

AT LAUTOKA

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Civil Jurisdiction

Action No. 287 of 1978

BETWEEN: DAVENDRA KUMAR s/o Bhagauti
Prasad

Plaintiff

and

QBE INSURANCE LIMITED

Defendant

Mr. Chaudhary, Counsel for the Plaintiff

Mr. R. Krishna, Counsel for the Defendant

J U D G M E N T

The plaintiff purchased a delivery van from Burns Philp in May 1978 at the same time executing a bill of sale to cover most of the purchase price. At the same time he took out a policy of Insurance with the defendant company in respect of the vehicle. The proposal form Exhibit C was signed by the plaintiff though he said it was filled in by somebody in Burns Philp. He argued that the person who filled in the form was the agent for the defendant, but clearly that was not the position. He was surely merely a link between the plaintiff and defendant, and there was no evidence that he overrode the plaintiff or put anything in the proposal form that was not what the plaintiff told him or agreed to, and signed to.

In reply to a question in the proposal form "Have you or any other person who to your knowledge drives or is likely to drive the vehicle -

(a) SECURED THE NECESSARY LICENCE TO DRIVE"

the answer is given "Yes".

Just above the plaintiff's signature is the following "I/we do hereby declare and warrant that the answers given above are in every respect true and correct and I/we have not withhold any information likely to affect the acceptance of this proposal....."

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The fact is that the plaintiff obtained a driving licence in 1975, renewed it in 1976, and that it had lapsed on 11/11/77 and not been renewed. So that at the time of signing the proposal form, and at the time of the subsequent accident the plaintiff did not hold a valid current driving licence.

The defendants argue that this reply by the plaintiff was untrue and entitled them to avoid the policy.

The plaintiff's argument is that on the true construction of the words of the question there was no untrue statement, that he had secured a driving licence and was qualified to drive, but that he had merely allowed the licence to lapse. It is certainly correct that the question could be rather better worded by the defendants. But can the question be of any value unless it is construed as meaning a "current and valid licence"? It that were so of course the second part of the question i.e. "ever had a licence suspended, endorsed or cancelled" would be unnecessary. On the other hand could it not be said that the plaintiff had withheld information likely to affect the acceptance of the proposal? Surely the answer to that is - if the defendant had known that the plaintiff's driving licence was expired and had expired 6 months ago would it have issued the policy? Would it not have insisted that the plaintiff obtained a valid licence?

However that may be the defendant issued the policy of insurance Exhibit D insuring the vehicle for \$6,837. The policy contains various exclusion clauses the relevant one being -

"This policy does not cover -

4. Loss damage liability and/or compensation for damage and/or injury caused whilst the motor vehicle

(e) is being driven by the Insured or by any person with the consent of the Insured if the driver was not duly authorised under all relevant laws, by laws and regulations to be driving such vehicle for the purpose for which it was being used."

The defendants argue that in accordance with the terms of this exclusion clause the plaintiff is not entitled to any claim under the policy. The plaintiff has argued to the contrary claiming that he had a driving licence and was qualified

to drive the vehicle, but because it had lapsed he was merely liable to a fine. That is an argument I cannot accept. The Traffic Act does not say "no person shall drive a vehicle unless he has in respect of it a valid driving licence", it merely provides for a penalty in respect of any one driving a motor vehicle without having a valid driving licence. But surely it must amount to the same thing. The purpose of the provision is to keep off the roads persons not in possession of valid and current licences. So that at the time of the accident the plaintiff was not duly authorised under the Act to be driving the vehicle.

There is also another exclusion clause in the following provision in the policy -

"Provided always that the due observance and fulfilment by the insured of the terms provisions conditions and memoranda contained in endorsed on or attached to this policy in so far as they relate to anything to be done or complied with by the insured and the truth of the statements and answers in the said proposal together with all statements made in writing by the insured or anyone acting on behalf of the insured for the purpose of this policy shall be conditions precedent to any liability of the company to make any payment under this policy."

The plaintiff had an accident which considerably damaged the car, the cost of repairs being over \$4,500. The accident occurred on 2/7/78, and subsequently the plaintiff, apparently realising that his driving licence had lapsed, renewed it. He was charged with driving without a driving licence, pleaded guilty and was convicted and fined. Exactly when he renewed his licence is not clear. It was never produced and in fact the plaintiff said that it had not been renewed on the occasion he saw Jitendra.

On 5/7/78 the plaintiff went to the defendants office with a duly completed claim form. In the claim form in appropriate places he gave the number of his driving licence, the class of vehicles covered, the date it was obtained (i.e. 12/11/75) all correctly. However in the place where he was to insert the date the licence was in force to he had inserted 3/7/79. This might or might not have been correct on 5/7/78 because by then the

licence may have been renewed, but it was not correct for 2/7/78, the date of the accident because on that date the licence had ceased to be in force since 11/11/77.

But this date of 3/7/79 has been crossed through with a different coloured ink and the date 11/11/77 written above it with marks to one side which could be initials - even the plaintiffs initials. There is dispute as to when this was written in.

The plaintiff says he went to the defendant's office with the form on 5/7/78, and with him were a solicitor M.T. Khan and two other persons. According to him he gave Jitendra Dalton, the defendant's branch manager at Lautoka the claim form and his driving licence and Jitendra noted that it had expired. M.T. Khan then said he had had a driver whose licence had expired in similar circumstances and the insurance company had paid. Apparently Jitendra said nothing, collected the claim form that had been filled in and \$400 being excess payable by the plaintiff under the policy, and, apparently also an estimate of the cost of repairs and there was no other conversation. He says that when he handed over the form and paid the excess he believed that his claim would be met. Although in evidence he also said that when he used to see Jitendra he used to say it was up to Suva head office.

M.T. Khan is now dead and so could not be called as a witness, but two other persons gave evidence that they had gone to Jitendra's office on 5/7/78 with the plaintiff and M.T. Khan and seen the plaintiff produce his driving licence to Jitendra, and pay over the excess.

Only Jitendra gave evidence for the defendant. His evidence was that M.T. Khan never went to his office with the plaintiff, although he said that some time much later M.T. Khan spoke to him on the phone about the matter and said that the company had once paid in a similar case. He denied that the plaintiff had produced his driving licence and said that when he received the claim form and forwarded it to Suva only the date 3/7/79 was shown, it had not been crossed out nor had the date 11/11/77 been written above it.

He agreed asking for \$400 excess it being company policy to collect this money when processing claims but that he had no authority to accept liability on claims this

being done in Suva after due processing. There is no reason for me to believe otherwise. I note that at the bottom of the claim form are the words " N.B. ALL QUESTIONS MUST BE ANSWERED - THIS COMPANY DOES NOT ADMIT LIABILITY BY THE ISSUE OF THIS FORM."

Apart from asking for \$400 and forwarding the form and money to Suva, there was nothing in the evidence which could indicate that the company had already decided to meet the claim and were estopped from denying it.

So far as the disclosure of the date the driving licence expired the plaintiff gave no explanation how the date was altered from 3/7/79 to 11/11/77, or whether it was his writing and I accept Jitendra's evidence that when the form was handed to him and when he forwarded it to Suva the date shown was 3/7/79. I accept also from him that he did nothing to give the plaintiff any reason to believe that he was accepting liability on behalf of the defendant company. And I accept that he had no power to commit the defendant company to paying the claim.

The sole issue remaining is whether the defendant company had the right in accordance with the terms of the policy to reject the plaintiff's claim and deny liability.

It can hardly be said that the plaintiff had made full disclosure on a material matter, it can hardly be said that the absence of a valid current driving licence is not a material consideration.

The plaintiff's counsel has argued the policy was only voidable because of the plaintiff's omission, and that since the policy had not been avoided by the defendant before the accident the defendant was bound by it. He cited the case of Ram Dayal v. Regina Vol. 6 FLR 134 which was a criminal case involving the existence of a valid 3rd Party insurance, and section 11 of the Motor Vehicles (Insurance) Ordinance, which was intended to protect 3rd parties. I do not find that case particularly helpful in this case, nor the cases therein cited.

Nor do I find the distinction between void and voidable policies helpful in this case. It may well be relevant in a criminal case, or where Third persons are involved, where an insurance company might still be prepared to consider itself liable under the policy even though there might be grounds for denying liability. But as between the insurers and insured the

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matter depends entirely upon the construction of the exclusion clause and whether the insurance company wishes to rely on it. This I think can be deduced from Ram Dayal's case, Ram Prasad v. Regina 8 FLR. 63, Mazara Khan v. R. 11 FLR.161. It seems to be implicit in Mazara Khan's case for instance and Lester Bros. (Coal Merchants) Ltd. v. Avon Insurance Co. (1942) 72LL L Rep. 109 that the insurer can deny liability under the policy where the driver was to the owners knowledge driving without a licence.

In this case I consider that the defendants liability rests entirely on the construction of the exclusion clause 4(e) above quoted and to a lesser extent perhaps the information contained in the proposal form and the defendants were within their rights under the terms of the policy to deny liability.

The plaintiff's counsel argued that the defendants had waived their right to deny liability when Jitendra asked for and accepted \$400 excess from the plaintiff and forwarded the claim form to Suva. There is a clause in the policy dealing with waiver stating that any such waiver had to be expressly stated in writing. There was certainly no writing in this case, but then neither was there any evidence of waiver. There was no evidence that Jitendra said anything about waiver, and the mere fact that he asked for \$400.00⁵⁰ that the claim could be forwarded to Suva can not be construed as in any way waiving breaches of the conditions of the policy or as accepting liability on the part of the defendant under the claim - even if he had authority to admit the claim. And according to him he had no such authority. There was no evidence for the Court to think otherwise.

The result then is that the plaintiff's claim is dismissed with costs, to be taxed if not agreed.

LAUTOKA,
16th July, 1982.


(G.O.L. Dyke),
JUDGE.