

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 4572/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED:

In the application of:

VALERIE ANN BADER

First Plaintiff

CHARLES MICHAEL BADER N.O.

Second Plaintiff

ANGELA LEE BADER N.O.

Third Plaintiff

JOHANNES PETRUS BARNARD N.O.

Fourth Plaintiff

DBF EXECUTORS SERVICES (PTY) LTD N.O.

(REPERSENTED BY DAVID LESLIE FISHER)

Fifth Plaintiff

and

CENTRIQ INSURANCE COMPANY LIMITED

Defendant

Coram: WEPENER J

Heard: 6 February 2017

Delivered: 16 February 2017

Summary: Insurance – section 156 of the Insolvency Act 24 of 1936. Section creates a distinct right – claimant not absolved as against insurer from proving that claim falls within the indemnity provisions of the policy

JUDGMENT

WEPENER J:

[1] This matter comes as a stated case before me. The facts are as follows:

‘The pleadings in the action remain relevant to the determination of the matter. . . .

AGREED FACTS

1. At all material times, the defendant was the insurer of Delru and agreed to indemnify Delru in terms of a policy attached to the particulars of claim marked ‘POC1’.
2. The policy was in place for the period of insurance 1 June 2009 until 31 May 2010.
3. The premiums due under the policy were paid and the policy was in force during February and March 2010.
4. On 26 February 2010, the plaintiffs made a claim against Delru for breach of professional duties to the plaintiffs and that claim was notified to the insurers during February or March 2010. A copy of the claim notification with plaintiffs’ letter is attached to the particulars of claim marked ‘PoC2’.
5. The defendant rejected the claim notified by Delru by letter dated 25 November 2011, attached to the particulars of claim marked ‘PoC3’.
6. The plaintiffs sued Delru under case number 57810/2011 in the Pretoria High Court and Delru joined the defendant to the action as a third party (‘the original action’).
7. The full pleadings in the original action are attached.

8. Shortly before the trial in the original action, Delru's attorneys delivered a notice of withdrawal and at the trial, Delru was not represented. The plaintiffs and the defendant (then the third party) were represented at the trial.

9. At the commencement of the trial in the original action:

9.1 the defendant (as third party) sought an order for dismissal of the third party proceedings against it;

9.2 plaintiffs' counsel, in court, gave notice to the defendants as recorded in para 11 of the Tuchten J judgment;

9.3 the third party proceedings between Delru and the defendant were then dismissed, having the effect of absolution from the instance as between Delru and the defendant;

10. The plaintiffs led evidence in the trial. There was no opposition and consequently witnesses were not cross-examined.

11. Tuchten J granted judgment in favour of the plaintiffs against Delru and a written judgment was handed down. A copy of that judgment is attached to the particulars of - claim marked 'PoC4'. No appeal was made against the judgment.

12. On 15 January 2015, under case number 19113/2014, Delru was placed under final winding up.'

[2] As foreshadowed in the statement of agreed facts the determination of the issue also depends on the pleaded case. The plaintiffs instituted action against the defendant pursuant to the provisions of s 156 of the Insolvency Act.¹

[3] The claim is based on the fact that Delru Makelaars BK (Delru) was a financial advisor and the defendant, an insurer, issued a professional indemnity insurance policy in terms of which it indemnified Delru in accordance with the policy terms. During 2010 a claim was made by the plaintiffs against Delru for breach of professional duties and

¹ Act 24 of 1936 'Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party [up to the limit of the indemnity]'

the defendant was notified thereof. In due course the defendant repudiated liability under the policy. In the letter of repudiation the defendant relied on an exclusion contained in clause 3(ii) of the exclusion section of the policy. However, on the pleadings in this matter the defendant, as it is entitled to do,² relied on further grounds of exclusion to avoid liability.

[4] Plaintiff instituted action against Delru, the latter who joined the defendant as a third party. That joinder came to an end when Tuchten J dismissed the third party proceedings. The plaintiff proceeded with its case against Delru on an unopposed basis and the defendant declined to participate in the proceedings by virtue of the dismissal of the third party proceedings. The defendant was consequently not a party to the proceedings before Tuchten J undertaken and the findings of that court are not binding on the defendant. Put differently, there was no *lis* between the plaintiffs and the defendant insurer to be adjudicated and there was no reason for the defendant to be involved in the action before Tuchten J. The plaintiff obtained judgment against Delru. The particulars of claim, after setting out the above background facts, aver:

'17. In the circumstances, in a final judgement, the above Honourable Court found that Delru was legally liable to the plaintiff.

18. The claims in respect of which the Court found Delru liable are claims covered by the indemnity provided by Centriq under the policy.'

The defendant admitted the contents of para 17 but denied the allegations contained in para 18.

[5] It is so that Tuchten J found that Delru was legally liable to the plaintiffs, however, the court made no reference to the liability in terms of or under the indemnity wording. The plaintiffs' counsel submitted that due to the wording³ of the indemnity that the defendant's liability was established. It was submitted that Tuchten J found such

² See by analogy *Beck v Du Toit* 1975 (1) SA 366 (O) at 368F-G; *Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 832C-D.

³ Clause 1: 'Any legal liability arising from claims first made against the Insured and reported to the Insurers during the period of insurance as stated in the certificate: for breaching of duty in connection with the business by reason of any negligent act, error or omission.'

legal liability. The legal liability is defined in clause 1 of the indemnity and it is for the plaintiffs to establish that the legal liability is in terms of the indemnity or covered by the indemnity. I am of the view that the plaintiffs are still obliged to prove that the conduct of Delru fell within the wording of the policy in order to saddle the defendant with liability. The submission by counsel for the plaintiffs that once the court held Delru liable to the plaintiffs the requirements of s 156⁴ of the Insolvency Act would be satisfied does not follow. Seen in its context s 156 can only be applied if the court held Delru liable 'as provided for in the policy', ie that the conduct of Delru fell under the provisions of the indemnity provided for in the policy. There is no evidence that the liability of Delru is indeed covered by the wording of the policy and that still has to be established and the finding of a court in litigation between the plaintiffs and Delru did not do so and cannot be binding on the defendant.

[6] The plaintiffs went further in their argument and submitted that pursuant to s 156 of the Insolvency Act they had to prove four elements only ie: firstly, that there was an insurance policy between the insurer and Delru at the relevant time in terms of which the insurer was obliged to indemnify Delru in respect of liabilities incurred by Delru towards third parties; secondly, that Delru is liable to the plaintiffs for a wrong caused by delru to the plaintiff; thirdly, that Delru's liability to the plaintiffs is covered by the insurance policy issued by the insurer and fourthly, that the insured is insolvent. (own emphasis). However, I am of the view that in proving these elements the claim would fall short of proving the liability of the defendant 'in terms of the indemnity'. The judgment of Tuchten J does not do so and there is an absence of a link between the finding of liability of Delru and the indemnity issued by the defendant. It would be incumbent upon the plaintiff to prove that the liability of the defendant falls within the terms of the indemnity. In this respect, the judgment of Scott JA in *Le Roux v Standard General Versekeringsmaatskappy Bpk*⁵ makes it clear that the liability of the insurer to indemnify the insured must be proved by a plaintiff. Section 156 does not, in my view, overcome or dispense with that requirement. Having stepped into Delru's shoes⁶ the

⁴ See note 1 above.

⁵ 2000 (4) SA 1035 (SCA) at para 7.

⁶ *Van Reenen v Santam Limited* 2013 (5) SA 595 (SCA) at para 17.

plaintiffs still have to prove that the claim falls within the indemnity as the liability of Delru, as found by Tuchten J, is not linked to the terms of the indemnity.

[7] Relying in passages in *Van Reenen v Santam*,⁷ counsel for the plaintiffs submitted that there is no need to re-prove the facts in order to succeed against the insurer. In my view, the argument misses the fact that s 156 creates a right and *Van Reenen* did not find that it absolves a party relying on s 156, to prove its case against an insurer in the same manner than the insured would have had to do, including the fact that the conduct of Delru fell within the terms of the indemnity. The plaintiff obtained no greater rights than those enjoyed by the insured. Furthermore s 156 does not transfer, nor vest existing rights of an insolvent in the third party.⁸ The section creates a new distinct cause of action for a third party on sequestration of the insured as a means to recover from the insurer precisely what the latter owes the insured under the indemnity.⁹ The result is not that the plaintiffs would be required to prove the facts ‘again’ in order to establish the liability. The facts have never been established in litigation to which the defendant was a party and which could bind the defendant. I am also of the view that the reliance on the phrase ‘any legal liability’ is misplaced. These words must be read as any legal liability covered by the terms of the indemnity. Proof that the conduct of Delru falls within the indemnity clause, rests on the plaintiffs. Counsel for the plaintiffs was alert to this as it was submitted in heads of argument:¹⁰

‘. . . Delru need only to show that the insurance policy covers the liability found by the Court.’ (own underlining)

In order to determine whether the terms of the indemnity cover the conduct complained of, both aspects will have to be traversed, as far as the defendant is concerned, and both aspects will require proof by the plaintiff.

⁷ At para 24

⁸ *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 (6) SA 21 (SCA) paras 7 and 8; *Le Roux* supra at 1046J – 1047G.

⁹ *Van Reenen* at paras 17 and 18.

¹⁰ Paras 16 and 17.

[8] This firstly, in my view, accords with the English Law which requires that it is necessary to establish that the insured was under actual legal liability.¹¹ The Court of Appeal in *AstraZeneca*¹² held that even a judgment against the insured is not necessarily in itself sufficient to establish liability under the relevant policy and that neither a judgment nor an agreement are necessarily determinative of whether or not a loss which a third party might claim, is covered by the policy and that it is, therefore, open to insurers to dispute that the insured was in fact liable.¹³ Flaux J, in the court a quo, in *AstraZeneca* said the following:¹⁴

‘I consider that the better view is that, absent some agreement to be bound, it will be open to a liability insurer or a reinsurer to challenge findings of liability in an underlying judgment in proceedings to which it was not a party in order to question whether in fact the insured is under a liability. In other words, whilst the judgment may ascertain or establish the loss, it will not necessarily establish the legal liability of the insured or reinsured, although it may be compelling evidence of such liability, depending on the circumstances in which it was obtained.’

[9] It also accords with the Law of South Africa. In *Le Roux*,¹⁵ Scott JA said as follows:

‘Om te kan slaag in ‘n aksie ingevolge art 156 moet ‘n eiser aanspreeklikheid aan die kant van die versekeraar teenoor die versekerde bewys. Dit blyk uit die woorde, “wanneer iemand (hieronder die versekeraar genoem) verplig is om iemand anders (hieronder die versekerde genoem) skadeloos te stel. . .”. Daar is eger niks in die artikel om aan te duit dat daardie aanspreeklikheid slegs tydens die toestaan van die sekwestrasiebevel kragtens die polis staat kan maak nie. Indien die appellant se vertolking van die artikel korrek is, sou dit beteken dat ‘n eiser onder die artikel ‘n beter reg teen die versekeraar verkry as wat die versekerde self geniet het. Dit sou ook beteken dat die versekeraar verhoed word om op sy kontraktuele regte te steun indien dit blyk dat die versekerde kontraktbreuk gepleeg het. So ‘n vertolking is onhoudbaar en kon nooit die bedoeling van die Wetgewer gewees het nie.’

¹¹ *AstraZeneca Ins. Co. v. XL Ins. (Bermuda) Ltd.* [2013] EWHC 349 (Comm) at para 13.

¹² *AstraZeneca Ins. Co. v. XL Ins. (Bermuda) Ltd.* [2013] EWCA Civ 1660 at 23.

¹³ Ibid, at points 5 and 6 of the summary.

¹⁴ At para 65.

¹⁵ *Le Roux* at para 7.

[10] The parties agreed on the stated case as set out above, and I need say nothing further regarding the pleadings nor am I called upon to make any finding in relation thereto.

[11] The relief sought before me is a determination of whether the judgment of Tuchten J dated 20 January 2014 establishes, as between the plaintiffs and the defendant, the liability of Delru to the plaintiffs for purposes of an action between plaintiffs and the defendant in terms of s 156 of the Insolvency Act. I have found that such a link between the liability of Delru and the terms of the indemnity is absent and needs to be proved.

[12] In the circumstances, the question posed as in the stated case is to be decided in the defendant's favour. Plaintiffs are ordered to pay the costs in relation to this part of the proceedings.

Wepener J

Counsel for Plaintiffs: D Turner

Attorneys for Plaintiffs: Norton Rose Fulbright South Africa Inc.

Counsel for Defendant: C. Watt-Pringle SC with J. Joyner

Attorneys for Defendant: Andrew Miller & Associates Inc.