

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

- (1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES:YES
(3) REVISED: YES

09/11/2022

SIGNATURE

DATE

CASE NO: 30445/2014

In the matter between:

TRANSNET SOC LIMITED

Plaintiff

and

SANTAM LIMITED

Defendant

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] I shall refer to the Defendant and Plaintiff in their actual names or as parties where context requires that they be mentioned together. This is a claim for payment emanating from a written insurance contract ("the contract") concluded by the parties on 13 April 2010 at Johannesburg pursuant to which the Defendant signed and issued a written insurance policy to the Plaintiff, which duly conveyed its acceptance thereof. The contract and its terms and conditions are not contested by either party but their construal were at variance obliging them to approach this court for determination.

[2] Transnet seeks to recover money it has expended in the rehabilitation of soil contaminated by aviation fuel escaping from an underground pipeline belonging to it. Transnet has registered servitude through the land where the pipeline is positioned. However, the land that has been polluted belongs to another party. The pollution happened as a result of a deliberate act of unknown individual who excavated a hole of approximately 1 metre by 1 metre above the pipeline. Once the pipeline was uncovered, an opening was then made apparently with an instrument suspected to be a hacksaw. The aviation fuel leaked into the 1 Metre by 1 metre hole and formed a type of a pool from which it could be collected and removed.

[3] The unknown individuals controlled the outflow from the pipe into the hole by a rubber tube, which caused the aviation fuel to slowly percolate. As the aviation fuel gradually accumulated in the hole, the unknown individuals collected the fuel. This process of collection of the fuel endured as the hole replenished until it was discovered on 28 January 2011. The leakage allowed fuel to soak the surrounding soil causing pollution.

[4] Transnet now alleges that in compliance with its responsibilities contemplated in Section 30 of the National Environmental Management Act of 1998 ("NEMA"), it arranged

and paid for the soil recovery. These are the costs that Transnet seeks to claim from Santam under the "Public Liability Section" of the Insurance Agreement. However, in consequence of the court order to treat liability and quantum discretely, which the Court made following agreement between the parties that it would be convenient, this judgment is solely devoted to the former.

FACTUAL MATRIX

[5] The background facts that gave rise to this claim are primarily a matter of common cause. On 13 April 2010, the parties entered into the contract. The period of cover by the contract was 1 April 2010 to 31 March 2011. On 28 January 2011, the attention of Transnet was drawn to the ongoing theft of its fuel from the pipeline. The parties have, despite being mindful of presence of evidence to the contrary, agreed to regard 28 January 2011 as both the date of occurrence and discovery.

[6] On 31 January 2011, Transnet transmitted an e-mail message followed by a telephone call to the Director-General of the Department of Environmental Affairs advising him of the occurrence. On 18 March 2011, a meeting was held with the Director-General of the Department of Environmental Affairs. In March 2011, Mr Khaled, an acting security manager of Transnet, produced a report furnishing details of the occurrence. Restoration and clean-up operations began and in that context:

- 6.1 The clean -up experts delimited the affected area to contain further contamination. The demarcated area was not more than 10 metres from the actual hole from which the fuel had been stolen;
- 6.2 31 March 2011, Transnet received the first invoice in the amount of **R132 077.10** pertaining to the rehabilitation operations;
- 6.3 On 1 April 2011, Transnet received a further invoice of **R113 974.87**;

6.4 On 7 April 2011, Transnet notified Santam of the occurrence for the first time. The total expenses that Transnet had incurred until then, as per the two invoices, amounted in all to **R246 051.97**.

[7] Following the above, the parties, through their relevant representatives comprising, their respective insurance brokers, underwriting managers and the loss adjustor engaged in various exchanges. These interactions culminated in a letter of 20 March 2014 by which Santam denied liability under the Insurance Agreement and excluded the claim of Transnet.

[8] Santam states that it is not contested that firstly, no demand was ever made on Transnet by the owner of any property that may have been damaged as a result of the pollution. Secondly, that Santam did not consent in writing to Transnet incurring costs in the amount of approximately **R7.2 million** in dealing with the pollution and Transnet accepting or agreeing to be responsible or liable for the costs of dealing with the pollution.

EVIDENCE

[9] Transnet called two witnesses, both in its employ, to testify on its behalf. These were Mr Pilime ("Pilime") and Ms Prashika Mahesh ("Mahesh"). Mr Pilime was the first to take the stand. The agreement between the parties that the date of occurrence and discovery could be assumed to have coincided on 28 January 2011 has largely obviated the need to deal with his testimony extensively. In large part, Mr Pilime confirmed the factual matrix described above. As such, I do not see the need to explore what he told this Court.

[10] Ms Mahesh was and continues to be responsible for insurance management at Transnet Pipelines. She had asked the environmental Manager, Ms Zondi, to complete a claim form so that she could submit it to the brokers. The brokers would, in turn, submit it to the insurer, Santam. She said that there was no immediate reaction from Santam following submission of the claim form but she believed that it appointed a loss adjustor.

[11] Once appointed, the loss adjustor met with Ms Zondi, at the location of the occurrence. Following this meeting, the loss adjustor regularly interacted with Ms Zondi. She testified further that she would submit invoices to the brokers as and when she received them. She said that due to the nature of the remedial intervention that had to be carried out on the contaminated soil, the period of communication between the parties concerning this incident became protracted.

[12] In consequence, the money that Transnet expended on the treatment of the soil affected its liquidity compelling it to ask its brokers to request Santam to consider making interim payments. Although Santam confirmed that it would consider it, ultimately it repudiated the whole claim on 20 March 2014 being approximately three years from the date of the occurrence. She confirmed that the period of three years was mainly spent interacting with the brokers, sending invoices to them and the loss adjustor communicating with Ms Zondi.

[13] On 14 March 2013, she forwarded an e-mail message to Marius Strydom advising him that Transnet was awaiting final costs pertaining to the rehabilitation of the soil and that such costs would be submitted once at hand. She then proceeded to inform him that since Santam had indicated that it would make interim payments, he could submit all the invoices in his possession. Ms Georgia-Groblar wrote advising Transnet that due to the amount to be paid, the question regarding interim payments was still being considered by their legal department.

[14] On 7 November 2013, Ms Schalkwyk of Transnet wrote to Ms Georgeia-Groblar requesting her to establish from the loss adjustor if Santam could not make interim payments to Transnet. On 21 November 2013, Ms Georgia-Groblar wrote back and stated that their head of legal was on leave returning only on Monday the following week and that the matter including the question of interim payments would be discussed with him then. On 17 December 2013, Ms Georgia-Groblar, in an email message, advised that they would not revert until the following year.

[15] Ms Mahesh again wrote on 9 January 2014 enquiring about interim payments and estimated the amount expended by Transnet until that time to be **R7.1 Million**. She explained further that her chief executive was putting a lot of pressure on them as the expenses were affecting their liquidity. She testified that insofar as she was concerned, Santam was aware that Transnet was making interim payments to have the soil rehabilitated and that it did not object or raise any concerns.

[16] She said that they continuously enquired from the loss adjustor when they could expect the report. The response she received from the Loss Adjustor was that a report would only be finalised once Transnet has submitted its full and final costs. The impression created to her by the loss adjustor was that Transnet needed to pay all the costs of the treatment of the soil and only then would the loss adjustor finalise the report, which would be followed by payment from Santam.

[17] On 17 January 2014, Rayesha Subalas, an insurance manager at Transnet Group, sent an email message to Puba Krishna, who was part of the Transnet brokers. Rayesha Subalas asked him to confirm whether they have made any progress on the issue of interim payments. In his same day response to the email message, Puba Krishna said that they were still waiting on a follow-up that they have made with Santam. He concluded by undertaking to revert immediately upon hearing from Santam.

[18] On 22 January 2014 Georgia-Groblar wrote to Puba Krishna stating that they were not in a position to provide a feedback yet. She explained that Santam was in the process of reviewing the information submitted and the requests of interim payments. She concluded by stating that they would revert shortly. Puba Krishna responded on 11 February 2014 wanting to know if Georgia-Groblar had received any feedback from the loss adjustor and asked if she could provide a progress report as Transnet needed it urgently.

[19] Ms Mahesh stated that these exchanges of correspondence concluded on 20 March 2014 with a letter of repudiation of the claim. In that letter Santam neither registered a complaint relating to late submission of the claim nor did it protest that Transnet could not pay for the rehabilitation of the soil without its consent. Ms Mahesh agreed that the policy wording stipulates that The claim must be submitted as soon as is reasonably practicable.

[20] She stated that to the extent that it might be suggested to her that the claim could have been submitted earlier than it was, in less than two months, she agreed but said that Transnet was waiting for Reasonable estimate of the costs before it could submit the claim. She added that even the environment management report or NEMA Report did not contain any estimated costs at the time it was presented to the department.

[21] The amount of the claim gradually climbed as invoices were being presented. This took time as the rehabilitation process was also drawn-out. Ms Mahesh testified that the last invoice that ultimately brought the amount to the claim herein is one presented on 5 April 2014. This concluded the evidence of Ms Mahesh in chief.

[22] Under cross examination and in response to a question why there were two separate claim forms, signed on the same day by two different individuals, she explained that the repair to the pipelines fell under the assets portion of the Insurance while the rehabilitation costs formed part of the General Liability insurance. Ms Mahesh agreed that Transnet claimed under the assets policy for the repairs to the pipeline. She did not know whether or not the assets policy contained a pollution extension.

[23] The costs for the repairs to the pipeline were estimated at **R100 000.00** consequently they were effected shortly after discovery and as a matter of urgency, confirmed Ms Mahesh. She agreed that it was not difficult to estimate the costs of repairs to the damaged pipeline on 7 April 2014 and that it is not a requirement under the insurance policy that Transnet had to wait until it had reasonable estimation of the clean-up costs.

[24] Ms Mahesh agreed that on 7 April 2014, the estimated costs for the rehabilitation of the polluted area were **R4 million** and that the total ultimately came to **R7 479 891.72**. Clean-up costs were to be claimed under General Liability Policy. She agreed that the Transnet asset policy also had a pollution extension. That said, she testified that this specific occurrence would not have fallen under the Assets Policy because it was an incident that occurred on a property not belonging to Transnet and the owner never submitted a claim.

[25] She testified that the owner of the polluted area did not submit a claim because NEMA imposes the obligation to rehabilitate the contaminated area on Transnet. She stated that Geo Pollution Technologies furnished Transnet with estimated costs of the rehabilitation of the affected area, which on 7 April 2014 was **R4 Million**. She was persistent that the reasonable estimated costs were not known.

[26] Transnet only had an estimation of **R4 Million** at that juncture. She conceded that the policy did not require Transnet to submit the claim with reliable estimations of the amount. It was put to her that the claim could have been submitted earlier than it was. As such, it is not true that Transnet was waiting for reasonable estimations because the policy does not require it.

[27] Ms Mahesh was then referred to the part of the contract that is headed: 'General conditions applicable to all sections of the policy' under which it is stated that Conditions 1 – 5 are precedent to the insurer's liability to provide indemnity under this policy. She was also referred to the contract clause that reads: '*2. The insured shall give written notice to the insurer as soon as reasonably practicable of any occurrence that may give rise to a claim under this policy and shall give all such additional information as the insurers may require.*'

[28] It was put to Ms Mahesh that there was nothing that prevented Transnet from notifying its insurers of the incident as soon as it was discovered on 28 January 2011. The clause therefore, it was put to her further, posits Transnet to first report the incident

and the insurer may thereafter ask for more information that it may need. She was further referred to the part dealing with: 'Primary Liability Insurance' and specifically to the clause that reads:

"The insurers will indemnify the insured against their liability to pay compensation (including claimant's costs, fees and expenses) ... in accordance with the laws of any country. except and to the extent and subject to the conditions specified herein."

[29] Ms Mahesh was then shown different parts of the contract dealing with sections that anticipate a third party claiming compensation from Transnet, which it would in turn submit to its insurers as it has been indemnified in terms of the contract. This part of the contract is different insofar as there is no third party who has presented a claim to Transnet against which it can be indemnified. This was somewhat requiring more as such the question was abandoned.

[30] She conceded that in her entire communication with the insurers there was never a promise to make interim payments undertaken by Santam. All that the insurers advised was that they were discussing the matter with their head of legal without any promises that they would eventually make such payments. She agreed further that her evidence that provisional payments were being considered by the insurers was incorrect. Re-examination of the witness by Transnet accomplished nothing of significance.

ISSUES

[31] From the facts above, this court is required to decide whether or not the rehabilitation costs incurred by Transnet are recoverable from Santam under the contract. That main issue cannot be decided independently and without consider whether or not:

31.1 No liability arises under the contract for a purely statutory obligation imposed in terms of NEMA for pollution rehabilitation costs;

- 31.2 There was a sudden unintended and unexpected happening giving rise to the pollution damage, as contemplated by the insurance contract;
- 31.3 Given the date of the occurrence, 28 January 2011, can the date on which Transnet notified Santam of the occurrence, 7 April 2011, be accepted as having been 'as soon as was reasonably practicable'?
- 31.4 There was written consent given by Santam to Transnet making payment of the rehabilitation costs;
- 31.5 Assuming that notice was not given as soon as was reasonably practicable, can Santam be said to have waived those provisions?

RELEVANT CONTRACTUAL PROVISIONS

[32] The controversy in this matter is centred around the contract. As such, full extracts of the pertinent parts of the contract require specific mention. The starting point is Part 1, the 'General Operative Clause'. In this regard, the unnumbered paragraph immediately following the heading: "General Operative Clause" states:

"The insurers will indemnify the insured against their liability to pay compensation (including claimants' costs, fees and expenses) in accordance with the law of any country, but not in respect of any judgment, award or settlement made within countries which operate under the laws of the United States of America or Canada (or to any order made anywhere in the world to enforce such judgment, award or settlement either in whole or in part) except to the extent and subject to the conditions specified herein."

[33] Still under General Operative Clause, the contract continues to state that 'this indemnity applies only to such liability as defined by each Section of this Policy arising out of the Business outlined in the Schedule, subject always to the terms, Conditions and Exclusions of such Section and of the Policy as a whole'.

[34] Under the heading: 'Indemnity Limits', the contract provides that:

"Insurers' total liability to pay compensation and/or claimants' costs, fees, expenses and Defence costs shall not exceed the sum stated in the Schedule against each Section in respect of any one occurrence or claim or series of occurrences or claims arising from one originating cause, but under Sections C, D and E separately the limit applies to the total amount payable in respect of the Period of Insurance."

[35] Part 2 of the contract bears the heading: 'General Conditions Applicable to all Sections of the Policy'. It provides as follows:

"This Policy does not cover liability: -

1. *arising out of the deliberate, conscious or intentional disregard by the Insured's technical or administrative management of the need to take all reasonable steps to prevent loss, Injury or Damage:*
2. *for:*
 - 2.1 *Injury or Damage or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination, provided always that this paragraph 2.1 shall not apply to liability for Injury or Damage or loss of or physical damage to or destruction of tangible property or loss of use of such property damaged or destroyed, where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance;*
 - 2.2 *The cost of removing, nullifying or deeming-up seeping, polluting or contaminating substances unless the seepage, pollution or contamination is caused by a sudden unintended and unexpected happening during the period of this insurance, and including such costs incurred in order to avoid or minimise Injury or Damage."*

[36] The word, damage, is defined as loss of or damage to property, including loss of use of property under the General Operative Clause. 'Still under General Operative Clause of Part 2 of the contract, 'pollution' means 'the emission, discharge, dispersal, disposal, seepage, release or escape of any liquid, solid, gaseous or thermal irritant, contaminant or pollutant into or upon land, the atmosphere or any water-course or body of water. The second part of the definition of pollution is not relevant for purposes of this judgment. As such, it is omitted.

[37] To go back to the part of the contract headed: 'General Conditions Applicable to all Sections of the Policy', Clause 2 provides that:

"The Insured shall give written notice to the Insurer as soon as reasonably practicable of any occurrence that may give rise to a claim under this Policy and shall give all such additional information as the Insurers may require. Every claim, writ, summons of process and all documents relating thereto shall be forwarded to the Insurers immediately they are received."

[38] Clause 3 under the same Section prescribes that:

"No admission, offer, promise or payment shall be made or given by or on behalf of the Insured without the written consent of the Insurer who shall be entitled to take over and conduct in the name of the Insured the defence or settlement of any claim or to prosecute in the name of the Insured for their own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of Any proceedings and in the settlement of any claim and the Insured shall give all such information and assistance as the Insurers may reasonably require."

LEGAL FRAMEWORK

[39] There is general understanding between the parties that for the one or other party to be held liable or absolved, the universal rules of construal of the pertinent provisions of the contract and legislation find application. Recognising that background and context

against which a document was concluded to interpret it is not akin to making a contract for the parties, it is agreed that The above requires a court to pay attention to the language of the document, read it in context and have regard to the purpose of the relevant provisions to establish the intention of the parties. The following passage of the SCA from the famous paragraph from *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹, fortifies the statement:

“The present state of the law can be expressed as follows:

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[40] Section 30(4) of NEMA prescribes that:

“(4) The responsible person or, where the incident occurred in the course of that person’s employment, his or her employer, must, as soon as reasonably practicable after knowledge of the incident—

¹ 2012 (4) SA 593 SCA at 603F – 604D

- (a) *take all reasonable measures to contain and minimise the effects of the incident, including its effects on the environment and any risks posed by the incident to the health, safety and property of persons;*
- (b) *undertake clean-up procedures;*
- (c) *remedy the effects of the incident;*
- (d) *assess the immediate and long-term effects of the incident on the environment and public health."*

[41] Section 30(8) provides that where the responsible person fails or inadequately complies with a directive under Subsection (6), or in the event of uncertainty on who the responsible person is or where there exists an immediate risk of serious danger to the public or potentially serious detriment to the environment, a relevant authority may take the measures it considers necessary to:

- "(i) contain and minimise the effects of the incident;*
- (ii) undertake clean-up procedures; and*
- (iii) remedy the effects of the incident."*

[42] Subsection 9 makes provision that the relevant authority may claim reimbursement of all reasonable costs incurred by it in terms of subsection (8) from every responsible person jointly and severally.

[43] If ambivalence persists following application of the primary general rules, other principles of interpretation must be invoked. I am mindful that while the aforesaid is common cause, the parties are sharply divided on the existence of a need to appeal to

further interpretive guidelines to resolve the alleged obscurity. To the extent that these rules may become necessary as this judgment unfolds, I continue to describe them below:

- 43.1 The parties' subsequent conduct after the conclusion of the contract;
- 43.2 Where an ambiguity arises on the face of the policy, a contract of insurance should be construed in favour of the insured rather than the insurer;
- 43.3 If ambiguity persists after the application of all the interpretive guidelines, resort may be had to the *contra proferentem rule*, according to which a contract must be construed against the contracting party by whom it was formulated.

ANALYSIS

[44] Santam denied that the occurrence is covered by the contract. Consequently, it repudiated the claim lodged by Transnet for indemnification of the amounts expended for the rehabilitation of the polluted area occasioned by the seepage of the contaminant or for any amounts that may become payable in future. The grounds of its refusal to indemnify is that:

- 44.1 No liability arises under the contract for a purely statutory obligation imposed in terms of NEMA for pollution rehabilitation costs;
- 44.2 In terms of the General Operative Clause of the contract read together with Section B, Indemnity Clause, it assumed the obligation to indemnify Transnet against liability to pay compensation arising from damage to property. The occurrence against which Transnet seeks indemnity is not compensation emanating from damage to property;

- 44.3 In terms of General Exclusion 2 of the contract of insurance, there is no indemnity under the contract of insurance for liability for damage to property directly or indirectly caused by pollution or contamination unless such pollution or contamination is caused by a sudden, unintended and unexpected happening. The occurrence involved here for which Transnet claims indemnity is not for liability for damage to property occasioned as aforesaid;
- 44.4 General Condition 2 of the contract makes it a condition precedent to its liability to indemnify that Transnet gives written notice to it "*as soon as reasonably practicable*" of any occurrence that may give rise to a claim under the contract. To the extent that Transnet only notified it of the occurrence on 7 April 2011, it contends that Transnet failed to give notice as soon as it was reasonably practicable and as such, has failed to comply with the terms of the contract;
- 44.5 Lastly, General Condition 3 of the contract makes it clear that its liability to indemnify Transnet is contingent upon the latter not making any admission, offer, promise or payment without its written consent. Insofar as it did not give any written approval to Transnet to make the payments for which it now seeks indemnity, Transnet has violated one of the terms of the contract.
- [45] Prior to probing anyone of the grounds on which Santam believes the claim should be dismissed, I need to indicate that any of them will be dispositive of this whole action. With that preface behind, I proceed to consider each of them.

NO LIABILITY ARISES UNDER THE CONTRACT FOR A PURELY STATUTORY OBLIGATION IMPOSED IN TERMS OF NEMA FOR POLLUTION REHABILITATION COSTS

[46] Transnet is firm that in terms of the General Operative Clause of the contract it is envisaged that where Transnet is under obligation to act as contemplated in Section 30(4) of NEMA, Santam is obliged indemnify it against its liability to pay compensation. Transnet vigorously argued that its approach is fortified by the decision of this Court in *Verulam Fuel Distributors CC V Truck and General Insurance Company Ltd & another*².

[47] Transnet readily conceded that it relies on the case mindful that the wording of the indemnity clause in the case is different from the current. The difference lies in the indemnity being against all sums of money paid in undertaking the clean-up operations in the case of *Verulam Fuel Distributors CC supra* whereas *in casu* the relevant clause provides that the insurers will indemnify the insured against their liability to pay compensation (including claimants' costs, fees and expenses) ...

[48] Insofar as I could apprehend its argument, Transnet attributes no or little significance to the difference between the provisions of the clauses because fundamentally the primary principles are akin. The emphasis for Transnet is on how legal liability for Santam arises. For Transnet it is irrelevant that it does so as a matter of a statutory obligation or a third party claiming compensation against it. In justification of its argument, Transnet refers to the pronouncement of this Court in *Verulam Fuel Distributors supra* at paragraph 13.

[49] At paragraph 13, this Court found that on a proper interpretation of the indemnity clause, the insurer's obligation to indemnify the insured arises where an accident has been caused by an insured vehicle as a result of which the insured incurs expenses for which it is legally liable to pay, the only proviso being that there ought to exist a direct causal link between the expenses incurred and the damage to property of the third party. The Court rejected the notion that it is a requirement that the owner of the property must first seek to hold the insured liable for the damage. It concluded that liability can arise from a statute, as occurred in this case and in *Verulam*.

² (2002) JOL 13042 (W)

[50] I agree with Santam that I cannot disregard the difference in the wording of the two clauses in *Verulam Fuel Distributors* and the case *in casu*. In *Verulam Fuel Distributors*, this Court held as it did because it did not matter that the legal indemnity arose as a result of a statutory obligation or a third party claiming compensation from the insured. The reason is apparent – the insured was covered against all sums ... whereas *in casu* the indemnity of the insured is against its liability to pay compensation ... Compensation in the sense employed *in casu* has a more limited application in that it envisages a party claiming compensation against Transnet and not seeking reimbursement as a matter of statutory obligation as Transnet would have this court believe.

[51] In *Verulam Fuel Distributors supra*, the Court found the overseas case of *M/S Aswan Engineering Establishment Co Ltd v Iron Trades Mutual Insurance Co Ltd*³ where the Court had interpreted a provision that was substantially similar as the one it was contending with. The clause read: "...The company subject to the terms, exclusions and conditions herein contained will indemnify the insured ... against all sums which the insured shall become liable at law to pay as damages ... in respect of or in consequence of ... accidental loss of or damage to property from whatsoever cause arising during the said period of insurance ..."

[52] The Court in *M/S Aswan Engineering Establishment Co. Ltd supra* stated that a policy of this kind needs to be construed having regard to the ordinary use of language. If the words used have an ordinary and natural meaning that is reasonably clear that is the meaning which should be adopted and the court should not entertain an obscure or contrived argument to give these words some different meaning. The Court went on to say that this principle is reinforced where it is the insurance company that is seeking to reject the ordinary meaning and where the document is, as here, a standard form document produced by the insurance company itself.

[53] The court then stated that 'Liable at law' on its ordinary meaning simply means

³ 1989 (1) Lloyds Rep. 289

legal liability. This is a common-place, though to a lawyer tautologous phrase, and is used in the title of the policy itself, 'third party (legal and contractual liability) insurance'. The court rejected the argument of the defendants that it was equivalent to liability in *tort*. The Court said that but that was not what the wording says because it could be noted that when the defendants wish to refer to such liability they expressly do so a few words later as part of the definition of the second aspect of the basic cover: liability in *tort* or under statute."

[54] Importantly The court then concluded by stating that the cases demonstrate how an insurance company can word its policies if it wishes to exclude contractual liabilities, as indeed is common-place in public liability policies.

[55] Santam has referred this Court to several foreign jurisdiction dealing with the concept of compensation as used in the context of the General Operative Clause. the relevant indemnity clause in a matter that came before Court in *Hamcor (Pty) Limited and Another v Marsh (Pty) Limited and Another*⁴ read: "*The Insurers will indemnify the Insured against their liability to pay compensation for and/or arising out of Injury and/or Damage (including claimants' costs, fees and expenses), occurring within the territorial limits...*"

[56] Mindful that in the Hamcor case the plaintiff sought to claim compensation for clean-up costs incurred by it for damage caused to a property that it owned while there was a clause that specifically prohibited such, the Court dismissed the claim and said:

"The [Insured's] proposed construction fails to have due regard to the language of the Operative Clause. The 'insured' are to be indemnified 'against their liability to pay compensation'. The [Insured's] argument accepts that 'liability' means being under a legal obligation of some form or another. That obligation is of a particular kind. It is not a liability to comply with court orders or other statutory requirements regarding the land; it is a liability to 'pay compensation'. Those words, necessarily, contemplate the recompensing of a third party in respect of the insured's liability to that third party or otherwise by legal compulsion. The [Insureds] sought to overcome this difficulty by asserting that, where

⁴ [2013] QCA 262

remediation work was done, there was a liability to pay or recompense the contractors who performed the work. This, it was said, was a 'liability to pay compensation'. Such a construction gives an unnecessarily contrived, not to say improbable, meaning to the word 'compensation'. The words 'liability to pay compensation' have their ordinary, everyday meaning."

[57] In the circumstances, I find the Hamcor decision to be almost on 'all fours' with the case in *casu*. Accordingly, there is substance in the interpretive argument raised by Santam such that the two clauses cannot be characterized analogously. I am entitled to dismiss the claim on this basis alone but I choose to proceed to consider the other grounds in case this matter is appealed in which case the court of appeal might find itself impoverished because of my lack of consideration of the other grounds.

[58] Santam also contended that Transnet has failed to prove on a balance of probabilities the allegation made in its particulars of claim that had it not expended the funds towards the rehabilitation of the contaminated area, the relevant authority would have undertaken the cleaning-up operations itself and sought to be reimbursed in terms of Section 30(8) and (9) of NEMA respectively. This is aside from Transnet having promised to call a witness and the case being partly postponed to allow it to do so. I agree with this submission. The allegation pertaining to the provisions of Section 30(8) and (9) of NEMA without substantiation is bare.

IN TERMS OF THE GENERAL OPERATIVE CLAUSE OF THE CONTRACT READ TOGETHER WITH SECTION B, THE OCCURRENCE AGAINST WHICH TRANSNET SEEKS INDEMNITY IS NOT COMPENSATION EMANATING FROM DAMAGE TO PROPERTY

[59] The contention by Santam that this was an indemnity type insurance intended to compensate Transnet only in situations where damage has been caused to a third party's property and the third party has claimed for such loss from Transnet finds favour with this Court. I have partly dealt with this contention by Santam above. Transnet has argued that this court in *Verulam Fuel Distributors supra* rejected this assertion when it said:

[8] I do not agree with the construction contended for. The first defendant attributes a much narrower meaning to subsection B than is permitted by language. It is well settled that the intention of the parties is, in the first instance, to be gathered from the language used in the policy which, if clear, must be given effect to. This involves giving the words their plain, ordinary and popular meaning unless the context indicates otherwise."

[60] On the facts of Verulam, one cannot falter the decision of the Court. It must be borne in mind that the insured in that case was covered against indemnity for all sums, which is radically different from this case. So, on the facts in this case, it is important to note that Santam has designed the indemnity clause in a manner that attracts a contracted interpretation. Accordingly, it should be of consequence to distinguish whether the legal indemnity arises as a matter of statutory obligation or because of a party claiming compensation against the insured, Transnet in this instance.

[61] Again, I need to reiterate that given the facts in Verulam the following paragraph ought to be understood in context:

"[12] As to the contention that the heading of subsection B is an indication that only the owners of the affected land may seek to hold the plaintiff liable I would say the following. There is no reason to restrict the expression "third party" to the owner of the land that was damaged by the spillage. To do so would be inconsistent with the wide and expansive language employed in the subsection. In Digby v General Accident Fire and Life Assurance Corporation Ltd [1942] 2 All ER 319 it was held that the phrase "third party liability" did not have a rigid and definite meaning, so as to require in all instances, three parties. The phrase is used to indicate an indemnity against some liability, in contradistinction to an indemnity against loss or damage to the insured's own property. It means only that the insurer will indemnify the insured against proper liability incurred elsewhere."

IN TERMS OF EXCLUSION 2 OF THE CONTRACT OF INSURANCE, WAS THE POLLUTION OR CONTEMINATION CAUSED BY A SUDDEN, UNINTENDED AND UNEXPECTED HAPPENING

[62] The argument by Santam in this regard is firstly, that the occurrence was not sudden as the escape of the fuel from the incision was deliberately controlled by the thieves causing the discharge to happen over an extended period. This is common cause between the parties. Secondly, it was intended because the thieves' objective was to continue stealing the fuel for as long as they remained undetected. Lastly, it was expected as the thieves anticipated to receive the fuel from the cut pipeline.

[63] The definition of the word, 'sudden' has occupied the minds of different Courts in this country and many jurisdictions abroad. Having considered how the word has been interpreted by both overseas and court in this country, the Court in *African Products (Pty) Ltd v AIG South Africa Ltd*⁵ at paragraph 19 settled on the meaning assigned to it by the Court *a quo* that in the context used in the contract should be understood in its temporal sense, meaning "abrupt" or "occurring quickly" or "taking place all at once". In this contract too, it is my opinion, that 'sudden' is meant to deliver the same meaning.

[64] The assertion by Transnet that sudden ought to be understood to mean that the seepage did not happen as a result of wear and tear such as corrosion of the pipeline stands to be rejected. The event covered by the policy is the seepage that caused pollution not the puncturing. The escape of the fuel was gradual and so was the seepage. This had to be the case as the thieves supervised the escape of the fuel from the pipeline. Accordingly, it was not sudden as the parties had intended in the contract.

[65] I find the example given by the Court at paragraph 20 of the *African Products* case *supra* similar to this situation. For that reason, it could be useful to reproduce it below:

⁵ (2009) 4 All SA 99 (SCA)

"...Were a motor which drives a conveyor belt in the production line in the plant to stop running suddenly and without warning (unexpectedly) and it is subsequently discovered that a new screw inside the motor had snapped, causing other parts to be dislodged, the insurer would be liable to indemnify the insured for lost production while repairs to the motor were being effected. The physical damage that would have occurred as a result of the snapping of the screw would have been both unforeseen and sudden. Were it to be found, however, that a screw inside the motor had broken as a result of wearing out over a period, then the physical damage, though unforeseen, would not have been "sudden". The wearing out would have happened over time but would only have manifested itself when the screw eventually broke. In this scenario the insurer would not be liable to indemnify the insured for loss of production. The fact that the physical damage (wearing out) was undiscovered until the screw broke does not make the breaking sudden."

[66] It follows that if the escape of the fuel was controlled by the thieves, they must have intended to continue with their illicit enterprise for as long as they remained uncovered. The expectation was that they would carry on to receive fuel from the incision created by them on the pipeline. The fact that Pilime stated in Court that the piercing of the pipeline was sudden cannot turn it into one, it being immaterial that no witness on behalf of Santam contested his testimony.

GENERAL CONDITION 2 OF THE CONTRACT MAKES IT A CONDITION PRECEDENT FOR TRANSNET TO GIVE WRITTEN NOTICE TO SANTAM "AS SOON AS REASONABLY PRACTICABLE " OF ANY OCCURRENCE THAT MAY GIVE RISE TO A CLAIM UNDER THE CONTRACT AND IN TERMS OF GENERAL CONDITION 3 TRANSNET DID NOT OBTAIN THE WRITTEN CONSENT OF SANTAM BEFORE EXPENDING FUNDS FOR THE REHABILITATION

[67] Santam contended in this regard that the period that elapsed between the occurrence and the date on which Transnet supplied it with a written notification reporting the incidence was not given 'as soon as was reasonably practicable' as required by the provisions of the contract. The occurrence took place on 28 January 2011 but Transnet

only notified Santam in writing on 7 April 2011, approximately two months after the incidence. To show that it had complied with the above condition, Transnet led the evidence of Mahesh.

[68] Mahesh stated that the form that she had to complete when notifying Santam of the incidence was not as categorical as it could have been because it was open to various interpretations. It would seem that the meaning that Santam attaches to the phrase is that Transnet was supposed to have reported the incidence almost immediately following the discovery. On the other hand, she understood 'as soon as reasonably practicable' to require Transnet to first form some reasonable estimate of the costs involved in the rehabilitation of the area.

[69] The meaning that she attached to the phrase was not corrected by anyone from Santam, if anything, it was encouraged and left to endure until culminated by the letter of repudiation on 20 March 2014. for Mahesh reporting almost immediately would have been a difficult exercise because the costs escalated over a period as one continued to investigate the damage. Santam, as the party that designed the form and wishing to rely on the exclusion, ought to have appreciated that this was a possible meaning that an insured party such as Transnet could assign to 'as soon as practicable'.

[70] Mahesh's further evidence was that upon delivery of the claim form to Santam on 7 April 2011, it proceeded to appoint a loss adjustor. Strangely, Santam never complained of late submission of the claim when Transnet notified it. She had estimated the costs at **R4 Million** while the loss adjuster on 20 August 2011, four months later, projected it at **R4.5 Million**, a fact that validates the ever-increasing nature of the costs over time and the difficulty of furnishing precise figures early in the process.

[71] In fact Mahesh's evidence that the loss adjustor specifically told her that he would only compile his report upon receiving all the costs was not challenged. Additionally, other than cross examining Mahesh on her point that insofar as she was concerned, Transnet had notified Santam of the claim 'as soon as reasonably practicable', her evidence is

essentially uncontested and must stand. Furthermore, and in any event, Santam has failed to demonstrate that the claim stood to be excluded based on this.

[72] According to the contract, it is not every damage that will lead to a claim being brought against the insurer (Santam). In those circumstances therefore it is understandable why an insured would first investigate to establish whether or not this incidence would lead to a claim. It took Transnet a period as little as two months to give written notification of the claim in circumstances where Santam had chosen to use a nebulous phrase such as, 'as soon as reasonably practicable'. Given that background it can hardly be said that the period was not as soon as reasonably practicable and in any event, the *contra preferendum* rule finds application against Santam.

[73] Mindful that other than advising the various relevant Transnet personnel that it was considering or investigating the possibility of making interim payments, at no stage did Santam unequivocally undertake that it would make payment. This much was conceded by Mahesh during her testimony. Santam's behavior though raises an important question – why was it necessary, if at all, to repudiate the claim three years later when it genuinely believed that Transnet had failed to have notified it of the claim 'as soon as reasonably practicable'?

[74] Of course, Santam has always been at liberty to raise the issue concerning prompt notification especially if the reservation of rights contained in the letter of repudiation is anything to judge this but its conduct following receipt thereof suggests that it had accepted that the notice was in order. It is inexorable to conclude as I did when the following is considered:

74.1 On being served with the notice, it acknowledged receipt and appointed a loss adjustor who throughout the entire three years communicated with Mahesh and other relevant personnel from Transnet about the claim;

74.2 During the three-year period, a subtle message that interim payment would be made lingered thus keeping Transnet on a string; and

74.3 Santam repudiated the claim on an interpretive point as against lack of punctuality of the notification.

[75] Taking all the above into consideration, post the notification on 7 April 2011, I am persuaded that the parties' conduct is representative of a behavior consistent with a person believing that the notification was furnished 'as soon as reasonably practicable.

[76] Transnet has, in the alternative, argued that the conduct of Santam was consistent with a party that has waived its right to raise the exclusion pertaining to punctuality. Perhaps it could be instructive at this juncture to refer to the case of *Road Accident Fund v Mothupi*⁶ where the Court at paragraph 15 stated that waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it.

[77] At paragraph 16, the Court continued to state that the test to determine intention to waive has been said to be objective. That means, first, that intention to waive, like intention generally, is decided by its outward manifestations, secondly, that mental reservations, not communicated, are of no legal consequence and thirdly, that the outward manifestations of intention are resolved from the perspective of the other party concerned, that is to say, from the perspective of the reasonable person standing in the shoes of the latter.

[78] The outward manifestations can consist of words; of some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to act or speak exists. See, paragraph 18 of the Mothupi case *supra*. At paragraph 19, the Court says that since no one is presumed to waive his rights, firstly, the *onus* is on

⁶ 2000 (4) SA 38 (SCA)

the party alleging it and secondly, clear proof is required of an intention to do so. The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say, consistent with no other hypothesis.

[79] Like in the Mothupi case, Santam did not in any express terms notify Transnet in advance that it would be invoking the exclusions concerning lack of prompt notification of the claim and failure to obtain prior approval to expend funds towards the rehabilitation of the area. Again, as in the case of the Mothupi case, the controversy becomes whether or not Santam's failure to have done so amounted to a conduct reminiscent of a party that would not place reliance on those exclusions to repudiate Transnet's claim. Transnet contends that whichever way one assesses the behavior of Santam, in every respect its conduct was in harmony with those of a party which had waived its right to raise the exclusions.

[80] In other words, any reasonable man in the shoes of Transnet would have read the conduct of Santam not to have been consistent with any other proposition but that it has waived its right. At paragraph 74.1 to 74.3, in a different context, I have described the conduct that inescapably lead to this conclusion. The significance of the conduct warrants reiteration:

80.1 Conscious of the late delivery of the written notice of the claim, Santam went ahead to accept it, acknowledged receipt and appointed a loss adjustor who throughout the entire three years exchanged a substantial amount of correspondence with Mahesh and other relevant personnel from Transnet about the claim;

80.2 During the three-year period, a subtle message that interim payment would be made lingered thus keeping Transnet on a string; and

80.3 Santam repudiated the claim on an interpretive point as against - that the claim was not lodged 'as soon as reasonably practicable'.

[81] Is there a different hypothesis that can be assigned to this conduct other than that Santam had waived its right? The answer, in my opinion must be in the negative. At the risk of repeating oneself, why was it important to wait for approximately three years to repudiate when this could have been done right at the onset? Why was it necessary to string along Transnet for a period of three years if Santam was not seriously considering to compensate Transnet for the funds expended towards the rehabilitation of the area?

[82] Santam had right at the time of submission of the claim been aware that Transnet did not comply with General Exclusion 3 – no prior approval was obtained from it for the payment of the rehabilitation expenses. One would have expected Santam to immediately object to the claim because lack of compliance was so conspicuous and transparent. Its failure to have done so, in my opinion, is representative of an unequivocal conduct distinctive of a party waiving its right. Even if I am wrong in my approach to this issue, Santam has not contested the evidence of Mahesh on the two exclusions.

FINDINGS

[83] The following are the findings flowing from the judgment:

- 83.1 Legal liability to indemnify can arise from an obligation imposed on an insured by a statute but the wording of the indemnity clause negates this possibility in this case;
- 83.2 Similarly, the compensation sought by Transnet emanates from damage caused to another's property but on the facts of this case absent a claim from the third party, Transnet cannot succeed;
- 83.3 The compensation sought by Transnet is not for damage caused suddenly, unexpectedly and unintentionally;

83.4 Insofar as general exclusions 2 and 3 are concerned, it is inevitable to conclude that Santam, has by its conduct, waived its right to rely on General Exclusions 2 and 3 of the contract.

CONCLUSION

[84] In the result and recalling that I have stated that anyone of the points raised by Santam would be dispositive of this matter, the action fails and I make the following order:

The claim is dismissed with costs including those consequent upon the employment of two counsel, where applicable.



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 09 November 2022 at 10:00.

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Date of Judgment:

09 November 2022