

41/84

INCORPORATED GENERAL

INSURANCE LIMITED

APPELLANT

and

BENEDICT HARRIS

RESPONDENT

F S SMUTS, A J A.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

INCORPORATED GENERAL

INSURANCES LIMITED

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APPELLANT

AND

BENEDICT HARRIS

.....

RESPONDENT

CORAM : RABIE, C J, JANSEN, J A, et SMUTS, A J A.

HEARD : 2 March 1984.

DELIVERED: 29 March 1984.

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J U D G M E N T

SMUTS, A J A:

This is an appeal against an order granted

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by ACKERMANN , J, in the Transvaal Provincial Division whereby appellant - defendant in the Court a quo - was ordered to pay respondent the sum of R4 800-00 with costs of suit in respect of a claim by the latter for payment of R6 000-00. The parties will hereafter be referred to as plaintiff and defendant.

It appears that during 1975 plaintiff was the owner of a fleet of buses with which he carried on the business of conveying passengers for reward in the town and district of Pietersburg and further afield. On 16 October 1975 defendant issued to plaintiff a policy of insurance in respect of

21 buses. By virtue of this policy plaintiff undertook to "indemnify the insured against loss of or damage to any vehicle described in the schedule hereto and/or its accessories and spare parts whilst thereon". The schedule referred to contains a list of 21 buses, one of which is a 1971 model Leyland with registration TAL 3319. A value is also placed on each of the 21 buses, ostensibly by the insured. The value thus attached to the first five buses enumerated in the schedule varies from R6 000-00 to R10 000-00. From the sixth bus onwards the value is in each case stated to be R6 000-00. The model of each vehicle is also specified. There are two of 1962, two of

1965, one each of 1967, 1968 and 1969, three of 1970, three of 1971 and one of 1972.

Shortly after the insurance was effected the bus TAL 3319 was involved in a head-on collision. It was extensively damaged. In terms of the policy defendant was entitled, at its option, to "repair, re-instate or replace such vehicle or any part thereof and/or its accessories and spare parts or, ~~pay~~ pay in cash the amount of the loss or damage not exceeding the reasonable market value of such vehicle and/or its accessories and/or spare parts at the time of such loss or damage". Defendant obtained possession of the bus for the purpose of deciding which course

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to adopt. Thereafter, on 19 May 1976 , defendant notified plaintiff that it was repudiating liability under the policy on the ground that he had failed to pay the premium due under the policy. Plaintiff accepted the repudiation. Defendant had prior to 19 May 1976 sold and delivered the damaged bus as scrap to one Sudner, who conducted a business of selling used truck spare parts. The purchase price was R1 400-00. Defendant was accordingly not in a position to return the damaged vehicle to plaintiff. Plaintiff thereupon instituted action against defendant for payment of R6 000-00 as damages suffered by him. His claim was based on alleged breach of contract....6

contract. A number of defences were raised in the plea. In addition to denying that it was ever in possession of the bus defendant pleaded that the premium payable in terms of the policy was never paid and that as a result thereof the policy never came into force, or, if it did, that it was lawfully cancelled.

It appears from the judgment of ACKERMANN, J, that at the commencement of the trial the Court was informed by counsel that it had been agreed "that the sole issue for determination ..... was the value of the bus in its damaged condition after the collision, such value to be determined as at December 1975".

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It was common cause that once the value aforesaid was established plaintiff would be entitled to judgment in that amount. It therefore became unnecessary to determine the legal basis for defendant's liability to compensate plaintiff in damages.

In his particulars of claim plaintiff alleged that the R6 000-00 claimed represented the "value of the said motor vehicle" at all material times. In a request for particulars for the purposes of trial plaintiff was asked to state "how precisely the amount of R6 000-00 was computed". The reply was as follows :

"The amount of R6 000-00 represents the

fair.....8

fair and reasonable market value of the vehicle. Plaintiff will also rely in this regard on the fact that the vehicle concerned was worth approximately R12 000-00 immediately before it was involved in a collision during about November 1975, that the reasonable and necessary cost of repairing the vehicle as a result of the damage caused in the said collision was R5 821-98 and that the vehicle was removed by Defendant before it was repaired."

During the trial plaintiff led evidence as to the value of the vehicle before the collision and of the cost of repairing the damage caused thereby. In addition evidence was allowed to be led, despite objection thereto, in regard to the value of the undamaged component parts of the bus. In giving judgment.....9

judgment the learned Judge in the Court a quo found that the value of the bus before the collision had not been established but that the evidence in regard to the value of the component parts was sufficiently reliable to enable him to find that loss in an amount of R4 800-00 had been suffered by plaintiff. He accordingly awarded plaintiff damages in that amount.

In this Court it was contended on behalf of defendant that it was not legally competent for the Court a quo to have granted judgment on the basis of the value of the component parts.

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It was contended that in the light of the pleadings and the agreement between the parties, stated above, plaintiff was only entitled to the value of the damaged bus as such. Counsel for plaintiff (who was also counsel in the Court below) conceded, correctly I think, that this submission was well-founded and stated that the evidence of the value of the component parts had been led merely as a check on the reasonableness of the value placed by plaintiff on the bus in its post-collision state.

On behalf of plaintiff it was contended that ACKERMANN, J, was not justified in rejecting

plaintiff's ...11

plaintiff's evidence that the pre-collision value of the bus was R12 000-00 nor that of N Kellerman, a witness called by plaintiff, that the value of the bus was between R12 000-00 and R13 000-00. It was pointed out that no witness was called by defendant to controvert this evidence and it was contended that the reasons advanced by the Court a quo for not accepting the evidence of plaintiff and the witness Kellerman as to the pre-collision value of the bus were inadequate. This argument was disputed on behalf of defendant and it accordingly becomes necessary to examine the evidence in more detail.

It appears from plaintiff's evidence that

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he commenced his own business, known as the Hamba Byna Bus Service, in 1964. Prior to that date he had been employed, for a period of 7 years, as the manager of the Pietersburg Bantu Bus Services. Plaintiff testified that he bought a new chassis in 1971 for R9 696-62 from the Leyland Motor Corporation. The cash price was R8 600-00. Thereafter he purchased from a firm known as African Body and Coach the necessary body-section to enable him to assemble a complete bus. The cost thereof was R4 500-00. The body-section was affixed to the chassis and the bus was then registered as TAL 3319. The total purchase price was accordingly R14 196-62 but the

cash....13

cash price R13 100-00. At the time of the collision the bus had done about 50 000 miles. If properly cared for it could, in plaintiff's opinion, have lasted 18 years. There would have been no need even to consider replacing the diesel engine with which it was fitted before 200 000 miles had been completed. He testified that the bus was in good condition and had been used sparingly as he regarded it as one of his special buses. In the light of his experience he valued the bus at R12 000-00 at the time of the collision.

It appears from Kellerman's evidence that he owned a business named Sansusi where panel-

beating.....14

beating, spraypainting and mechanical repairs to vehicles were done. In addition he did repairs to damaged bodywork and constructed bodies for vehicles, including buses. For a long period he had had experience of buying and selling buses. Relations of his were engaged in the business of "heavy transport" and when they bought and sold vehicles he was consulted. He was well acquainted with the market prices of new and second hand vehicles, including buses. This evidence by Kellerman was not attacked in cross-examination. No reason appears to exist for doubting Kellerman's ability to testify to the value of a bus such as that with which this matter is concerned.

It appears from the evidence that Kellerman was asked by plaintiff to submit a quotation in regard to the cost of repairing the bus. Kellerman inspected the damaged bus and quoted a figure of R5 821-98. This was in respect of mechanical repairs as well as repairs to the bodywork. Apart from the damage caused by the collision he found the bus to be in good condition. He valued the bus in its pre-collision condition at between R12 000-00 and R13 000-00.

Plaintiff's valuation was subjected to criticism on various grounds by counsel for defendant. This criticism was based, inter alia, on the value placed on the bus in the schedule to the policy

and the "book value" thereof appearing in a "schedule of depreciation" drawn up by plaintiff's bookkeeper. It is not necessary to discuss the merits of this criticism, which was found by ACKERMANN, J, to be invalid , as the grounds on which the learned Judge rejected plaintiff's valuation can in any event not be faulted.

In regard to this evidence he said the following:

"The cash price of R13 100-00 for the bus and chassis..... reflects the value of the bus when new. Even making due allowance for inflation over a period of 4 years from date of purchase to the date of the collision, it seems hard to credit that, having been driven

for.....17

for at least 50 000 miles over this period of 4 years, the bus would only have depreciated in value by the seemingly small amount of R1 100-00."

Later on in his judgment the learned Judge again stated that he had "difficulty in accepting a pre-accident value of the bus at a figure as high as R12 000-00 or R13 000-00, having regard to the purchase price of the bus".

On behalf of plaintiff it was contended, as I have already stated, that the learned Judge had no reason to reject plaintiff's and Kellerman's valuations as no evidence to controvert it had been presented by defendant. The argument however loses

sight of the following evidence by Kellerman. After testifying that he was under the impression that the purchase price of the bus had been between R15 000-00 and R16 000-00 in 1971, he went on to say that the amount by which the bus would have depreciated in value in the course of travelling more or less 50 000 miles between 1971 and 1975 would be between R3 000-00 and R4 000-00. It appears therefore that the Court a quo had evidence before it from plaintiff's own witness that a substantial amount of depreciation would have occurred over the period of four years that the bus was used before the collision took place. This evidence afforded ACKERMANN, J, sufficient cause to doubt whether the

depreciation.....19

depreciation caused to plaintiff's bus, which cost him R13 000-00, would have been as little as R1 100-00. Kellerman's valuation of the bus was in turn influenced by his mistaken view that it had cost between R15 000-00 and R16 000-00 in 1971.

On the basis that the pre-collision value of the vehicle was R12 000-00, counsel for plaintiff sought to arrive at a figure in excess of R4 800-00 by means of subtracting the cost of necessary repairs from the figure of R12 000-00 and then again adding to the figure thus obtained the value of certain component parts. As plaintiff failed to establish the basis on which this method of assessing value depends, viz the pre-collision value of the bus, it is not necessary to consider the correctness of counsel's calculations and the arguments based thereon.

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That is however not yet the end of the matter. Kellerman also gave evidence in regard to the value of the bus in its damaged state. So did the witnessess S J Sudner and G Marais who were called by defendant. Defendant's counsel contended, on the strength of the evidence of Sudner and Marais, that it was not proved that the value of the damaged bus was more than R1 400-00.

It appears that Sudner made a business of buying wrecked heavy vehicles, dismantling.....21

tling them and selling the used parts thus obtained. He conceded that to a large extent his purchases were a gamble. Sometimes the wreck was found to contain less sound parts than had been bargained for and sometimes more. He conceded further that the offers he made for wrecked vehicles were not necessarily related to their intrinsic value because he was not in a position to examine properly what he was buying. Sudner testified that he initially offered R900-00 for plaintiff's damaged bus. He was then told by

Marais, who represented the firm of claims assessors who were dealing with the matter on behalf of defendant and who had offered the bus to him, that R1 400-00 was required to enable the owner's claim to be settled. As a result he increased his offer to R1 400-00 which he regarded as a fair price. This offer was then accepted. When he bought the bus the whole of the front of the vehicle had been cut away. He could not ascertain the mileage the bus had done since the speedometer had been removed. All the controls were missing as also the windscreen.

The witness Marais testified that he regarded it as uneconomical to repair the bus. He

had.....23

had seen a quotation for R3 300-00 by the Leyland Corporation for mechanical repairs to the bus. He had also had sight of a quotation for repairs to the body-section of the bus in a sum of over R4 000-00. He knew that the policy reflected an amount of R6 000-00 as the insured value of the bus. It is therefore understandable that he regarded the bus as not worth repairing and that he sought to sell it as scrap. For that purpose he approached Sudner and others and eventually sold it to the latter for R1 400-00 which he regarded as a reasonable price for the vehicle in the condition in which he found it. Marais also saw the bus with the front already cut

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away and with the speedometer missing. In addition he did not know the mileage registered by the bus. He conceded that knowledge thereof was an important factor in determining its market value. According to him the market value of the bus in its pre-collision state was R6 000-00. Notwithstanding his concession that mileage was an important factor he nevertheless maintained that the pre-collision value would have remained R6 000-00 irrespective of whether the bus had done 100 000, 50 000, 10 000 or even 5 000 miles. When it was put to him directly that his evidence was absurd, he persisted in his view of the matter. Marais' evidence

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that the value of the bus would remain R6 000-00  
irrespective of whether the mileage was 100 000 or  
5 000 is patently ridiculous and does not instil  
confidence in his ability as a valuer. As stated,  
he saw the bus only after the nose thereof had been  
removed, with the resultant effect which that fact  
would have had on a valuer or prospective buyer. It  
is clear that as Marais did not regard it as feasi-  
ble to repair the bus that he would not have looked  
at it through the eyes of anyone other than a dealer  
in scrap.

In arriving at the conclusion that it  
would be uneconomical to repair the bus Marais was

furthermore.....26

furthermore influenced by the statement in the schedule to the policy that its value was R6 000-00 and the fact that the quotation for repairs to the bodywork was in excess of R4 000-00. It appears from plaintiff's evidence, which was accepted by ACKERMANN, J, that he had never proposed a value of R6 000-00 for the bus; the value he had placed thereon had been much higher. He became aware of the figure of R6 000-00 appearing in the schedule when he received the policy from defendant. By that time the collision had already taken place. The evidence discloses further that the quotation of more than R4 000-00 for repairing the bodywork

was also exorbitant as the complete body-section had originally only cost R4 500-00. Marais' conclusion that the bus was not worth repairing was therefore based on grounds which are suspect.

Reliance was also placed on behalf of defendant on the evidence of plaintiff's witness, Steele. He was called to give evidence in regard to the value of the undamaged component parts of the bus. His occupation was that of a motor mechanic. He was the person who had on behalf of Leyland Corporation drawn up the quotation for mechanical repairs to the bus. He admitted that he had no experience of assessing the value of a vehicle as a whole. His experience.....28

experience was limited to valuations of individual parts. In cross-examination he testified that he regarded repairing the bus as an uneconomical proposition. It was on this evidence of his that counsel for defendant relied. It appears however that Steele also saw the bus only after much of the front had been cut away. He could therefore also not have known what distance it had covered.

In addition he also knew of the quotation by African Body Works of R4 500-00 for repairs to the bodywork which, together with his own quotation of R3 800-00 for mechanical repairs, meant that the cost of repairs would have exceeded R8 000-00.

Kellerman testified that he would have been prepared to offer R3 000-00 for the bus as it was after the collision. This amount would be his initial offer for the purpose of thereafter negotiating and reaching agreement with the owner as to a purchase price acceptable to both parties. His evidence in this regard reads as follows:

"----as 'n mens oor 'n tweedehandse voertuig kibbel, hy het sy prys, hy sê ek wil R6 000,00 hê. Ek sê ek is bereid om R3 000,00 te gee. Dan kompromeer ons op R4 000,00 of so iets of R4 500,00. 'n Mens kan mos nie nou oor so iets praat

nie....30

nie. Dit is die beloop van besigheid. Sy prys is R6 000,00. Ek is bereid om R3 000,00 te gee. Nou kibbel ons en ons sê alright, ons kom-promeer, ek sal jou R4 000,00 of R4 500,00 gee, dit hang af hoe 'n groot behoefte jy aan daardie voertuig het of hoe graag jy hom wil hê, wat jy betaal.

Mag ek dit dan anders aan u stel. As daardie ander kant nou nie kom met 'n prys nie, wat sou u sê sou die maksimum prys wees waarvoor u daardie bus in die beskadigde toestand sou gekoop het?--- As ek wil geld maak uit hom uit, dan probeer jy so min as moontlik, ek wil nie nou sê nie, maar so 'n bus, my gesonde verstand sê vir my dat al sy komponente lyk mooi, hy is goed en so aan, ek begin by R3 000-00. As daardie man 'n potensiële kliënt is en jy wil met hom gereeld besigheid doen, dan sal jy hom 'n redelike prys aanbied."

When asked what he thought could be obtained for the

bus.....31

bus on the open market in its damaged condition after

the collision he replied as follows:

"Laat ek liever my antwoord kwalifiseer deur 'n voorbeeld te gebruik. Daar is administrasie PAT Administrasie wat gereeld vendusies hou. Daar is 'n groot Government Garage, Staatsgarage wat gereeld vendusies hou. Daar is Lebowa Regering wat gereeld vendusies hou en as ek daardie bus, as dit my bus sou gewees het of as die eienaar hom op sy vendusie aanbied, dan gaan hy R3 500,00, R4 000,00, R5 000,00 vir hom kry, want dit is die mark, dit is die aanvraag.

Dit wissel van R3 500,00 tot?--- Tot R5 000,00. Die aanbod is daar. Hy is nog al die tyd daar. Nou ook.

Waar sou u sê sou hierdie bus in daardie kategorie geval het?---So beskadig soos wat hy was?

Ja, soos u dit gesien het?--- Ek het reeds gesê enigiets van R3 000,00

na - kom ons sê dan R3 500,00 na  
 R4 000,00 sou ek ook vir hom betaal  
 op 'n veiling, maar dit is nie te sê  
 dat as dit myne was , dat ek hom daar-  
 voor sou verkoop nie. Dit maak 'n  
 verskil."

In cross-examination the following evidence appears:

"Maar ek het moeilikheid gehad, want  
 u het vir Sy Edele gesê u sou 'n prys  
 van R3 000,00 geoffer het as dit vir  
 jou persoonlik was?---As ek hom moet  
 koop.

Dan sê u op 'n vendusie sou dit  
 miskien so hoog soos R5 000,00 gegaan  
 het?-----R4 500,00. Ek het dit ge-  
 kwalifiseer by R4 500,00 min of meer.  
 R4 000,00 na R4 500,00.

Dan het u gesê tussen R3 500,00  
 en R4 000,00. Wat is die billike  
 markwaarde of was daar nie een nie?  
 ----Die markwaarde word bepaal volgens  
 aanbod."

The effect of this evidence is that Kellerman would have been prepared to commence negotiations by offering a price of R3 000-00 so as to obtain the best possible price from his point of view. He did not regard R3 000-00 as the price for which the owner would be prepared to sell and expected that the owner might want as much as R5 000-00. Depending on the demand the owner might even obtain R5 000-00 but he himself would not have gone above R4 500-00. His offer would have been between R4 000-00 and R4 500-00. In the light of all this evidence I find it proved that Kellerman, who made a good impression on ACKERMANN, J, would, as representing the ordinary knowledgeable

buyer.....34

buyer, have regarded R3 000-00 as his initial offer:

for the purpose of hard bargaining and would have

been prepared to pay between R4 000-00 and R4 500-00

for the damaged bus. There can be no doubt that

plaintiff would have commenced bargaining at a price

in excess of R5 000-00. A sale in the vicinity of

R4 250-00 would appear to be a fair reflection of the

market price on Kellerman's evidence. The evidence

given by Sudner cannot and does not detract from the

above conclusion. To start with, Sudner did not have

any knowledge as to the real condition of the bus.

Not only was he handicapped in this respect but when

he saw the bus, the front had been cut away so that

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it would have made a very sorry impression on him.

Sudner did furthermore not know that the bus had travelled only 50 000 miles as the speedometer had been removed. On his own evidence a purchase by him was in the the nature of a gamble. A sale effected by plaintiff of the damaged bus would have been of a different nature. Not only would he himself have been able to give more information to the prospective purchasers as to the condition of the bus and the distance it had travelled before the collision, but they would have seen the bus with all its body-work still on the chassis, though of course damaged. They would have been able to inspect the bus and

would...36

would not have had to approach the matter as a gamble.

The evidence of Marais and Steele can also not weigh up against that of Kellerman. Not only did they not possess his experience but in seeking to place a value of the damaged bus they were handicapped in the respects I mentioned when dealing with their evidence. Marais' evidence is further rendered suspect by his evidence in regard to the value to be placed on the bus irrespective of the distance it may have travelled. In my view Kellerman's evidence justified an award by the Court a quo of R4 250-00 as the market value of the bus in its

post-collision....37

post-collision state. It was due to no fault of plaintiff that he was unable to place better evidence thereof before the Court. He was denied the opportunity of having the bus valued by other valuers in its damaged condition as the result of defendant's sale thereof to Sudner. It is clear that plaintiff suffered loss by this unlawful act. In the nature of things this is not a case where plaintiff is able to prove the damage suffered by him in exact figures. Such evidence as he could obtain he placed before the Court a quo. It thereupon became the duty of the Court to assess the amount of damages suffered to the best of its ability (Turkstra v Richard 1926

T P D 276). I think that the evidence justifies the finding that R4 250-00 would have been a fair assessment of the damages suffered by plaintiff.

The appeal is accordingly allowed with costs. The judgment of the Court a quo is altered to read:

"Judgment for plaintiff in the amount of R4 250-00 with costs of suit."

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F S SMUTS, A J A.

RABIE, C J.     )  
                  ) Concur.  
JANSEN, J A.    )