REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 2011/35677

DATE:03/10/2011

REPORTABLE

In the matter between:

DALTRON FORGE (PTY) LTD Applicant

and

ETANA INSURANCE COMPANY LTD Respondent

JUDGMENT

MEYER, J

[1] The applicant by way of these urgent proceedings seeks an order that, pending the outcome of an action to be instituted, the respondent either pays to it several millions of rand on account in terms of an insurance policy or that it be directed to make

a determination within three days of the amount to be paid to the respondent on account.

[2] The applicant is said to be the second biggest producer of bolts in South Africa. It produces bolts and conical bits for various industries, particularly the coal mining industry. The only local producer of the quality and type of steel required by the applicant is ArcelorMittal ('AM'), which steel is produced at the Newcastle plant of AM.

[3] What is referred to as the 'Specified Suppliers Extension', was added with effect from 3 August 2011 to the insurance cover which the applicant enjoyed under an existing insurance policy issued to it by the respondent. The Specified Suppliers Extension entitles the applicant to indemnity from the respondent for loss following interruption of or interference with its business in consequence of a defined event occurring also on the premises of one of its selected suppliers. AM was specified as such a selected supplier of the applicant.

[4] On 5 August 2011, an incident occurred at the premises of the Newcastle plant of AM, which has rendered its blast furnace inoperable and this resulted in an inability on its part to supply the grade of steel required by the applicant for months to come. There is, according to the applicant, no other local steel supplier that is able to supply suitable steel to it and its only other option is to source it from overseas at a considerable premium.

[5] The applicant contends that the event that occurred at the Newcastle plant of AM is a defined event within the meaning of the policy and a specified risk that had been undertaken by the respondent. The applicant also avers that it will be unable to

continue with its business operations if it is not immediately given interim funding. The stance adopted by the respondent is that it requires time to investigate the matter before it could accept or reject liability under the policy and before it could consider the making of any payment to the applicant.

[6] The respondent is unquestionably entitled and obliged to consider the applicant's claim within a reasonable period of time after it has received it. What is a reasonable period depends upon the facts and circumstances of any given case. The complexity of the investigations into the incident appears from the expert evidence and opinions presented by both parties in these proceedings and such investigations undeniably require special expertise and an examination of the furnace in question, which, for safety reasons, could not as yet be conducted. It can accordingly not be said that a reasonable period of time within which the respondent must accept or reject liability for the applicant's claim under the policy has in the circumstances of this matter already expired. This, in my view, was also been correctly conceded by Adv S van Nieuwenhuizen SC, who appeared with Adv JM Heher for the applicant.

[7] The applicant, however, contends that its right to claim an interim payment from the respondent at this stage arises from the following general provision of the policy, which provision has the heading 'Payments on account' and it reads:

> 'In respect of any section where amounts recoverable from the company are delayed pending finalisation of any claim, payments on account may be made to the insured, if required, at the discretion of the company.'

The respondent contends that it is not obliged to exercise the discretion to make a payment on account under this general provision, because such a discretion could only arise once it has admitted liability.

[8] Whether or not the applicant has established a *prima facie* right to the relief it presently seeks requires an interpretation of that general provision of the policy. The rules relating to the interpretation of a policy of insurance were thus concisely stated by Smalberger JA, in *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (AD), at p 38B-E:

> 'The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (*Scottish Union & National Insurance Co ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464 – 5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (*Auto Protection Insurance Co Ltd v Hanmer-Strudwick* 1964 (1) SA 349 (A) at 354C – D); for it is the insurer's duty to make clear what particular risks it wishes to exclude (*French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd* 1931 AD 60 at 65); *Auto Protection Insurance Co Ltd v Hanmer-Strudwick* (s*upra* at 354D – E). A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the *contra proferentem* rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy (*Kliptown Clothing Industries (Pty) Ltd v marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (A) at 108C).

[9] Payments made to an insured in terms of the clause under consideration are 'on account'. The dictionary meaning of the words 'on account' (*The New Shorter Oxford Dictionary on Historical Principles* – Clarendon Press, Oxford – 1993 Vol II) is 'to be accounted for at the final settlement; not to be paid for immediately; as interim payment.' What is of importance is the use of the words 'amounts recoverable from the company are delayed pending finalisation of any claim'. The dictionary meaning of the word 'recoverable' (*The New Shorter Oxford Dictionary on Historical Principles (supra)* Vol I) is 'able to be recovered or regained; retrievable; able to be reclaimed or reused.'

[10] The language used is clear and unambiguous and must accordingly be given effect to. An ability to recover an amount from the respondent insurer can at the earliest arise when the respondent accepts its liability for the applicant's claim or part thereof under the policy. Any payments made to an insured under this clause are interim payments that are to be accounted for at the final settlement of the claim. This interpretation, in my view, also accords with the obvious purpose of the general provision, namely to facilitate the payment of admitted or undisputed amounts that will in due course be paid to an insured in circumstances where the immediate payment thereof is delayed pending the finalisation of the claim.

[11] The context also does not indicate that the words used should not be given their plain and ordinary meaning. The clause is a general provision of the policy and its application is not limited to the Business Interruption section of the policy. The policy also has no specific provision for repayment in the event that the respondent does not accept liability, and if the applicant's contention is correct, such a provision would have to be implied, and the terms thereof are matters for mere speculation. By contrast, the specific conditions of the Business Interruption section of the policy provide for the repayment to the respondent in other circumstances of payments that have been made on account of a claim.

[12] The applicant has failed to establish a *prima facie* right or even one that is open to some doubt. This finding is fatal to the application and it accordingly falls to be dismissed.

[13] Finally, the matter of the scale of costs that should be awarded to the respondent. An order is asked for the applicant to pay the respondent's costs on the scale as between attorney and own client. Adv JF Mullins SC, who appeared for the respondent, submitted that the applicant '…had no right to bring, and then in the face of good objection, to persist in this application …'. I do not consider this application as unnecessary. I also consider the briefing of senior counsel on both sides to have been a reasonable precaution and necessary.

[14] In the result, the following order is made:

The applicant's application is dismissed with costs, including the fees consequent upon the employment of senior counsel.

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P.A. MEYER
JUDGE OF THE HIGH COURT

3 October 2011

Date of hearing:	28 September 2011
Date of Judgment:	3 October 2011
Counsel for the Applicant:	Adv S van Nieuwenhuizen SC Adv. JM Heher
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