



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

05 October 2024

DATE OF JUDGMENT



SIGNATURE

CASE NO: 14433/2022

In the matter between:

T NGOBENI

APPLICANT

And

PSG INSURE

FIRST RESPONDENT

ABSA INSURANCE COMPANY

SECOND RESPONDENT

OMBUDSMAN FOR SHORT TERM

THIRD RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 05 October 2024.

JUDGMENT

COLLIS J

INTRODUCTION

[1] In the present application the Applicant as per the issued Notice of Motion, seek relief in the following terms:

1. Declaring that the contract between the Second Respondent and the Applicant *void ab initio* concluded 18th November 2020 by the Representative of the First Respondent acting on behalf of the Second Respondent.

2. Declaring that the aforementioned contract contravenes and/or it violates the relevant provisions of Consumer Protection Act (hereinafter referred to as the "Act")

3. Directing the First and Second Respondent to pay the Applicant an amount of R408,070.00, being the limit of the indemnity, alternatively, pay the Applicant the value of the vehicle an amount of R399 000-00, the one paying and the other to be absolved.

4. Reviewing and setting aside the decision of the Third Respondent dated 2nd February 2022 in terms of the Promotion of Justice Administration Act of 2002.

5. Costs of this application on attorney and own client scale.

[2] As per the Joint Practice Note filed between the parties, and as against the second respondent, the applicant seeks the following relief:¹

2.1. the applicant seeks to declare an insurance policy concluded between the applicant and the second respondent void ab initio;

¹ Joint Practice Note 021-1.

2.2 secondly, the applicant thereafter seeks a declarator order that the insurance policy fails to comply with the provisions of the Consumer Protection Act; and

2.3 thirdly, the applicant seeks payment from the second respondent premise on the insurance policy.

[3] As against the third respondent, the Ombudsman for Short Term Insurance, the applicant seeks to review a decision of the third respondent in terms of which the applicant's complaint was dismissed by the third respondent.

BACKGROUND

[4] At the outset it should be mentioned that no opposition to the application was given by the first respondent. The application has only been opposed by the second and third respondents.

[5] Furthermore, that to the answering affidavits filed by the second and third respondents, the applicant has failed to file a Replying Affidavit. In the absence thereof, any evidence presented in answer to the Founding Affidavit as a consequence therefore remains uncontroverted.

[6] In casu the first respondent is the insurance broker who acted as the applicant's agent in procuring the insurance cover with the second respondent. The said contract of insurance was concluded on the 18 November 2020 in terms of which the Applicant's motor vehicle would be insured for whatever damage as a result of an accident.

[7] On 20 January 2021 on the Mabopane Highway, Pretoria the applicant was driving from a friend's place to his place of residence. It was dark and the road surface was wet as it was raining. At approximately 22:00 to 23:00 The rear of the vehicle slipped out along a section of the road where there was a sharp bend causing the applicant to lose control of the vehicle. The vehicle then veered across the road, crashed through the steel barriers and rolled, ending up in a veld further down the road. At the time the applicant was driving at a speed ranging from 140 km/h to 235 km/h.²

[8] Pursuant to this incident the applicant lodged a claim with the second respondent for the damage to the vehicle.³ The second respondent appointed CLE investigation services to conduct an investigation and upon conclusion of the investigation, the report was sent to the second respondent. The applicant's claim was subsequently repudiated on the basis that he was driving in a reckless and negligent manner.⁴

² Founding affidavit paras 6.1 and 6.2 p.001-10.

³ Founding affidavit para 7.1 p.001-11.

⁴ Founding affidavit para 8.1 p.001-16.

[9] As a result of the second respondent's repudiation of the claim the applicant elected to lodge a complaint with the third respondent.⁵

[10] The third respondent found that the applicant's conduct was prima facie reckless and material to the loss as he would to a greater probability have been in a better position to observe the sharp curve and pass through it safely if he had driven within the regulated speed. It concluded that the applicant was driving in a reckless and negligent manner.

[11] It further held the view that the applicant's conduct was in breach of his contractual obligation to take reasonable care to prevent loss and that in terms of its policy, TM5, it was accordingly not liable to pay the applicant's claim.

[12] Before the Ombudsman, the applicant contended that the policy regulating the relationship between himself and the second respondent should be Quote, TM1. In this regard he submitted that the policy, TM5, should be set aside as the first respondent, as representative of the second respondent, did not advise him that his claim would be determined in terms of the provisions of the policy, but rather than on the terms of the provisions

⁵ Founding affidavit para 8.2 p.001-16.

of TM1. TM1 states that “it is only a summary of the elements of the policy”. It identifies the second respondent as the insurer whereas, TM5 is, on the face of it, the policy from which the summary in TM1 was compiled.

[13] The third respondent considered the applicant’s contentions and advised the applicant that it does not have jurisdiction over the first respondent as it is an insurance broker and not a member of the third respondent. The first respondent was not a party before the third respondent and the third respondent could under no circumstances make a finding that would affect the first respondent.

[14] The third respondent further advised the applicant that it does not have the requisite jurisdiction to consider his challenge to the validity of the contract.⁶

[15] On 2 February 2022 the third respondent then issued a ruling in terms of which it found that the second respondent’s rejection of the claim was upheld.

[16] The third respondent, accordingly, applied the terms of the policy at TM5 to the facts of the complaint and upheld the second respondent’s

⁶ Last two paragraphs on page 001-101.

repudiation of the claim. Dissatisfied with this outcome, the applicant then launched the present application, wherein he seeks, as against the third respondent, an order reviewing and setting aside the third respondent's 2 February 2022 decision.

[17] As against the third respondent, as mentioned, the applicant seeks to review and set aside its ruling. The third respondent as argued by counsel for the third respondent has no direct or substantial interest in the dispute between the applicant and the first and second respondents. It is on this basis that the counsel contended the joinder of the third respondent to the dispute between the applicant and the first and second respondents constitutes a misjoinder.

MISJOINDER

[18] Misjoinder is the joining of several plaintiffs or defendants in one action in circumstances which the law does not sanction. The objection is that the wrong plaintiffs are suing or that the wrong defendant is being sued.

[19] The test is whether or not a party has a direct or substantial interest in the subject-matter of the action, that is a legal interest in the subject-matter of the litigation which may be affected prejudicially by the judgment

of the court.⁷ In respect of joinder the provisions of rule 10 finds applicability to applications by virtue of rule 6(14).

[20] Before this Court, as mentioned, the applicant has failed to file a replying affidavit. As such he has failed to respond to the misjoinder point raised by the third respondent in its affidavit. In addition, it is clear that the ruling of the third respondent does not prevent the applicant to approach any Court for relief which the applicant may want to achieve. This being so, it then must follow, that the third respondent has no direct and substantial interest in the subject-matter of the litigation which may be affected prejudicially by the judgment of this Court.

[21] For this reason, this Court finds the point of misjoinder sound and consequently the point is upheld with costs.

[22] The third respondent in addition had raised a *point in limine*, i.e that the relief sought by the applicant as against the third respondent does not have any practical effect.

[23] In support of this argument the submissions advanced on behalf of the third respondent, were the following:

⁷ Unreported WCC case no 20317/2017 dated 28 October 2022 at para [23].

23.1 The Constitutional Court in *Director-General Department of Home Affairs v Mukhamadiva* 2013 JDR 2860 (CC) confirmed that it is a fundamental principle which has crystallised into a rule of law, that courts should not decide matters that are abstract or academic and which do not have any practical effect either on the parties before the court or the public at large⁸;

23.2 The third respondent is an Ombud scheme as envisaged by the Financial Sector Regulation Act 9 of 2017. In terms of section 211(3) of the Act, since 1 November 2020 it is compulsory for financial institutions who provide short term insurance products to be members of the third respondent;

23.3 As such all complaints referred to the third respondent are regulated by the Third Respondent's Terms of Reference. The Terms of Reference are binding on all members of the first respondent, the insurance providers. By referring a complaint, the complainant, such as the applicant, agrees to accept the Terms of Reference;

23.4 the Terms of Reference expressly provide on no less than six occasions that a ruling by the third respondent is not binding on a complainant and that a complainant may at any stage of the proceedings pursue litigation against the insurer. The Terms provide that the complainant's right to institute proceedings shall not be affected by provisions of the Terms of Reference, save that the third respondent will withdraw from the matter if

⁸ At paragraphs 33 to 38.

the dispute is referred to an attorney for the purpose of corresponding with the insurer or instituting litigation.⁹

[24] The effect of the Terms of Reference is reiterated in the third respondent's ruling. The third respondent advises the applicant in the penultimate paragraph that the ruling is not binding on the applicant and he is at liberty to pursue the matter further through litigation, should he wish to do so.

[25] As per the Notice of Motion, the applicant seeks the setting aside of the third respondent's ruling. A court by granting such relief the third respondent contended will have no practical effect in that:

25.1 The applicant is not bound by the ruling;

25.2 The ruling is not a bar to the applicant pursuing litigation against the first and second respondents, or any other third party; and

25.3 It will have no practical effect on the public at large.

[26] It is on this basis therefore that counsel for the third respondent had argued that the application against the third respondent falls to be dismissed.

⁹ Third respondent's answering affidavit paragraph 14 pp.003-6 to 003-8, Annexure 1- Terms of Reference clauses 4.2, 4.4, 7.4, 8.1, 8.39, 8.40 and 9 at pp.003-23 to 003-37.

[27] This Court is in agreement that without the setting aside of the third respondent's ruling the applicant has not been barred from approaching any court for any relief. The current proceedings are testament of this fact. Further, that the setting aside of this specific ruling made by the third respondent, will have no practical effect on the public at large nor has the applicant before Court been bound by that decision so made.

[28] Consequently, the inescapable conclusion to be reached is that a ruling made as against the third respondent, will have no practical effect and as a result the *point in limine* is as a result also upheld with costs.

[29] On behalf of the second respondent it was further argued that the applicant in these proceedings attempts to obtain relief in circumstances where material disputes of fact exist, which disputes cannot sustain an entitlement to any relief sought. As mentioned, in the absence of the applicant having filed a Replying Affidavit, no rebuttal evidence has been presented before this Court and as a consequence the application, in the circumstances, falls to be dismissed with costs.

[30] As already mentioned, it is common cause that the applicant, whilst driving the vehicle, was involved in a motor vehicle collision on 29 January

2021.¹⁰ The applicant submitted a claim, resulting from the collision, in terms of the insurance contract.¹¹

[31] It is common cause, as the applicant himself relies upon the investigation report, that an investigator determined that the applicant provided the investigator with a tracking report that failed to contain the speed at which the vehicle was travelling.¹² The applicant as such, provided the investigator, in direct contravention of the insurance contract, with incorrect information.

[32] The investigator, it is common cause, determined that:

32.1 The speed limit on the road which the applicant was travelling in the vehicle was 120km/h;¹³

32.2 The applicant, prior to and at the time of the collision was travelling at speeds between 140km/h to 235km/h. This contention is positively stated and accepted by the applicant in his founding affidavit.¹⁴

¹⁰ FA, pp001-10, para 6.1, AA, pp003-59; read with pp003-175, annexure "E";

¹¹ FA, pp001-11, para 7.1; AA, pp003-59, para 37.

¹² AA, pp003-59 to pp003-61, para 38 to 41.3; read with pp003-178 [annexure "F", specifically pp003-200 to 003-211] and pp003-219 [annexure "G"].

¹³ AA, pp003-61, para 41.4.

¹⁴ AA, pp006-62 to pp003-63; para 43 to 45; FA, pp001-10, para 6.2.

32.3 It was raining, the road surface was wet and it was dark.¹⁵

32.4 At the time of the collision, the vehicle was travelling at 215km/h.¹⁶

32.5 The conditions that evening was confirmed in the Officer's Accident Report.

[33] The second respondent, in the circumstances, rejected the applicant's claim as the applicant had materially breached his obligations in terms of the insurance contract.¹⁷ Not only had the applicant provided the investigator with the incorrect tracking report but the applicant's conduct, whilst driving the vehicle in the manner which the applicant had done, was clearly reckless.¹⁸

[34] In motion proceedings, the test, when dealing with factual disputes on the papers, is the following:

¹⁵ FA, pp001-10, para 6.2; AA, pp003-63 to pp003-64, para 47, read with pp003 175 [annexure "E"].

¹⁶ AA, pp003-63, para 45.1.

¹⁷ AA, pp003-64, para 49 & 50.

¹⁸ AA, pp003-64, para 50l.

*"Where in proceedings on notice of motion, disputes of facts have arisen on the affidavits, the final order...may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact."*¹⁹

[35] The Supreme Court of Appeal, in *National Director of Public Prosecutions*,²⁰ held that:

"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common-cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such

¹⁹ Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (A) 634-635.

²⁰ National Director of Public Prosecutions v Zuma 2009 (1) SACR 361 (SCA).

an order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[36] In the present matter the second respondent's version as to the conclusion of the insurance contract and the documents comprising the insurance contract, cannot be rejected.

[37] The applicant, and since no Replying Affidavit was delivered by the applicant²¹, has not taken issue with the second respondent's facts relating to the conclusion of the insurance contract and the parties involved thereto.

[38] In respect of the conclusion of the contract it is clear, and must be accepted, that the applicant was at all material times represented by his broker. See in this regard *Leanarts*²² and *Hosken Employee Benefits (Pty) Ltd.*²³

²¹ *Helderberg Laboratories CC and others v Sola Technologies (Pty) Ltd* 2008 (2) SA 627 (C)635C-E.

²² *Lenearls v JSN Motors (Pty) Ltd and Another* 2001 (4) SA 1100 (W).

²³ *Hosken Employee Benefits (Pty) Ltd v Slabe* 1992 (4) SA 183 (W) 185D-F.

[39] The version as proffered by the second respondent as to the basis of the rejection of the applicant's claim, cannot be rejected on the papers particularly in considering the unassailable evidence produced by the second respondent in sustaining the rejection of the claim.

[40] It is the second respondents' case as per the Answering Affidavit that the applicant was reckless in his conduct whilst driving the vehicle, and went on to provide the second respondent's investigator with incorrect information relating to the vehicle's tracking report. This assertion, has not been refuted by the applicant in a Replying Affidavit.

[41] It is on this basis that counsel contended that the most reasonable inference, considering this failure, is that the applicant purposefully provided the incorrect information to the second respondent's investigator and on this basis the applicant's claim had been rightfully rejected by the second respondent.

[42] Support for this argument had also been found in the decision Zurich Insurance Co South Africa ²⁴ where the Supreme Court of Appeal stated the following:

²⁴ Zurich Insurance Co South Africa Ltd v Gauteng Provincial Government 2023 (1) SA 447 (SCA).

"[43] In *Centriq Insurance Company Ltd v Oosthuizen and Another* Cachalia JA made the point that while insurance contracts must be interpreted like any other written instrument — having regard to language, context and purpose in a unitary exercise aimed at achieving a commercially sensible result — their specific purpose activates other considerations too. He stated in this regard:

'But because insurance contracts have a risk-transferring purpose containing particular provisions, regard must be had to how the courts approach their interpretation specifically. Thus, any provision that places a limitation upon an obligation to indemnify is usually restrictively interpreted, for it is the insurer's duty to spell out clearly the specific risks it wishes to exclude. In the event of real ambiguity the doctrine of interpretation, *contra proferentem*, applies and the policy is also generally construed against the insurer who frames the policy and inserts the exclusion. But, like other aids to the interpretation of contracts of this nature, the doctrine must not be applied mechanically, for exclusion clauses, like other contractual clauses, must be construed in accordance with their language, context and purpose with a view to achieving a commercially sensible result.'

He also sounded a word of caution — that 'courts are not entitled, simply because the policy appears to drive a hard bargain, to lean to

a construction more favourable to an insured than the language of the contract, properly construed, permits'.

[43] As the applicant had failed to file a Replying Affidavit, this Court must accept the version pleaded by the second respondent as to the terms contained in the insurance contract and the reasons for its subsequent repudiation of the applicants' claim.

[44] The applicant in his Founding Affidavit further alleges that the second respondent has failed to take cognisance of various provisions of the Consumer Protection Act, Act 2008.²⁵

[45] In this regard the applicant alleges that the second respondent supplied services of a different category to the applicant in violation of the CPA Act²⁶. The applicant further alleges that the first and second respondents in concluding a contract for insurance with the applicant failed to explain the terms and conditions in a simple language that the applicant would understand the content, significance of the contract in accordance with the spirit and purpose of the CPA.²⁷

²⁵ FA, pp001-23; para 10.1 to 10.4.

²⁶ Sec 8(1) (d) of the above Act.

²⁷ Sec 22(1)(2) and (3) of the above Act.

[46] The second respondent denies that it had breach the terms of the Consumer Act at the time when it contracted with the applicant. It further alleges that the applicant has failed to allege any facts to sustain a conclusion that the provisions of the Consumer Act have been infringed or contravened.²⁸

[47] The same criticism is levelled against the applicant by the third respondent, in that it alleges that the applicant has failed to plead any facts contemplated by the provisions of the Consumer Act.²⁹

[48] Failure by the applicant to have pleaded any facts in support of contraventions of the Consumer Act, to my mind, is fatal to the applicants' case to find support for this allegation. This is more so, where the applicant has failed to file a Replying Affidavit to gainsay these allegations as made by the respondent.

APPLICABILITY OF PAJA

[49] In the Heads of Argument filed on behalf of the applicant, this point was not persisted with. This Court however notwithstanding deems it necessary to express itself on this point further.

²⁸ Answering Affidavit-Second Respondent para 91.2 003-80.

²⁹ Answering Affidavit -Third Respondent para 81 003-21.

[50] The applicant, as mentioned seeks an order reviewing and setting aside the third respondent's ruling in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)³⁰. It is, therefore necessary to determine whether PAJA applies to a ruling by the third respondent.

[51] PAJA applies to administrative actions, in the context of the third respondent, by a natural or juristic person exercising a public power or performing a public function in terms of an empowering provision.

[52] Section 3 of PAJA provides that an administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair, and section 6(2) sets out the grounds on which a court may review an administrative action which is not procedurally fair.

[53] The principal elements of an administrative action to which PAJA applies has been summarised by the Constitutional Court as follows:³¹

³⁰ Notice of Motion prayer 4, p.001-3.

³¹ Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC) at para 33, referring with approval to Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA).

- 53.1 A decision of an administrative nature;
- 53.2 by a natural or juristic person, other than an organ of state,
- 53.3 exercising a public power or performing a public function;
- 53.4 in terms of any legislation or empowering provision;
- 53.5 that adversely affects the applicant's rights or legitimate expectations;
- 53.6 that has direct, external legal effect; and
- 53.7 that does not fall under any of the exclusions in PAJA.

[54] Whether an action is an administrative action in terms of PAJA, requires an investigation into the facts and is best done on a case by case basis.³²

[55] The following facts are relevant to determining whether the third respondent's ruling is an administrative action:

55.1 The third respondent was established in 1989 as a voluntary scheme to play a self-regulatory role in the short-term insurance industry, it was not established in terms of legislation.³³

³² President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC) at paras 141 to 143.

³³ Third respondent's answering affidavit paragraph 38 p.003-12.

55.2 In 2004 the third respondent was granted recognition as a scheme in terms of the Financial Services Ombud Schemes Act 37 of 2004.³⁴

55.3 Chapter 14 of the Financial Sector Regulations Act 9 of 2017, which regulates ombud schemes, came into operation on 1 November 2020. The third respondent was recognised as an industry ombud during the transitional period in the Act, and received official recognition as an ombud scheme in terms of Section 194 of the Act on 29 April 2022. Section 211(3) of the Act makes it compulsory for financial institutions that provide short term insurance products to be members of the third respondent.³⁵

55.4 The service rendered to the public is not quasi-judicial and its functions are not performed in terms of any law or mandate. The third respondent's services to the public are contractually regulated.

55.5 The third respondent's jurisdiction and monetary jurisdiction are determined by its rules.³⁶

55.6 Complainants may withdraw their complaints at any time, are not bound by the third respondent's rulings, and may pursue their complaints

³⁴ Third respondent's answering affidavit paragraph 40 p.003-12.

³⁵ Third respondent's answering affidavit paragraph 42 pp.003-12 to 003-13.

³⁶ Third respondent's answering affidavit paragraph 42 pp.003-12 to 003-13.

in a court of law, irrespective of the stage of proceedings before the third respondent.³⁷

55.7 Policy holders and other complainants are not obliged to make use of the third respondent's complaint process, nor can they be compelled to do so.³⁸

[56] Having regard to the exposition of the facts as set out above, it appears that the third respondent is not exercising a public power or performing a public function, nor is it exercising a function in terms of legislation or an empowering Act.

[57] An applicant for judicial review does not have a choice as to the 'pathway' to review: if the impugned action is administrative action, as defined in the PAJA, the application must be made in terms of s 6 of the PAJA; if the impugned action is some other species of public power, the principle of legality will be the basis of the application for review.³⁹

[58] As previously mentioned, a ruling by the third respondent is not binding on a complainant, and there also appears to be no basis on which

³⁷ Third respondent's answering affidavit paragraph 45 p.003-13.

³⁸ Third respondent's answering affidavit paragraph 46 p.003-13.

³⁹ Minister of Home Affairs v The Public Protector 2018 (3) SA 380 (SCA) at para 28.

the third respondent's ruling can be considered to adversely affect the applicant's rights or legitimate expectations.

[59] In addition, the third respondent's ruling does not appear to have any direct external legal effect as it is neither a prerequisite for, nor an obstacle to, the applicant pursuing litigation against the first and second respondents.

[60] Consequently, there does not appear to be a factual basis on which to conclude that the third respondent's conduct is an administrative action in terms of PAJA,⁴⁰ with the resultant effect that no relief can be granted by this Court in terms of prayer 3 of the Notice of Motion.

ORDER

[61] For the reasons as alluded to above the following order is made:

61.1 The application against the second respondent and third respondents are dismissed with costs.

⁴⁰ See in this regard also *De Lange v Ombudsman for Long Term Insurance and Others* (919/2011) (2012) ZAECPHC 45 (26 June 2012) at paragraphs 10 and 11, and *Ngwenya N.O v Ombudsman for Long-Term Insurance and Others* (17326/2018) [2021] ZAGPJHC 172 (30 August 2021) at paragraph 8 where the court found that PAJA does not apply to the Ombudsman for Long Term Insurance.



C. COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

APPEARANCES:

Counsel for the Applicant: Mr. Ndala

Instructed By: Ndala Inc.

Counsel for Second Respondent: Adv. WA De Beer

Instructed By: SNB Attorneys

Counsel for Third Respondent: Adv. M Niewoudt

Instructed By: MOODIE & ROBERTSON

Date of Hearing: 12 February 2024

Date of Judgment: 05 October 2024