

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A303/2009

In the case between:-

POLTEK MANUFACTURING & SALES BK Appellant
(Plaintiff in the court *a quo*)

and

REGENT VERSEKERINGSMAATSKAPPY BEPERK Respondent
(Defendant in the court *a quo*)

CORAM: H.M. MUSI, JP *et* MOCUMIE, J *et* JORDAAN, J

JUDGMENT BY: JORDAAN, J

HEARD ON: 6 SEPTEMBER 2010

DELIVERED ON: 16 SEPTEMBER 2010

- [1] The appellant (plaintiff in the court *a quo*) sued the respondent (defendant in the court *a quo*) for payment of an amount of R135 000,00 as an indemnification for damages to a vehicle allegedly insured by the defendant at the behest of plaintiff in terms of an alleged written insurance policy. The claim was initially based solely on a written policy of insurance but, by

amendment, the plaintiff also introduced an alternative claim based on an alleged oral agreement of insurance. At the trial, at the close of the plaintiff's case, defendant applied for absolution from the instance and, though it does not appear clearly from the record, it is common cause that the application was refused with costs and the trial duly proceeded.

[2] For the sake of clarity the appellant will be referred to as plaintiff and the respondent as defendant in this judgment.

[3] The trial court eventually granted judgment in favour of plaintiff in the amount claimed (which amount was agreed upon by the parties) but refused to grant an order for interest on that amount and also ordered that each party should pay its own costs. The trial court granted leave to appeal to plaintiff against the refusal of interest and the costs order and also granted leave to appeal to the defendant against the order as to costs in the application for absolution as well as against the final award in favour of the plaintiff and the order as to costs.

[4] In terms of its main claim the plaintiff relied on a written insurance policy issued by the defendant on the 7th of June 2004 indemnifying the plaintiff against loss or damage to *inter alia* a Mercedes Benz truck. Although the policy was only issued on the 7th of June 2004, its inception date was, according to the policy, the 10th of May 2004. It was common cause that the said truck was damaged on the 27th May of that year after the inception date but before the issue of the policy. The defendant's defence to that claim was based on the allegation that the damage to the vehicle before issuing of the policy was a material fact pertaining to the risk insured, which should have been but was not communicated to defendant prior to the issue of the policy and that defendant therefore was entitled to avoid the policy and liability under the policy, which it lawfully did. In regard to this claim it was recorded in the Rule 37 minutes as follows:

“Eiser erken dat indien eiser nie aan verweerder voor uitreiking van die versekeringsooreenkoms die betrokke ongeluk rapporteer

het nie, eiser nie behoort te slaag met eiser se eerste skuldoorsaak nie.”

- [5] As far as the alternative claim is concerned it was the plaintiff's case that the plaintiff duly represented by Joan Claassens Brokers and the defendant duly represented by an employee of Aon South Africa (Pty) Ltd, a brokerage company, entered into an oral agreement of insurance during May 2004, a so-called “time-on-risk” agreement, in terms of which the defendant undertook to insure plaintiff's vehicles from the 10th of May 2004 until a formal and written policy of insurance was issued. Defendant denied that such an agreement was entered into and denied that Aon South Africa (Pty) Ltd had authority to enter into oral insurance agreements on behalf of defendant. In the alternative the defendant pleaded that if it is found that Aon had such authority and entered into such agreement, the agreement would only come into effect and become binding once an insurance premium was paid by the plaintiff to the defendant, which did not happen before the aforesaid truck was damaged.

[6] On behalf of the plaintiff the evidence of Mrs Visser was tendered. The only part of her evidence that might be relevant to the issues presently to be decided was that both she and her husband had signing power to sign financial documents such as debit orders on behalf of the plaintiff. The only other witness called by plaintiff was Mrs Joan Jackson (formerly Claassens) the proprietor of Joan Claassens Brokers. She testified that she for some time acted as short-term insurance broker for plaintiff. The short term insurance of plaintiff was previously placed with Santam Insurance but that policy was cancelled because of the fact that premiums remained unpaid. She acted as a sub-agent and broker for, *inter alia*, Aon Brokers through whom the previous policy was also effected. As such, Aon was well aware of plaintiff's previous insurance history, including the fact that the previous policy had been cancelled due to non-payment of premiums. After the policy with Santam was cancelled she was approached by Mr Visser on behalf of plaintiff and requested to obtain quotes from insurance companies to place plaintiff's short-term insurance.

For that purpose she contacted Mr Leon Kruger of Aon, who was well aware of plaintiff's short-term insurance history, to obtain the necessary quotes. She requested a quote for insuring the plaintiff's vehicles as well as a quote for insuring any loads that might be transported by plaintiff on such trucks, also known as "goods in transit" insurance. In relation to the insurance of the vehicles she received a quote dated the 5th of March 2004 from the said Kruger on behalf of Aon and also a quote for goods in transit dated the 23rd March 2004. The quote in regard to the insurance of the vehicles was not acceptable to Mr Visser of plaintiff and not accepted. (Copies of the aforesaid quotations formed part of the exhibits in the trial).

- [7] On the 10th of May 2004 Mr Visser on behalf of plaintiff called her and requested her to arrange immediate cover for his vehicles and goods in transit. She thereupon contacted Leon Kruger of Aon who confirmed that the previous quote would still be applicable whereupon she called the aforesaid Visser who intimated that the quote is acceptable and that she must

please arrange for immediate cover which she thereupon did by calling Leon Kruger and made the necessary arrangements. At that stage Mr Visser of plaintiff was not available so as to be able to pay the initial premium, sign the necessary debit order authorisation or to fill in and sign the usual application for insurance form. She conveyed those circumstances to Kruger who agreed to waive the type-written conditions on the quote, confirmed that cover will take effect immediately with effect from the 10th of May 2004, but that the deposit premium and signed debit order authorisation should be forwarded as soon as possible thereafter. On the 28th of May 2004 she met with Visser during which consultation the formal application for insurance form was completed and signed, the debit order authorisation was signed by Mrs Visser and she arranged with Visser to pay the initial premium directly into the account of Aon. During the afternoon of the 28th Visser called her and informed her that the aforesaid truck was damaged in an accident on the 27th. She arranged to have the necessary claim forms forwarded to plaintiff to be completed by plaintiff. She called Kruger of Aon on the 31st of

May and informed him about the accident and the claim resulting therefrom. She conceded that interim insurance or “holding cover” is not the normal way of obtaining a new insurance policy.

- [8] On behalf of the defendant the evidence of one W D Jacobs was tendered as an expert witness. He duly qualified himself as an expert in short-term insurance. At the time he was the co-director of Paradigm Risk Consultants Underwriting Agency who acted as underwriter for the defendant company. According to him no insurance cover could be given on new insurance policies before at least a premium in regard thereto has been paid. In particular, the defendant did not have a product for such cover in the case of new insurance business before a policy is issued. In the case of existing policies “hold cover” can be arranged when an existing client would like to add a new vehicle to the insurance policy, in which case the insured would have immediate cover notwithstanding the fact that the revised premium would only be recovered later. According to him Aon did not have any authority to extend

hold cover without an existing policy being in place. If a prospective new client might require interim insurance or hold cover before a new policy is issued, the broker is obliged to refer the request to the insurance company for written authority before that can be granted. As an intermediary or broker Aon was not authorised to waive any conditions regarding a policy or quotation. Aon never requested permission to grant cover or to deviate from the conditions of the quotation in regard to the plaintiff. In regard to new policies an insurance company first has to accept the proposal and the first premium has to be paid before any cover can take effect. Finally he confirmed that the credit intermediaries agreement that form part of the exhibits contained the terms and conditions of the relationship between the defendant and Aon as credit intermediary or broker.

- [9] Mr Leon Kruger then testified on behalf of the defendant. He has been employed in the short-term insurance industry since 1985. According to him he was not entitled to alter or waive any conditions of an insurance policy nor entitled to enter into

any oral insurance agreements on behalf of defendant. He has never granted interim cover without an existing policy being in place. Neither he nor Aon was entitled to give interim cover and he never applied for such permission from the defendant. He denied Mrs Jackson's evidence as to the alleged telephonic conversations on the 10th May 2004. According to him one Kaylene Victor in the employ of Joan Claassens Brokers approached him in his office on the 10th of May 2004 and asked him whether the quotation of the 5th of March 2004 would still be applicable as it is. He told her that, if there were no altered circumstances since then, the premium will remain the same. She asked him whether the insurance company could go on risk regarding that quote whereupon he told her that it can be done only if a deposit premium as well as a signed debit order and fully completed proposal form have been obtained. At that stage Mrs Victor had a partially completed proposal form with her and informed him that she was sent by Mrs Jackson who intimated that the client will accept the quote and wanted cover as soon as possible. He told her that the specific client had previous

unpaid premium payments, that the quotation was given on behalf of a new insurance company and that risk can only be accepted once the first premium was paid, a debit order authorisation obtained and the proposal form handed in. Victor then intimated that they were busy processing the necessary forms and will send it over as soon as possible. At the time he made notes on the written quotation in his own handwriting. Although the notes were done by means of abbreviations, it can be translated as follows:

“On risk with effect from 10/5/04, deposit and debit order to follow.”

According to him, if he received the required items that same afternoon, he could arrange with the defendant to go on risk immediately. At the time he also gave Mrs Victor a document containing Aon's banking information as well as a note of the amount of the premiums in the amount of R8344,38 required.

[10] According to him Mrs Annette Havenga, another employee of

Aon, sent an e-mail to Joan Claassens Brokers on the 17th May 2004, which e-mail also forms part of the exhibits and reads as follows:

“Ons kan ongelukkig nie bogenoemde polis uitreik alvorens ons in die besit is van getekende debiet order & deposito premie nie. U dringende berigte word afgewag.”

According to Kruger the signed and completed proposal form, proof of the deposit and the signed debit order authorisation was received on the 31st of May 2004. On the proposal form the date 10 May 2004 was filled in as the required inception date of the policy.

[11] Kruger denied being informed of the accident by Mrs Jackson at any stage before the policy was issued. He was not aware of the accident at all.

[12] In her judgment, the learned trial judge relied heavily on the notes made by Kruger on the quotation of the 5th of March 2004 as follows:

“In applying the basic rule of interpretation that words must be given their ordinary grammatical meaning, one can come to no other conclusion than that the word ‘on risk’ means precisely what it says, i.e. that the plaintiff was covered with immediate effect from 10th May 2004. It was Mrs Jackson’s testimony that her understanding was precisely this.”

She went on to find:

“I find that the probabilities of this case favour the plaintiff’s version that Kruger agreed to hold the plaintiff covered for a period from 10 May 2004 until the premiums were paid and the proposal form and other documents completed when the written policy of insurance would be issued.

Kruger’s evidence supported by the defendant’s expert witness Jacobs that he had no mandate and no authority to assume interim risk on behalf of the defendant and that such interim cover was not provided by the defendant in respect of new policies but only existing ones, flies in the face of his own agreement with the defendant, known as the credit intermediary agreement (annexure “B1” to the papers), which specifically provides in broad non-

specific and general terms for the provision of interim cover for the period between the due date of the premium and 15 days after the end of the month in which the due date occurs. In the case of new policies, whether monthly or annual policies, the due date is the inception date of the policy.”

- [13] The learned judge accepted the testimony of Mrs Jackson “unreservedly” and found that the plaintiff has discharged the onus it carries of proving on a balance of probabilities that the defendant assumed the risk in respect of the said vehicle. The trial court also found that the fact that the plaintiff failed to disclose the fact of the accident on the 27th May 2004 is irrelevant and does not affect the plaintiff’s right to claim damages from the defendant as the plaintiff was covered by the defendant in the interim period between the 10th of May 2005 to the 31st of May 2005. The learned judge went on to state that she does not approve of the conduct of the plaintiff in concealing the true state of affairs from the defendant. She found that the plaintiff’s non-disclosure borders on dishonesty, is morally reprehensible and is to be visited with a suitable penal order relating to the plaintiff’s claim for interest and

costs. On that basis she refused the claim for interest and ordered that each party should pay its own costs.

[14] In finding that the probabilities favour the plaintiff the trial court unfortunately did not elaborate on those probabilities. I will revert to the probabilities later. The unreserved acceptance of Mrs Jackson's evidence sounds somewhat strange in view of the fact that other findings made by the learned judge are directly the opposite of what Mrs Jackson testified. The court found that the oral agreement was entered into by Mrs Kaylene Victor on behalf of Joan Claassens Brokers, which is contrary to the evidence of Mrs Jackson. The penal orders as to interest and costs were also based on the acceptance that the fact of the accident and resultant damages were concealed from defendant, contrary to what Mrs Jackson testified and in accordance with the evidence of Kruger.

[15] In view of the trial court's finding that the fact of the accident was concealed and not made known to the defendant or Aon before the issue of the policy, a finding with which I agree,

plaintiff could not succeed on the main claim, as conceded in the Rule 37 minutes referred to above. There is no documentary evidence, as would have been expected, to show that the accident was reported to either Aon or the defendant before the issue of the policy. From the exhibits it appear that the claim form duly completed and supporting documents were only sent through by plaintiff to Joan Claassens Brokers on the 8th of June 2004, after the policy had been issued. The only issue in regard to the merits of the matter that has to be decided is therefore the question whether the plaintiff succeeded in proving the alleged oral agreement of insurance. Before dealing with that it is necessary to deal with the cross-appeal aimed at the refusal of the application for absolution from the instance and the resultant costs order.

- [16] As referred to above, the record does not contain any reasons for the refusal of the application for absolution. The basis for the refusal is therefore unknown at this stage. However, the evidence of Mrs Jackson on its own and even taking into

account that some portions of her evidence were contradictory was, to my mind, sufficient to justify a finding in favour of plaintiff. The notes made by Kruger on the quotation do have the potential to be interpreted in a fashion that corroborates her evidence. I have no doubt that the application for absolution from the instance was correctly refused and that the order as to costs following upon that was therefore correctly made.

[17] The issue regarding the deprivation of interest and costs to plaintiff depends on whether the cross-appeal against the order granting the capital amount to plaintiff succeeds or not. I will first deal with the cross-appeal in that regard.

[18] The trial court did not make adverse findings as to the demeanour of any of the witnesses. The findings were almost exclusively based on the court's view of the probabilities and the interpretation of documentary evidence.

In regard to the probabilities, due regard is to be had of the

contractual relationship between Aon and the defendant as well as the factual background pertaining to the dealings between the parties.

[19] In terms of the defendant's credit intermediaries agreement that applied to the relationship between the defendant and Aon, Aon is by virtue of clause 1.1 thereof mandated to introduce business to defendant. Clause 1.6 reads as follows:

“Except where agreed to by the company in writing, the intermediary may not:

1.6.1 commit the company in any way

...

1.6.4 alter any policy, endorsement or receipt,...

It is common cause that the proposed policy would have been a monthly policy and in terms of the definitions of the aforesaid agreement the due date in relation to monthly policies and relating to the payment of premiums is described as:

“In respect of the inception, subsequent continuance and endorsement of a policy, the date on which the premium in terms of the policy is due for collection.”

Clause 2.2. provides:

“In the event of premiums not being received on due date, no cover will be provided and the policy will, insofar as same is necessary and applicable in the circumstances, become terminated.”

Insofar as “hold covered” in respect to monthly policies is concerned, the agreement states the following:

“In the event of the company at its sole discretion, agreeing to provide cover to the insured for a period of time (the hold covered period) during which the intermediary has not yet received the premium from the insured, the following clauses shall become operative:

2.4.1 cover will be provided by the company between the due date and the last day of the month in which the due date occurred.

2.4.2 the provisions of clause 2.4.1 shall only be of application in respect of the first month in which the policy shall become operative and/or renewed.”

[20] The factual circumstances were that the plaintiff, after the quotation of the 5th of March 2004, decided not to accept that quotation. His previous policy was already cancelled due to non-payment of premiums of which Kruger on behalf of Aon was aware. Apparently the plaintiff was content with the fact that his vehicles were not insured between the 5th of March 2004 and the 10th of May 2004. According to the plaintiff's case, for some or other unknown reason he suddenly decided that he needed immediate cover on the 10th of May 2004. The reason why he could not attend to immediate payment of the premiums, signing of a debit order and completing a proposal form was his alleged absence from his office and the fact that he could not be reached. However, his wife, Mrs Visser had the necessary authority to effect payment and sign debit orders. There was no evidence that she was also unavailable. Mrs Jackson, herself, conceded that granting cover on a proposed new policy before the issue of the policy is not the

normal way of transacting new business.

[21] Kruger was an experienced broker as far as short-term insurance was concerned. He knew that in terms of the intermediate agreement with defendant, he was not allowed to commit the company in any way or to alter any policy, endorsement or receipt. It must also be accepted that he knew that as far as the hold cover is concerned, it may only be provided if the insurance company in its sole discretion agrees to provide such cover. Aon had a long standing relationship with defendant which could be jeopardised by Aon committing the company to an unusual form of going on risk. In addition to that Kruger knew that the plaintiff's previous insurance history was clouded by the fact that the previous policy was cancelled due to non-payment of the premiums. All the above militate strongly against the probabilities that he would grant such cover orally.

[22] It is true that the notes made by Kruger on the quotation tend to show that immediate risk or cover was contemplated. The

plaintiff's case to the effect that those notes were meant to be the only conditions and to constitute a waiver of the type-written conditions on the same quote appears to be opportunistic. Firstly, the plaintiff never relied on a partly written and partly oral agreement but only an oral agreement. Secondly, the notes by the appearance thereof appears to be abbreviated notes made by Kruger and not meant to be a full recordal of the terms and conditions relied upon. If the latter was the case it is unexplained why the type-written conditions, in as far as they are contrary to the handwritten notes, have not been deleted.

[23] The finding of the trial court to the effect that Kruger and Jacobs' evidence that Aon was not mandated and did not have the authority to assume risk on behalf of the defendant was contrary to the terms of the intermediary agreement is simply not correct. That agreement expressly provides that the broker, namely Aon, was not authorised to commit the defendant in any respect, not authorised to alter or amend the conditions of policies of insurance and could only give hold

cover in the event of the defendant in its sole discretion agreeing thereto.

[24] The trial court, however, was correct in that the said intermediary agreement does provide for instances where a hold cover can be allowed on new business. Jacobs' evidence however, did not contradict that. In that regard his evidence reads as follows:

“Let me put it differently, did Aon as a credit intermediary have the authority to give hold cover or temporary cover without an existing policy?

..... No.

Who had that authority? It had to be referred to the underwriter or Regent and we would have given that authority in writing.

There had to be a request? Yes there had to be a request, sorry.”

[25] Kruger's evidence also did not go as far as denying that it was possible, with the consent of the defendant, to grant such

cover. When he was asked whether he was authorised on behalf of Aon to give such cover his answer was:

“I was not allowed to give such cover without consent from the company.”

[26] The letter written by Annette Havenga on behalf of Aon to Joan Claassens Brokers dated the 17th of May 2004 corroborates Kruger’s version that he at least required a signed debit order and deposit of the first premium before he could arrange cover. Although the letter refers to the issuing of a policy after receipt of the debit order and premium, it was common cause that at that stage no proposal form was received and a formal policy could therefore not have been issued. The letter could only refer to the arrangement of cover as soon as possible and the two requisites for that purpose.

[27] It is so that the formal policy was eventually issued with inception date being the 10th of May 2004. On behalf of the plaintiff it was argued that that is a clear indication of the fact

that cover was granted from that date since, otherwise, it would have been totally uncalled for to have an inception date that far back. It must, however, be remembered that the proposal form asked for an inception date being the 10th of May 2004 and the issuing of the policy, according to the evidence, is done by another department on the strength of that proposal form, not necessarily knowing the reason for that.

[28] It is true, as argued on behalf of the plaintiff, that the case law shows that there are instances in which a broker is regarded as having at least implied authority to grant interim cover. That is usually the case where an insurance company provides an agent with cover notes to issue on its behalf. There is, however, no evidence to that effect in the present circumstances. In the Law of South Africa (first re-issue) Volume 12, para 506 it is correctly concluded as follows:

“From the above exposition it is clear that only in exceptional circumstances will a canvassing agent have authority to conclude

a contract on behalf of the insurer.”

[29] To add to that I am of the opinion that it will much more readily be inferred that a broker has such authority when granting interim cover on an existing policy as opposed to new business. In a case of an existing policy the insurance company already approved of the risk profile of the client and has already issued an insurance policy showing that the client’s risk profile is acceptable. To add another vehicle or similar item to an existing policy in those circumstances will in the ordinary course of events not alter the risk at all. The position is quite different in the case of a proposed new policy where the insurance company did not even have the opportunity of assessing the proposed clients’ risk profile.

[30] Even if the trial court was correct in finding that Kruger did enter into an agreement with the plaintiff represented as aforesaid and did purport to grant interim cover, the plaintiff still had to prove that he was authorised either explicitly, ostensibly or impliedly by the respondent to grant such cover.

See DICKS v SA MUTUAL FIRE AND GENERAL INSURANCE COMPANY LIMITED 1963 (4) SA 501 (NPD).

In this regard it was argued on behalf of the plaintiff that the plaintiff was not in a position to gather evidence of the internal requisites and dealings between Aon and the defendant. Plaintiff submitted that the question of authority in that regard is something within the exclusive knowledge of the defendant and that in those circumstances, authorisation will more readily be inferred although the plaintiff produced only secondary or scant evidence to that effect. The answer to this is simply that Aon, being a broker and not an insurance company, in itself was just as available to the plaintiff as Joan Claassens Brokers was available to testify. Moreover nothing stopped the plaintiff from obtaining the necessary documents and files by means of proper request for discovery from the defendant. There is no indication that that avenue has been followed and that discovery was refused or not fully done.

[31] In view of the aforesaid I am convinced that the trial court erred in finding that the plaintiff discharged the onus of, at

least, proving that Kruger and/or Aon had the necessary authority to enter into such oral insurance agreement. That finding makes it unnecessary to deal with the other grounds of appeal raised by the plaintiff, except for remarking that the defendant conceded that, if judgment was correctly granted in favour of the plaintiff, the plaintiff should have been granted interest on the capital amount as well. Moreover, as far as the costs order is concerned, if the plaintiff succeeded in an alternative claim, there was no compelling reason for disallowing it its costs.

[32] In conclusion I am of opinion that the following orders should be granted:

1. The appeal is dismissed with costs.
2. The cross-appeal relating to the order of costs pertaining to the application for absolution from the instance is dismissed with costs.
3. The cross-appeal in relation to the final order granted by the trial court is upheld with costs.
4. The final order of the court *a quo* is set aside and

substituted with the following:

“Plaintiff’s claim is dismissed with costs.”

A. F. JORDAAN, J

I agree.

B. C. MOCUMIE, J

I agree and it is so ordered.

H. M. MUSI, JP

On behalf of the appellant:

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Symington & De Kok
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