IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 2711/2009
REPORTABLE

In the matter between:

SHIRAZ KHAN **PLAINTIFF**

and

SWAZILAND ROYAL INSURANCE CORPORATION **1ST DEFENDANT**

STANDARD BANK OF SWAZILAND **2ND DEFENDANT**

Neutral Citation	:	Shiraz Khan vs Swd. Royal Insurance Corporation & Standard Bank of Swaziland (2711/09) [2017] SZHC 137 (17 AUGUST 2017)
Coram	:	MABUZA – PJ
Heard	:	30 JANUARY 2017
Delivered	:	17 AUGUST 2017

SUMMARY

Civil Procedure: Plaintiff made application in terms of Rule 39 (11) for the 1st Defendant to adduce evidence first – Duty to begin discussed – Onus and evidentiary burden – Two separate and distinct aspects – Application dismissed – Plaintiff ordered to begin first.

RULING

MABUZA -PJ

[1] Plaintiff is Shiraz Khan, an adult businessman of Lot No. 88, 1st Avenue Matsapha, Industrial Sites, District of Manzini.

[2] 1st Defendant is Swaziland Royal Insurance Corporation, a statutory corporation incorporated under the laws of Swaziland, carrying on business as insurers at Somhlolo Street, Mbabane, District of Hhohho.

[3] 2nd Defendant is Standard Bank of Swaziland Limited, a financial institution registered in terms of the laws of Swaziland with its principal place of business situated at Swazi Plaza, Mbabane District of Hhohho.

[4] No order is sought against the 2nd Defendant which is cited in its capacity as the financer (lessor) of the vehicle which is the subject matter of this action and has a direct and substantial interest in the cause of action.

[5] The Plaintiff has sued out a claim against the Defendant; and the action is defended by the 1st Defendant.

[6] On the date this matter appeared before me for trial counsel for the Plaintiff made an application in terms of Rule 39 (11) which states:

> "Either party may apply at the opening of the trial for a ruling by the court upon the onus of adducing evidence, and the court after hearing argument may give a ruling as to the party upon whom such onus lies: Provided that such ruling may thereafter be altered to prevent injustice".

[7] The 1st Defendant opposed this application and the trial ultimately did not take off and the Court did not make any ruling in terms of Rule 39 (11). The matter was postponed *sine die,* and wasted costs, for that day including certified costs of counsel were awarded to the 1st Defendant.

[8] During the period of postponement the 1st Defendant filed a notice of intention to amend its plea, to which the Plaintiff filed a notice of objection

on the grounds that the amendment was prejudicial to the Plaintiff in that the 1st Defendant was seeking to withdraw an admission and introduce a new defence.

[9] The amendment was subsequently withdrawn by the 1st Defendant and I heard arguments on the 31/01/2017 from counsel on behalf of the parties in respect of the Plaintiff's application under Rule 39 (11).

[10] The Plaintiff's claim is based on a written contract of insurance entered into with the Defendant in terms of which the 1st Defendant undertook to insure the Plaintiff's motor vehicle against *inter alia,* theft.

[11] The Plaintiff's argument is that the onus to begin to adduce evidence rests on the 1st Defendant because the 1st Defendant raised and pleaded the issue of fraud.

[12] The Plaintiff further contends that the question as to the existence of the contract of insurance and that the Plaintiff had an insurable interest (being the owner) in the vehicle are facts that are expressly admitted and are

accordingly eliminated from issues to be tried and the Plaintiff is relieved of the duty to bring in evidence to establish them.

[13] The Plaintiff has further stated that the 1st Defendant has not denied certain pertinent facts which were open for it to deny and which, if denied, would have had to be proved by the Plaintiff for example the following facts are not denied:

(a) that the event in respect of which the contract was taken out as giving rise to the insurer's liability (the loss of the vehicle) did occur;

(b) that the Plaintiff performed his own obligations in terms of the contract (paid the premiums) and

(c) that the loss is in the tune of E1,420,000.00.

According to the Plaintiff the above facts are admitted in terms of Rule 22 (3) which states that:

> "Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be not admitted, shall be deemed to be admitted…"

[14] In response thereto the 1st Defendant pleaded that its consent was vitiated by the Plaintiff's fraudulent misrepresentation which induced it to enter into the

contract making the contract void ab initio and liable to be rescinded by the 1st Defendant.

[15] I am persuaded by the 1st Defendant's arguments which I hereby set out hereinunder.

[16] In its counter arguments the 1st Defendant contends that the duty to begin rests with the Plaintiff and that it is necessary to distinguish between the duty to begin and the onus of proof or over all onus.

[17] The relevant Rules of Court provide as follows:

21.1 Rule 39 (13):

> "(13) Where the onus of adducing evidence on one or more of the issues is on the Plaintiff and that of adducing evidence on any other issue is on the Defendant, the Plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case. The Defendant, if absolution from the instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him."

2.2 Rule 39 (14)

> (14) After the Defendant has called his evidence, Plaintiff shall have the right to call rebutting evidence on any issues in respect of which the onus was on the Defendant: Provided that if the Plaintiff shall have called

evidence on any such issues before closing his case he shall not have the right to call any further evidence thereon."

[18] The wording of the relevant South African Rule is precisely the same as that of the Swaziland Rule. In their commentary the learned authors of Erasmus – Superior Court Practice, state the following:

> **"… Subrule (5): 'The burden of proof …'** The term 'burden of proof' is used in different senses. In its primary meaning the phrase denotes 'the duty which is cast upon the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence as the case may be …'. The incidence of the burden of proof in this sense is on each issue a matter of substantive law.
>
> In the secondary sense the phrase denotes the duty to adduce evidence in order to combat a *prima facie* case made by his or her opponent, sometimes called the 'evidential burden' (weerleggingslas'). The duty to adduce evidence is merely a procedural device which 'ensures that the parties give their evidence in the most logical order and allows the trial to be shortened by dispensing with the evidence of one party if his opponent has adduced no evidence which could support a finding in his favour'. The secondary meaning is clearly recognized in subrules (11), (12) and (13) by the use of the phrase 'onus of adducing evidence'. The duty to adduce evidence usually coincides with the onus of proof in the primary sense, but there are cases in which from the beginning the duty to adduce evidence is upon the one party but the onus is on the other. The incidence of the burden of proof in this secondary, sense is determined by the pleadings. In this subrule and in subrule (9) the phrase 'burden of proof' is probably used in its primary sense. This does not, however, mean that the two subrules impose a rigid order in which first the Plaintiff and then the Defendant are entitled or obliged to present their respective cases to the court. The order in which the parties present,

their cases and adduce their evidence may be altered by a ruling or direction under subrule (11), (12) or (13)."

[19] The Plaintiff makes the following averments in his particulars of claim:

> "5. On the 1st September 2007 Plaintiff and the 1st Defendant entered into a written agreement of insurance in terms of which the 1st Defendant undertook to insure **Plaintiffs (sic) motor vehicle,** being a Hummer H2 against risks mentioned in the contract, one of them being the theft of the vehicle…
>
> 7. During November 2008 whilst the policy of insurance was in force **the said motor vehicle was stolen.**
>
> 8. **The value of the motor vehicle at the time of its theft was E1,600,000.00**
>
> 9. The value of Plaintiff's claim in terms of the policy is the sum of R1,420,000.00 (One million four hundred and twenty thousand Emalangeni) **being the value of the vehicle less the applicable excess.**
>
> 10. Plaintiff has duly notified the first defendant of the theft **and has in all other aspects complied with his obligations under the policy."**

[20] The highlighted portions of the Plaintiff's Particulars of Claim set out above are allegations which are **not admitted** in the 1st Defendant's plea.

[21] All that is admitted in the 1st Defendant's plea in this regard is that it insured the vehicle which is alleged to have been the Plainitff's vehicle. The

Defendant further contends that the Plaintiff accordingly has the onus to establish, *inter alia:*

1. That he was the owner of the vehicle;

2. That he had an insurable interest in the vehicle (it is trite that for a valid agreement of insurance to be concluded the Applicant or proposer has to have and insurable interest);

3. That the vehicle was stolen;

4. That the value of the vehicle at the time of the alleged theft was E1,600,000.00;

5. Plaintiff's entitlement to claim the sum of E1,420,000.00… "being the value of the vehicle less the applicable excess";

6. That he has in all respects complied with his obligations under the policy.

[22] It is finally submitted on behalf of the 1st Defendant that clearly the onus is upon the Plaintiff in respect of the matters set out above and he clearly has the duty to begin and the duty to prove these allegations before the 1st Defendant is put on its defence.

[23] In Hoffman and Zeffertt, **South African Law of Evidence** (4th Ed) learned authors deal in Chapter 20 with the burden of proof. They point out that there is a difference between the onus and the duty to adduce evidence.

[24] As is pointed out on page 499 by the learned authors:

> "… A passage in the judgment of Davis AJA in **Pillay v Krishna** 1948 AD 946 at 953, calls for comment as it has caused some confusion to the semantically perplexed:
>
> > '…where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof which have nothing to do with each other, save of course that the second will not arise until the first has been discharged'.
>
> One has to be careful to confine the meaning of the words 'onus' or 'burden of proof, to the sense in which they have been used here, i.e. to 'the burden of proof' as it has been defined previously, namely 'the overall burden of proving that one is entitled to succeed with one's claim or defence as the case may be' ".

[25] At page 502 the learned authors deal with the question of who has to begin:

> "(i) Who has to begin
>
> In a criminal trial, the prosecution always has the right (or duty) to begin. The position in a civil trial is governed by the Rules of Court. In the Supreme Court it is expressly provided that where 'the onus of adducing evidence' on one or more issues is on the Plaintiff, and that of 'adducing' evidence on any other issues on the Defendant, **the**

Plaintiff will first have to call his evidence on any issues in respect of which the onus is on him, and may then close his case.'' If absolution is not granted, it is the Defendant's turn to adduce evidence on all issues in respect of which the onus is on him. If a duty to adduce evidence is on the Defendant he has to begin."

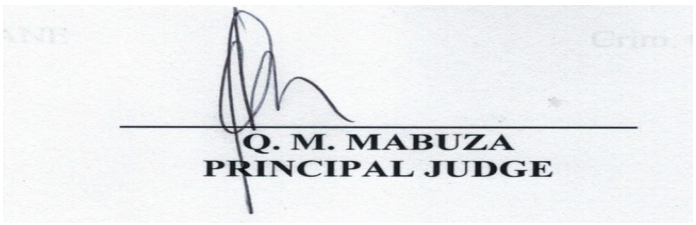
And lower down on the same page:

"(1) Normally, where the Plaintiff bears the onus of proof, in the primary sense, and **on one or more of the issues in the case, the Plaintiff would also have the duty to begin and adduce evidence.**

Topaz Kitchens (Pty) Ltd v Maboom Spa (Edms) Bpk 1976 (3) SA 470 (A).

[26] I respectfully align myself with the leaned authors.

[27] In conclusion it is clear that the duty to begin rests on the Plaintiff and I so order. The application by the Plaintiff is dismissed. The Plaintiff is hereby ordered to pay the costs hereof including the certified costs of senior counsel in terms of Rule 68 (2).



For the Plaintiff	:	Mr. Mamba with Ms. Ndlovu
For the Defendant	:	Advocate F. Joubert instructed by Mr. Z. Shabangu