



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**REPORTABLE**

**Case no: 603/2005**

In the matter between

**JOHANNES HERMANUS JACOBS N.O.**

**APPELLANT**

and

**FREDERICK JOHANNES BRAAFF**

**RESPONDENT**

**Coram: NAVSA, NUGENT, CONRADIE, HEHER and PONNAN JJA**

**Heard: 6 NOVEMBER 2006**

**Delivered: 24 NOVEMBER 2006**

**Summary: Insurance – motor vehicle extension clause – right in executor of authorized driver to compel insured to submit claim for indemnity to insurer arising from tacit term of agreement for use of the vehicle.**

**Neutral citation: This judgment may be referred to as Jacobs v Braaff [2006] SCA 142 (RSA)**

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**JUDGMENT**

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**HEHER JA:**

[1] This is an appeal with leave of the court *a quo* (Waglay J) against an order dismissing the appellant's claim with costs. The relief which was sought was an order compelling the respondent to submit a claim on the appellant's behalf to Santam Insurance Company ('Santam') under circumstances which are described below.

[2] In May 2000 a young woman, Ezelda Ann Fielding, caused a summons to be issued against the appellant (as first defendant) and Frederick Johannes Braaff (as second defendant). I shall hereinafter refer to the parties by their designations in those proceedings.

[3] The first defendant was cited in his capacity as executor in the deceased estate of Heinne Frederick Braaff. The deceased was the son of the second defendant.

[4] The plaintiff claimed payment from the defendants jointly and severally of R722 581,60 as damages. It was common cause at the trial of the matter that on 29 November 1997 the plaintiff was a passenger in a motor car driven by the deceased and of which the second defendant was the owner. By reason of the negligence of the deceased the vehicle left the road between Robertson and Bonnievale near Montagu, crashed and caught fire. The deceased died in the accident. The Plaintiff was severely injured.

[5] The plaintiff alleged in her particulars of claim that the deceased was driving the vehicle at the relevant time with the second defendant's authority, wholly or partly on his behalf or in his interest and subject to his 'retention of the right to control the manner in which the said vehicle was driven'.

[6] The plaintiff further averred, and it was not disputed, that she had successfully lodged a claim against the Road Accident Fund in terms of the provisions of Act 56 of 1996 in respect of the damages she had suffered but that her compensation had, by reason of the provisions of the statute, been limited to an amount of R25 000.

[7] The first defendant denied all the material allegations made by the plaintiff. He caused a third party notice to be served on the second defendant. In his annexure he alleged that prior to the date of the collision the second defendant and Santam concluded a written agreement of insurance which was operative at the date of the collision. He relied on two clauses in that agreement and, not being in possession of the policy, quoted equivalent provisions from a standard policy. The actual clauses which were included in the policy were made available to the trial judge and it is convenient to quote them in this context. It can first be noted that section II of Part 5 of the policy afforded cover to the insured in respect of liability to third parties.

[8] Under the heading ‘Uitbreidings ingevolge Artikel II’ the policy issued by Santam in favour of the second defendant provided as follows:

‘(1) UITBREIDING BETREFFENDE AANSPREEKLIKHEID TEENOOR DERDEPARTYE (Slegs van toepassing indien die versekerde voertuig òf ‘n private tipe motorkar òf ‘n ligte afleweringsvoertuig is)

Indien die Versekerde voertuig òf ‘n private tipe motorkar òf ‘n ligte afleweringsvoertuig is, dan onderneem Santam om, ingevolge en behoudens die beperkings en by die toepassing van Artikel II van Afdeling 5 van hierdie polis,

- (a) enige persoon wat sodanige versekerde voertuig op las van of met die toestemming van die Versekerde bestuur of gebruik skadeloos te stel met dien verstande dat
  - (i) sodanige persoon nie ingevolge enige ander polis op skadeloosstelling geregtig is nie;
  - (ii) sodanige persoon asof hy/sy die Versekerde is die bepalinge uitsonderings en voorwaardes van die voormelde Afdeling en van hierdie polis vir sover dit van

toepassing kan wees nakom, uitvoer en daaraan onderworpe sal wees;

- (iii) geen versekeringsmaatskappy of versekeraar sodanige persoon enige motor- of motorvoertuigversekering of die voortsetting daarvan geweier het nie.’

[9] The first defendant alleged that the deceased had used and driven the insured vehicle with the permission of the second defendant as contemplated in the quoted extension. Accordingly, the first defendant averred, Santam was obliged to indemnify the authorised driver in respect of the damages claimed by the plaintiff.

[10] The first defendant further alleged that it was a tacit or implied term of the agreement between the deceased and the second defendant pursuant to which the deceased used and drove the vehicle with the second defendant’s permission, that in the event of circumstances arising whereunder the deceased became liable for damages to any party arising from his use of the vehicle, the second defendant would claim the indemnity contemplated in the written agreement of insurance from Santam. Accordingly, he averred that the second defendant was obliged to claim such indemnity on his behalf.

[11] The second term of the policy relied on by the first defendant was clause (7) which, under the heading ‘GEEN REGTE AAN ENIGE PERSOON BEHALWE DIE VERSEKERDE’, provided as follows:

‘Niks wat in hierdie polis vervat is verleen enige regte teen Santam aan enige persoon behalwe die Versekerde nie. Enige uitbreiding van Santam se aanspreeklikheid, ingevolge enige Afdeling van hierdie polis, ten opsigte van enige persoon behalwe die Versekerde verleen aan sodanige persoon geen reg om ‘n eis ingevolge hierdie polis in te stel nie, die bedoeling is dat die Versekerde in alle gevalle vir en namens sodanige persoon moet eis en die kwitansie van die Versekerde sal Santam in enige geval geheel en al van Santam se aanspreeklikheid ingevolge hierdie polis onthef.’

[12] The first defendant alleged that the second defendant was in the premises obliged to claim the indemnity from Santam on his behalf. Despite demand, the

second defendant had failed to do so. The first defendant therefore claimed

‘An order compelling [the second defendant] to claim, on behalf of [the first defendant] an indemnity from Santam Limited in respect of the damages, costs and expenses claimed by the plaintiff from [the first defendant] in the action by the plaintiff in the above Honourable Court under case number 2951/2000’.

The first defendant also relied on an alternative claim which for present purposes is not relevant.

[13] In his plea to the first defendant’s annexure to the third party notice the second defendant denied all the material allegations made by the first defendant.

[14] Prior to the trial the plaintiff and the first defendant concluded an agreement which at their instance Waglay J made an order of court. It provided as follows:

- ‘(a) On 29 November 1997, and on the Robertson-Bonnievale Road, Western Cape, the late Hennie (*sic*) Frederick Braaff negligently drove a motor vehicle with registration number CW 12199 (“the motor vehicle”) as a direct result of which a collision occurred in which the plaintiff, who was a passenger in the motor vehicle at the time, sustained injuries.
- (b) The defendant shall be liable to the plaintiff for the payment of damages if any, that the plaintiff may prove to have suffered as a result of her said injuries, after a deduction of R25 000, being the sum paid to the plaintiff by the Road Accident Fund.
- (c) The issue of the quantum of the plaintiff’s aforesaid damages, if any, will stand over for later adjudication.
- (d) The defendant shall be liable to the plaintiff for payment of the plaintiff’s costs in the cause as between party and party insofar as such costs relate to the determination of the aforesaid issue of the merits of the matter.’

[15] The first defendant proceeded with his action to compel the second defendant to claim an indemnity from the insurer. The main factual issue dealt with in evidence was the terms under which the deceased was driving the vehicle: did he do so with the permission of the second defendant, was there an agreement between them relating to its use and, if so, did that agreement extend to him the indemnity for which the policy

provided.

[16] Waglay J dismissed the claim. His principal findings were, in summary, that the second defendant had granted permission to the deceased to use the car and that the extension clause did not afford the authorised driver the right to enforce a claim against the insurer in the face of a refusal by the insured to assist him as provided in clause (7).

[17] Before proceeding to the merits of the appeal there is a further matter which requires mention. The second defendant, who testified at the trial in his own behalf, did not offer an explanation for his apparent refusal to assist the first defendant in the enforcement of his claim other than to say that he had left the matter in the hands of his insurer. It was apparent from the evidence of the plaintiff and, to some extent, from his own, that he cherished neither sympathy nor liking for the plaintiff and was not unhappy to see her without a remedy against the insurer. But counsel for the appellant submitted that the probabilities favour the conclusion that the insurer itself was the mind behind the second defendant's opposition and indeed Santam's representative stated in an affidavit that 'Ek hanteer hierdie eis namens die versekerde, Mnr F J Braaff'. It is unnecessary to reach a finding on this submission but I venture the comment that if counsel is correct such conduct is reprehensible given the insurer's undertakings in the policy (not to mention the slogan which is printed on the company's letterhead 'Actions speak louder than words; Dis wat ons doen wat tel').

[18] It is unnecessary to consider the correctness of the finding of the trial court concerning the third party's right to rely on clause (7). The appeal turns on the terms of the agreement between father and son.

[19] As Corbett AJA said in *Alfred McAlpine & Son (Pty) Lt v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531H, a tacit term denotes ‘an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties.’

At 532A the learned judge pointed out that the court implies not only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation, requiring the term had been drawn to their attention.

[20] The tests for a tacit term in the authorities are well-established and do not need repeating. See *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 (1) SA 822 (A) at 827B-828B, *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136H-137D; *Consol Ltd t/a Consol Glass v Twee Jongegezellen (Pty) Ltd* 2005 (6) SA 1 (SCA) at 18J-19F. It is the application of the tests to the facts which may be contentious.

[21] The telling evidence emanated from the first defendant himself. The deceased was a 21 year old college student, not in employment and possessed of no worldly goods. He lived in his parental home and was maintained by his father. He had been a licensed driver since his matric year but did not own a car. If he wished to use his father’s vehicle he was expected to obtain permission in advance. This indulgence was also extended to his sisters. The second defendant had been insured by Santam since about 1982 and he had always regarded the policy in question as one which would provide protection to his wife and children in the event of a mishap involving the vehicle, including incidents relating to driving of the vehicle by one of them. He had in turn made his family aware that insurance cover for them existed although he

had not thought it necessary to spell out the details. He conceded in cross-examination that should an event have arisen which fell within the terms of the policy he would have

had no hesitation in invoking the benefits, particularly if by so doing he avoided the involvement of a family member in litigation. He regarded the deceased as a responsible individual about whom he had no serious reservations in allowing him the use of the vehicle.

[22] In these circumstances this seems pre-eminently a case where, at the time that the deceased arranged to borrow the car on the fatal weekend, if a disinterested hypothetical bystander had asked ‘What will happen if Heinne is involved in an accident while driving and a claim is made against him by a third party?’, the overwhelming probability is that both father and son would, without hesitation, have replied ‘There is insurance cover for that, and a claim will be submitted in the eventuality’.

[23] For these reasons, it seems to me, the first defendant proved at the trial that the agreement to lend the car to the deceased included, as a tacit term, an undertaking to submit any claim against the deceased arising in the course of his driving of the vehicle to the insurer for indemnification of the deceased. There is no reason why the first defendant, as the executor in the deceased estate, should not be entitled to call on the second defendant to submit his claim to the insurer.

[24] In the result the appellant should have succeeded in the court below:

1. The appeal succeeds with costs.
2. Paragraph (b) of the order of the court *a quo* is set aside and replaced with the following:
  - ‘(b) The third party (Mr Braaff) shall submit a claim to Santam Limited for an indemnity in respect of the damages, costs and expenses claimed by

the plaintiff against the defendant (the executor) in the Court *a quo* under case no 2951/2000.

- (c) The third party is to pay the costs of the proceedings between himself and the defendant.’

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***J A HEHER***  
***JUDGE OF APPEAL***

NAVSA JA )CONCUR  
NUGENT JA )  
CONRADIE JA )  
PONNAN JA )