/JM

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE: 23-03-2017
CASE NO: 65685/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

23/03/2017 ....
DATE SIGNATURE

In the matter between:

MOHAMMED TAWFIR MOHAMMED MEHREZ 1ST PLAINTIFF

TRUDIE MEHREZ 2ND PLAINTIFF

And

SIFISO NDWANDWE DEFENDANT

JUDGMENT

MAKHOBA, AJ

[1] Plaintiffs and the defendant are neighbours, plaintiffs's property is situated right adjacent to that of the defendant. Plaintiffs instituted an action against the defendant and is claiming an amount of R333 983.00 against the defendant. The claim arise out of the fire that started in defendant's property and damaged the plaintiffs's property.

[2] During a pre-trial conference held at Groenkloof chambers in Pretoria on the 20 February 2017 the parties agreed that subject to the consent of the court, the court will only adjudicate on the special plea raised by the defendant and the merits and quantum will be postponed *sine die*.

[3] The special plea was argued before me on the 1st March 2017. The special plea can be summarised as follows:

3.1 The defendant has a short term insurance cover for some of the damages which form part of the plaintiff's claim.

3.2 Plaintiffs were informed of the said cover by the defendant.

3.3 defendant's insurer is an interested party to the proceedings as a result of which the plaintiffs ought to have joined the defendant's insurer as a party to the proceedings.

[4] Counsel for the defendant submitted to the court that the insurer is the integral party to the proceedings and should have been joined by the plaintiffs. Counsel for the defendant referred the court to various decided cases.

[5] For the plaintiffs their counsel objected to the special plea and handed his heads of argument to the court. He submitted to the court that:

5.1 Defendant did not annex the insurance agreement to his pleadings and thus plaintiff is not aware of the contents of the agreement between defendant and his insurer.

5.2. The insurance agreement was not discovered.

5.3 Plaintiffs have no obligation to join the insurer it is the duty of the Defendant.

[6] **Reinecke, Van Niekerk and Nienaber South Insurance law 2013 page 221 paragraph 11.23** the learned authors say the following " where insurance cover arises from a reciprocal insurance contract containing a stipulation in favour the third party will upon acceptance of the benefit be entitled to enforce his right only if the primary insured has paid or tendered to pay the premium. This conclusion is based in the view that the obligation for instance to indemnify the third party stems from the original contract and is part of the performance agreed to by the insurer in exchange for the insured's undertaking to pay the premium" On page 388 paragraph 18.15 the learned authors say the following on subrogation " In this context subrogation is simply a right the insurer has against the insured, it has no right against the third party. Subrogation involves only the insurer and the insured and therefore has no bearing on the third party

or its legal liability at all" In my view the authors unequivocally say that the third party has no connection or obligation towards the insured only the insured has a contractual obligation with the insurer.

[7] **In Kohler Flexible Packaging (Pinetown)) (Pty) Ltd v Marianhil Mission Institute 2000 (1) SA 141 (D)** the court held that third parties cannot be sued as joint wrongdoer unless they are liable to the plaintiff in delict see also **OK Bazaar (1929) Ltd and Others v Stern and Ekermans 1976 (2) SA521 (C) at 530G-531A** .

[8] In my view it is clear from the case law and to Reinecke et al referred to above that plaintiffs in this matter before me are not party to an agreement between the defendant and his insurer and therefore they are not obliged to join the insurer as a party to this proceedings. Only the defendant has the power and obligation to join his insurer in this matter.

[9] The following order is therefore made:

Defendant's special plea is dismissed with costs.

D MAKHOBA

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on: 15 March 2017
For the plaintiff : Adv J.G Van Der Merwe
For the dfendant : Adv V.P Ngutshana
Date of Judgment: