken to have denied that he personally received the repudiation notice and that therefore the defendant bore the *onus* to prove communication personally to the plaintiff of the repudiation notice. Even if I accept that the issue had indeed been properly raised in the pleadings (and there is considerable doubt it was if regard is had to my analysis of the pleadings above) the parties, knowing of the pleadings, decided to limit the issues on which the case was going to be fought. Mr Murorua's submission that the agreement did not preclude the plaintiff from raising the repudiation issue is clearly irreconcilable with the terms of the agreement. The agreement does not say that the claim be dismissed if the governing agreement is *that* alleged by the defendant, unless the Court finds for

the plaintiff on any other basis. As I have shown, even in his opening statement, Mr Murorua clearly spelled out the restricted nature of the issue that was placed before the Court *a quo*. There is no reference at all to the repudiation issue in the agreement or in Mr Murorua's opening statement. Therefore, what the Court *a quo* was to decide was limited by the terms of the agreement.

[23] By pressing the repudiation issue *a quo (*and now on appeal) Mr Murorua was, and is seeking, to reopen the ambit of the case to the pre-agreement stage. The only circumstance in which this Court could allow the plaintiff to do that on appeal is if the parties, notwithstanding the agreement, proceeded to fully ventilate the issue of non-communication of the repudiation in the Court *a quo*. As was stated by De Villiers JA in *Shill v Milner,* 1937 AD 101 at 105:

> "Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleadings of the opponent has not been as explicit as it might have been".

As I have shown, Mr Barnard on behalf of the defendant objected to the matter being reopened and made clear that the defendant would be prejudiced.

[24] Mr Murorua correctly withdrew his earlier submission that the defendant's counsel had at great length cross-examined the plaintiff on the issue of non-

communication of the repudiation. The converse is in fact the case: Mr Barnard on behalf of the defendant objected to evidence being led on the non-communication in the light of the agreement which precluded such evidence being led.

[25] There being no basis on which I can excuse the plaintiff from the terms and effect of the agreement between the parties limiting the issues that fell for decision by the Court *a quo*; and it being common cause that the defendant made every effort to limit the issues to the agreement between the parties, the plaintiff is not entitled to raise on appeal the issue of repudiation as it is clearly excluded by the terms of the parties' agreement limiting issues.

[26] In my view the only issue before the Court *a quo* (by agreement between the parties) was whether the terms alleged by the defendant constituted the agreement between the parties and that if that were in the affirmative, the claim should fail. That was the case the defendant was required to meet and did meet. Mr Murorua failed to include the ineffectiveness of the repudiation in the agreement limiting issues and he never at any stage asked the Court *a quo* to absolve the plaintiff from the terms of that agreement so as to raise repudiation as an issue in the way he seeks to do on appeal. It is not open for him to do so because the agreement limiting issues closed the door to a ''thorough investigation into all the circumstances'' of the matter. The plaintiff's treatment in the pleadings of the ineffectiveness of the repudiation was very vague at best and the defendant maintained during the trial that it was not open to the plaintiff to raise the issue of repudiation in view of the agreement. If the plaintiff's

understanding differed from that of the defendant, his counsel failed to rectify the matter even when specifically invited to do so. The plaintiff is therefore excluded by the terms of the agreement between the parties limiting the issues from raising the issue of repudiation on appeal.

[27] In the result, the appeal is dismissed with costs, including costs occasioned by the employment of one instructing and one instructed counsel.

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DAMASEB, A.J.A.

I agree

_____
STRYDOM, A.J.A.

I also agree

_____
CHOMBA, A.J.A.

FOR THE APPELLANT: Mr L Murorua

Instructed by: Murorua & Associates

FOR THE RESPONDENT	Mr P Barnard
Instructed by:	LorentzAngula Inc