IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: **2887/2021**

In the matter between:

SIMON MAVELA Plaintiff
and
OUTSURANCE INSURANCE COMPANY LIMITED Defendant

Coram: JP DAFFUE J

Heard: 15 & 16 OCTOBER 2024 (final heads of arguments to be delivered on 2 DECEMBER 2024)

Delivered: 28 MARCH 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 13H00 on 28 MARCH 2025.

Summary: The plaintiff was comprehensively insured by the defendant. When his vehicle was written off in a collision he filed a claim which was repudiated by the defendant. Action was instituted. The defendant pleaded that the plaintiff provided inaccurate and/or false and misleading information which was material to assessment of the claim and furthermore, that he was driving the vehicle at the time of collision whilst under the influence of alcohol. The court held that the defendant proved the defences relied upon and dismissed the claim.

ORDER

1. The plaintiff's claim is dismissed with costs.

JUDGMENT

Daffue J

Introduction

[1] On 12 April 2021 an insured person's Toyota Fortuner motor vehicle was damaged beyond economical repair in a motor vehicle collision on the R26 road between Hobhouse and Wepener in the Free State Province. His claim to be compensated for his loss was repudiated by the insurance company whereupon action was instituted.

The parties

[2] The plaintiff is Mr Simon Mavela, a major male surveyor residing in Mthatha, Eastern Cape Province, formerly residing in Bethlehem, Free State Province. He was represented by Adv HJ Benade on instructions of Phatshoane Henney Inc, Bloemfontein.

[3] The defendant is Outsurance Insurance Company Ltd, a short-term insurance company registered in terms of the Short-term Insurance Act 53 of 1998. It was represented by Adv RC Jansen van Vuuren on instructions of Van Breda and Herbst Inc. The local correspondent is McIntyre Van der Post, Bloemfontein.

The pleadings

[4] It is not in contention that the plaintiff and defendant entered into a valid short-term insurance policy in terms whereof the plaintiff's Toyota Fortuner motor vehicle was comprehensively insured by the defendant, *inter alia* against damages arising out of a motor vehicle collision. It should be recorded that the plaintiff attached only a portion of the insurance agreement between the parties to his particulars of claim as

annexures A and B.[1] The defendant denied the correctness of his version and attached the entire schedule and facility document to the plea as annexures OUT 1 and OUT 2.[2] More about this later.

[5] The defendant pertinently denied in its plea that the plaintiff complied with all his responsibilities in terms of the insurance agreement, that the plaintiff's Toyota Fortuner was damaged in a motor vehicle collision on 12 April 2021 on the R26 road between Hobhouse and Wepener and that he suffered damages as alleged.

[6] On 23 June 2022 the defendant admitted during a pre-trial conference held in terms of rule 37 that a motor vehicle collision occurred in which the plaintiff's Toyota Fortuner was damaged. Also, that the plaintiff carried the risk of loss, damage and destruction of the Toyota Fortuner. It also admitted that the Toyota Fortuner was insured against damages arising from a motor vehicle collision 'subject to the terms and conditions contained in the facility document and schedule under policy OT30338752'.[3]

[7] The parties agreed in the pre-trial conference that annexures A and B to the particulars of claim and annexures OUT 1 and OUT 2 to the plea reflect the relevant insurance schedule and facility document and that the defendant repudiated the claim.

[8] Consequently, the following remained in dispute:

a. whether the plaintiff complied with all his responsibilities in terms of the insurance agreement;

b. that the plaintiff suffered damages;

c. that the defendant was entitled to repudiate the claim on the basis as pleaded in paragraphs 7.1.1 to 7.1.7 of the plea;

d. that the defendant is liable to pay the claim; and

e. the quantum of the claim.

[9] The parties also agreed during the pre-trial conference that the merits and *quantum* be separated for the trial to proceed on the merits only, the *quantum* of the

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[1] Record: p 5, paras 3.3 & 3.4 read with pp 9-20.
[2] Record: pp 40&41, par 3 read with pp 48-138.
[3] Record; p 142, para 1.3 of the pre-trial minutes.

claim with reference to paragraphs 5.2 to 5.5 of the particulars of claim, read with paragraph 5 of the plea, to stand over for later adjudication if required. At the onset of the hearing I ordered a separation of issues as agreed upon.

The particular defences pleaded by the defendant

[10] The reasons for denial of liability and rejection of the claim are contained in paragraph 7 of the plea. It is alleged that the plaintiff stated on two occasions during investigation that 'he was at a stop street and heard a bang on the left side.' In the first occasion he also referred to potholes in the road. Having obtained further information, the defendant determined that the plaintiff had provided incomplete and/or inaccurate, false and/or misleading information in respect of the incident and the prevailing circumstances before and after the incident as well as his actions at the time which was material to the assessment of the claim. The defendant also ascertained that the plaintiff was under the influence of alcohol at the time of the incident. It averred that the plaintiff was charged with reckless and negligent driving and driving under the influence of liquor in respect of the vehicle collision. Consequently, the plaintiff committed a material breach of the insurance agreement entitling the defendant to reject the claim.

[11] It is apparent from the facility document, attached as annexure B to the particulars of claim, that driving under the influence of alcohol, or drugs, or when the concentration of alcohol in the blood exceeds the legal limit, or if the driver fails a breathalyser test, or refuses to give samples in this regard after an accident, shall be a reason to reject an insured person's claim.[4] This is the portion that was emphasised by the plaintiff's counsel during his opening and closing argument. Plaintiff's counsel apparently did not give attention to the admitted insurance schedule attached as annexure OUT 1. Under the heading 'Claims'[5] the plaintiff's responsibilities are set out. He was obliged to provide true and complete information to the defendant and the authorities. Insofar as the defendant acts on information provided by insured persons, it stipulated that any information which is misleading, incorrect or false will prejudice the claims process. Finally, the following is stated under a further sub-heading, 'Fraud or dishonesty': 'If you or anyone acting on your behalf submits a claim, or any

[4] Record: pp 18&72.
[5] Record: pp 62-64,

information or documentation relating to any claim that is in any way fraudulent, dishonest or inflated, we will reject that entire claim….'

Summary and evaluation of the evidence

[12] The plaintiff, Mr Simon Mavela, testified in support of his claim. His nephew, Mr Lebogang Mofokeng, was called to testify in support of the plaintiff's version to explain the presence of beer bottles in the plaintiff's vehicle at the time of the collision. The plaintiff did not testify in chronological order and I shall summarise his version as led during his examination in chief. He arrived at Bethlehem on the previous Friday night in order to attend a funeral to be conducted on the Saturday. According to him the Toyota Fortuner was stationary at the same place in the yard of his younger sister-in-law during the weekend. The vehicle was under his supervision all the time. The funeral proceedings ended at about 17h00 (5 o'clock). He departed from Bethlehem on the following Monday, *ie* 12 April 2021, on his way to Mthatha. He did not drink any alcohol during the weekend or on his way to where the collision occurred. He stopped at the Spar in Ficksburg to buy something to eat. In fact, if his memory served him correct, he consumed alcohol for the last time about two months before the incident.

[13] The plaintiff testified that as he was driving, he suddenly heard a huge impact from behind, stating that he could not say from the side, but from the back. He got confused and lost his consciousness for a while. However, he managed to control the vehicle, but could not say how it became stationary. He remembered that the vehicle left the road to the extreme left thereof, but could not remember anything further. He admitted photos 1 and 2 of exhibit A, depicting the damage to the Toyota Fortuner. He injured his right upper arm and incurred a deep cut to his lower lip. When he regained consciousness he disembarked the vehicle and took a walk to try and find help. There was nobody to be seen in the area. He went back to the vehicle, sat inside and made calls for his vehicle to be towed away.

[14] Eventually, after a very long time - according to the plaintiff's estimation after about two hours - a gentleman arrived who found him seated in his Toyota Fortuner. This person started talking to him. Thereafter paramedics and police officials arrived as well. The first gentleman – who he believed was a police officer - arranged that his vehicle be taken to the local Wepener panel beater shop. He was taken to the Pelonomi hospital where an operation was conducted on his broken upper arm.

[15] The plaintiff disputed that he had consumed liquor. He was informed by a police officer of the presence of beer bottles in his vehicle while he was hospitalised. He was on his version not aware of beer bottles in the vehicle whilst driving or even directly after the collision. Also, he was unaware of an alcohol smell in the vehicle. This is highly improbable and will be touched upon again later. He tried to explain the smell of liquor after the collision by referring to broken liquor bottles that were found lying around in the vehicle and the probable spillage of liquor that might have caused the smell. Yet, he personally detected nothing of this sort. He denied that the smell came from him. On a question by me, the plaintiff stated that he did not see bottles, broken or otherwise, in the vehicle during the time when seated in the vehicle after the collision.

[16] Eventually, the plaintiff came up with a long story to the effect that after the funeral his wife requested permission for her and other ladies to be seated in the Toyota Fortuner because there was not enough space in the house. He agreed. It was already dark by then. He then went to bed to take a nap. This version is in total contrast with that of his nephew, Mr Mofokeng.

[17] He explained that when the person came to him while he was seated in his vehicle, he talked to him, but kept it short as he had difficulty speaking due to the bleeding from his mouth. He denied that he was ever called upon to appear in a criminal case. He was referred to the defendant's letter of repudiation on page 3 of exhibit A, informing him that the claim was rejected due to him driving under the influence, relying on the relevant clause of the agreement referred to earlier. In a final paragraph it is stated as follows: 'Please note that the abovementioned reason(s) for rejection may not necessarily be exhaustive.'

[18] The plaintiff insisted that he was not under the influence of alcohol when driving the particular day. In concluding the examination in chief the plaintiff denied presenting the defendant with false and misleading information as alleged in the plea. He was adamant that he explained everything and only told the truth.

[19] During cross-examination the plaintiff found it really difficult to explain his version and did not know how to cope with the versions of the defendant's witnesses put to him. He initially denied that he had made a sketch to explain the collision, but

when the sketch, submitted into evidence as exhibit B, was shown to him, he admitted drawing and signing it. This depicts a T-junction to the left of the road he was travelling on and that his vehicle eventually veered off the road to the left after passing the T-junction. He did not draw any other vehicle into the sketch and testified that he did not see any other vehicle. He only heard afterwards that another vehicle was involved.

[20] He was referred to three further photographs and confirmed that two photographs represent his Toyota Fortuner, depicting damage to the left side and back thereof. He also admitted the third photograph as that of a Toyota Hilux Raider (Raider), indicating severe damage to the front thereof. However, he insisted that he never saw the Raider. The plaintiff, correctly in my view, conceded that although the Toyota Fortuner was also damaged at the back, the more severe damage is on the left hand side thereof. These photographs were admitted as exhibit C, in respect of the Raider and exhibits D and E in respect of the Toyota Fortuner.

[21] When it was put to him that his evidence and sketch differ materially from the defendant's version of the collision, being that there was no T-junction or adjoining road, that the Toyota Fortuner firstly went to the left, then suddenly and sharply moved to the right and into the closely approaching Raider's lane, that it caused the Raider to collide into the Fortuner's left side, that it then veered off the road to the right and ended up on his right some distance from the road, he simply answered that he never saw another vehicle approaching him from the front.

[22] It is important to record that the plaintiff confirmed during cross-examination that his version in court was in line with what he told Mr Van Zyl, the assessor who consulted him on behalf of the defendant shortly after the incident. There was therefore no necessity for the defendant to call Mr Van Zyl.

[23] The plaintiff testified that the only person that approached him whilst in his vehicle, communicated with him in isiZulu, his home language. He could not remember that two further persons – the defendant's witnesses as put to him - approached him at different stages, spoke to him and observed that he was under the influence of liquor. He stated that he did not take notice of the other two, but only listened to the one speaking isiZulu. He denied that he was at any stage aware of beer bottles in the vehicle. It is highly improbable that the plaintiff who drove through the towns of

Bethlehem and Ficksburg and on the R26 on his way home did not hear the clinking sound of glass beer bottles. Logic dictates that he had to stop at stop streets from time to time, pull off again and go around corners, causing the bottles to roll and make contact with each other. Yet, he heard no clinking sound at any stage. His version that he became aware of the presence of beer bottles in the vehicle for the first time when in hospital is inherently incredible.

[24] When the defendant's version was put to him that he never disembarked the Toyota Fortuner or walked around as the Raider's driver and his passengers were on the scene all the time, and shortly thereafter their employer, he insisted that there were no other people on the scene or even vehicles passing during the two hours that he was sitting in the Toyota Fortuner. This he said notwithstanding the evidence of three independent witnesses who were called by the defendant to testify. The Raider was standing in the road close to the tyre marks made by the Toyota Fortuner. I cannot accept the plaintiff's version as true.

[25] In re-examination the plaintiff confirmed that he gave Mr Van Zyl the full picture as to how the incident occurred. On a question by me, he confirmed the duration of about 2 hours before the first person arrived. This is improbable, bearing in mind the presence of Mr Nzutha, the driver of the Raider on the scene and his evidence that he immediately went to the Toyota Fortuner to speak to him. W/O Tsotetsi and Mr Nzutha's employer, Mr Van Tonder, also arrived at the scene shortly after the incident.

[26] Mr Lebogang Mofokeng, the plaintiff's nephew, gave a very brief version as to what transpired during the weekend. Contrary to what the plaintiff testified about the presence of his wife and her female friends in the Toyota Fortuner, the nephew testified that he, his cousin and his cousin's colleague embarked the Toyota Fortuner and enjoyed themselves, drinking alcohol from 2 o'clock until about 5 o'clock that afternoon. This is contrary to the plaintiff's version that his wife requested permission that she and her female friends may embark the vehicle at a time that it was already dark. At a stage, according to the nephew, they disembarked and drove off in his cousin's car to buy some beer. There might have been one or two sealed beer bottles and two or three empties in the Toyota Fortuner when they disembarked. On their return they did not enter the plaintiff's car again, but remained in the cousin's car. It is

quite strange that these three males decided to occupy the plaintiff's vehicle initially when the cousin's vehicle was available.

[27] In cross-examination he stated that they never fetched the sealed bottles at any stage from the Toyota Fortuner. He alleged that they forgot about them as they were drunk. This is just so improbable. The witness and his cousin went to buy more beer where after they remained seated in the cousin's car. Why would anyone so keen to consume alcohol, leave behind full beer bottles and then spend money to buy more beer? This version is rejected as false and it is in any event in contrast with the plaintiff's version to the effect that his wife and her friends would be using the Toyota Fortuner. According to the witness he only discovered that they had left beer behind in the Toyota Fortuner when he was told that alcohol was found in the vehicle after the collision. Mr Mofokeng was adamant that the plaintiff did not drink any alcohol during the whole weekend. According to him the plaintiff is not a regular drinker.

[28] The defendant called three witnesses, to wit Warrant Officer MS Tsotsetsi, Mr DAF van Tonder and Mr SS Nzutha. It should be mentioned at this stage that three photographs of the collision scene were admitted as evidence, to wit exhibits G, H and J. These photographs depict the tar road, to wit the R26 between Wepener and Hobhouse. No potholes appear on the photographs and also no T-junction. As one looks at the photographs, the road curves to the right. A double barrier line prohibits overtaking from either direction. The photographs were taken on 20 April 2021, eight days after the collision. The tyre marks on all three photographs indicate movement of a vehicle from the far left of the one lane across the barrier lines onto the lane of oncoming traffic and leaving the tar surface.

[29] W/O Tsotetsi was the first witness for the defendant. He is stationed at Wepener and was on duty on the day of the collision. He received a report at about 16h00 and immediately went to the scene, about 8 km from Wepener. He explained the direction in which the two vehicles were travelling before impact. He went to the driver of the Toyota Fortuner who was seated in his vehicle. He was identified as Simon Mavela, the plaintiff. He noticed beer bottles which he eventually took and handed in at the SAP 13 store when he opened a docket against the plaintiff. When he got closer to the driver he picked up an alcohol smell from his breath. His eyes were red. The plaintiff

was injured. He also went to the Raider and spoke to the driver, Sebapala (Mr Nzutha). His two passengers were seriously injured. The witness called an ambulance.

[30] When the ambulance arrived, the paramedics took the plaintiff out of the vehicle onto a stretcher and put him in the ambulance. At that stage the witness was close to the plaintiff and he could detect the alcohol smell from his breath. It is reiterated that the plaintiff also testified that the witness was present when he was loaded into the ambulance.

[31] He testified about tyre marks on the road and described it as a zig zag shape before it left the road. He testified that charges were preferred against the plaintiff as he was satisfied that he was driving under the influence of alcohol. According to him the plaintiff was trapped inside his vehicle. The witness was confused as to from which side of the vehicle he spoke to the plaintiff. He confirmed that he spoke through an open window. The plaintiff could not pronounce words properly which indicated that he was under the influence of alcohol. Although he mentioned that this could not be ascribed to the injuries, I am mindful of the fact that the lip injury could cause the plaintiff to speak with some difficulty.

[32] In cross-examination the witness confirmed that he deposed to his witness statement at about 21h30 that evening. The statement was handed in as exhibit F. He was criticized for failing to refer to the zig zag tyre marks on the road, that the plaintiff's eyes were red and that his tongue was stiff and slippery. The witness said it was not necessary to provide all the detail in the statement, but conceded that these aspects were in fact crucial. He was also confronted with the confusion about whether he actually opened the Toyota Fortuner's door before speaking to the plaintiff. He admitted that beer could have spilled when the beer bottles broke as a result of the impact.

[33] Although he was questioned about his description of the tyre marks, he eventually confirmed the scene and photos taken on 20 April 2021, exhibits G, H and J. He maintained that according to him the plaintiff's left leg was broken and stuck underneath the pedal.

[34] Mr Van Tonder, the owner of the Raider, testified next. His employee called him to the scene. When he arrived at the scene, the employee called Seun (Mr Nzutha),

was arranging the traffic. Triangles were put out. The Raider was stationary in the road. He went to the driver of the Toyota Fortuner and spoke to him through the open left hand side window which was broken. The driver was talking to himself. He did not understand what he was saying. He mentioned the presence of beer cans inside the vehicle – it is common cause that there were beer bottles in the vehicle – and mentioned that he smelled alcohol coming from the inside of the vehicle. He called SAPS and an ambulance. He went back to the plaintiff's vehicle at a stage before the ambulance arrived at which stage he was still talking to himself. He pointed out the tyre marks on the road, which he referred to as skid marks, to the police officers that arrived at the scene. He determined the point of impact on the road, relying on the fluid and oil spillage from both vehicles as well as mud from the Raider. The point of impact was inside the Raider's lane as it was travelling to Hobhouse. According to Mr Van Tonder he followed the tyre marks and established from the tracks that the Toyota Fortuner moved off the tar road to the left and from there the vehicle came back and eventually left the road on the right hand side. He testified that it was clear that the Raider collided head-on with the left side of the Toyota Fortuner.

[35] In cross-examination he confirmed that he saw four lines of tyres and not two as depicted on the photographs. However, there was no doubt that the scene of the collision was depicted in the photographs. He insisted that there was a strong smell of liquor coming from the vehicle and that he saw a beer can. When referred to the contradiction between him and W/O Tsotetsi, he pointed out that he was more concerned to find out about the plaintiff's injuries, but they could not understand each other. He was speaking English and the plaintiff in an indigenous language.

[36] Mr Nzutha was the defendant's last witness. He was the driver of the Raider. His version of how the collision occurred was not attacked at all. He confirmed that the Toyota Fortuner swerved across the barrier lines into his lane of traffic and that there was nothing which he could do to avoid the collision. He went to the Toyota Fortuner and opened the passenger door. A strong smell of alcohol was detected. He asked the driver if he was fine. The response was inaudible as he was mumbling. The witness went closer to the driver's face to hear what he was saying, but then caught the smell of alcohol from the driver's breath. He noticed bleeding from the driver's mouth, but did not see beer bottles. He decided to close the door and called his employer. He then put triangles out to warn other road users.

[37] The pictures confirm the version presented on behalf of the defendant. I am satisfied that the defendant's version as to how the collision occurred must be accepted. Therefore, I find that the plaintiff's Toyota Fortuner moved across the barrier lines out of control if the tyre marks are considered and left the road to the right and not to the left as the plaintiff testified.

[38] Plaintiff's counsel relief on *Incorporated General Insurances Ltd v Boonzaaier NO (Boonzaaier)*[6] in submitting that the defendant had failed to prove that the plaintiff was driving under the influence of liquor. The facts *in casu* are totally distinguishable from those in *Boonzaaier* where the court commented as follows:

'It is however not necessary to decide these legal aspects as there is no evidence on record to show that the insured had at the time of the accident driven his car while under the influence of intoxicating liquor. It cannot be deduced that the insured upset the dish of peanuts on account of the liquor he had consumed nor that he failed to reduce speed after having observed and been reminded of the road sign or failed to see and/or remember the right-angled bend in the road on account of the influence of the intoxicating liquor he had consumed. His behaviour and lack of care can as easily be accounted for by the thoughtlessness, lack of circumspection and the effervescent excitement occasioned by the normal vitality of youth. The insured at the time of his death was but 23 years of age.'

[39] In *Minister of Safety and Security and Another v Swart*[7] the issue was whether, based on the facts known to the second appellant at the time when he observed the respondent at the scene, it could be found that the respondent was the driver of the vehicle that went off the road and whether his suspicion, that the respondent was at the time under the influence of intoxicating liquor, was reasonable. The road on which the particular vehicle travelled was dark with no lights and had a dangerous curve. There were also road constructions with no road markings to alert road-users of any possible danger. The court pointed out the following:

'[18] Based on the facts of this case the key question that merits consideration, is whether the mere smell of alcohol was sufficient to give rise to a reasonable suspicion on part of the second appellant that the respondent was under the influence of intoxicating liquor and that for that reason he could not drive a vehicle.'

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[6] 1974 (4) SA 200 (c) at pp 203C -204C.
[7] (194/11) [2012] ZASCA 16; 2012 (2) SACR 226 (SCA) (22 March 2012).

[40] The court continued to say that there was no evidence that the respondent was unsteady on his feet, that his speech was slurred, that he could not walk in a straight line or that his eyes were bloodshot. It then concluded:

'[22] On the contrary, the respondent behaved like a person in full control of his faculties. When he saw their vehicle he ran towards them and stopped them. He used a torch light to flag them down. Furthermore, when the respondent requested that they drive him to his home to fetch his other van, he spoke in a friendly and coherent manner. All these actions indicated that the respondent was in full control of his senses.'

[41] I shall now deal with the plaintiff's alleged driving under the influence of alcohol. At first glance it may appear that the parties' versions are mutually destructive, in which event the witnesses' credibility and reliability, and the probabilities of their versions must be weighed to determine which version shall be accepted[8], but from a closer evaluation of the evidence, it might not be necessary, as set out below.

[42] The plaintiff's version is that he did not drink any alcohol, that he did not have an alcohol smell, that he did not know of any alcohol in his vehicle, that he walked around after the collision and that he only spoke to one person after the collision. The defendant's version is that the plaintiff's breath strongly smelled of alcohol and that his speech appeared slurry as if he was under the influence, that his eyes were red, that several bottles of beer were found in his vehicle, that he never walked around after the collision, that he spoke to several people, and that he was not in control of his vehicle before the collision occurred. I accept that there may be a question mark about the red eyes in light of W/O Tsotetsi's failure to mention this in his statement. But the totality of the facts must be considered. In failing to give an explanation what led to the movement of his vehicle immediately before impact, the plaintiff was probably so intoxicated that he did not have any control over his faculties and do not know what happened. Unlike in *Boonzaaier,* it is not a case of the plaintiff's alcohol smell alone that has to be considered.

[43] The plaintiff does not know how the collision occurred. He did not know how the road looked like at the time he spoke to the assessor and thought there was a T-junction. He did not even know that he collided with another vehicle. Furthermore, the

[8] *Stellenbosch Farmer's Winery Group (Pty) Ltd & 1 v Martell Et Cie & Others* 2003 (1) SA 11 (SCA) at p 141.

plaintiff eventually admitted W/O Tsotsetsi's observations and the defendant's version of the movements of the Toyota Fortuner.

[44] The plaintiff had a reason to remain steadfast with his version presented to Mr Van Zyl and his nephew obviously tried his best to assist the plaintiff. The nephew was a biased witness and as indicated, there are inherent improbabilities in both versions. The defendant's witnesses had no reason not to tell the truth, their evidence was corroborative, withstood cross-examination and they conceded propositions that they could not dispute, all of which indicate that they were credible and reliable. Given the evidence as a whole, the plaintiff's version is illogical and nonsensical, rendering it improbable, whereas on the same score, the defendant's version is the only one possible, is logical and sensical, and therefore probable.

[45] In the absence of any other explanation of how the collision occurred, the most reasonable, if not the only reasonable and plausible explanation, to be drawn from the common cause or established facts is that the plaintiff drove the vehicle whilst under the influence of alcohol. His claim should be dismissed with costs on this ground.

[46] In *Lehmbecker's Earthmoving and Excavators (Pty) Ltd v Incorporated General Insurances Ltd*[9] the court considered a condition in an insurance agreement stipulating that the insured will forfeit any benefits under the agreement in the case of a fraudulent claim. It held, that the words 'all benefit under this policy shall be forfeited' upon the making of a fraudulent claim were at least clearly capable of bearing the meaning that, as from the time that the fraudulent claim was made, the insured should have no further benefit or claim under the policy; and, therefore, that valid claims already accrued (and, a fortiori, valid claims already paid out to the insured) remained inviolate and untouched by the subsequent, unrelated fraudulent claim. A term as contained in the insurance agreement *in casu* is not *contra bonos mores* and there is no reason not to accept it as valid and enforceable. I was not addressed in this regard at all by the plaintiff's counsel.

[47] From the totality of the evidence it is apparent that the plaintiff materially failed to give true and complete information regarding the collision and from his own evidence, he persisted throughout with his false version. The plaintiff clearly did not

[9] 1984 (3) SA 513 (A).

comply with his contractual obligations when he filed his claim. Therefore, based on this defence as well, the claim should be dismissed with costs.

Conclusion

[48] As indicated herein, I am satisfied that the defendant has proved the defences relied upon. The plaintiff provided false information during the assessment of his claim which was material for determining the claim, but furthermore, he drove his vehicle whilst under the influence of alcohol at the time he caused the collision.

Order

[49] The following order is made:

1. The plaintiff's claim is dismissed with costs.

JP DAFFUE J

Appearances

For plaintiff:	Adv HJ Benade
Instructed by:	Phatshoane Henney Inc
	Bloemfontein
For defendant:	Adv RC Jansen van Vuuren
Instructed by:	Van Breda and Herbst Inc
	c/o McIntyre and Van der Post
	Bloemfontein