

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

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

07/08/2023

A handwritten signature in blue ink, appearing to be 'J. D. 1', is written over a light blue rectangular background.

CASE NO: 30445/2014

In the matter between:

TRANSNET SOC LTD

Applicant

and

SANTAM LTD

Respondent

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 07 August 2023 at 10:00.

JUDGMENT ON LEAVE TO APPEAL

MASHILE J:

[1] On 9 November 2022, this Court dismissed an insurance claim brought by the Applicant (“Transnet”) against the Respondent (“Santam”) with costs. Dissatisfied with the judgment and order, Transnet launched an application for leave to appeal wherein it outlines several grounds on which it asserts the Court has erred. As such, Transnet argues that there exist reasonable prospects that another Court would find differently from the decision reached by this Court. Arguing to the contrary, Santam opposes the application.

[2] Transnet challenges the judgment and order on the following basis:

- 2.1 The Court erred in dismissing the Plaintiff’s claims on the basis that the liability for which the Plaintiff sued was a statutory liability in respect of which there was no third-party claimant to compensate;
- 2.2 The Court erred by holding that pollution damage was only indemnified by the Defendant if it arose out of a sudden unintended and unexpected happening during the period of the insurance and that the seepage in this instance had happened over a long period of time/ and
- 2.3 The Court also erred in finding that it was necessary to call a witness to say what the State would have done if the Plaintiff had not performed its statutory obligation to clean up and pay for the cost of clean-up of the pollution.

[3] The application is brought in terms of Section 17(1) of the Superior Court Act 10 of 2013, which in relevant part stipulates that:

“Leave to appeal may only be given where the judge or judges are of the opinion that –

- (i) the appeal would have a reasonable prospect of success; or*
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration; ...”*

[4] If leave is granted against an order of a single Judge in terms of the provisions of Subsection 2(a) or (b), the Judge granting leave must direct that the appeal be heard by the full Court of that division unless:

- “(i) the decision to be appealed involves a question of law of importance...;*
- (iii) that the administration of justice requires consideration by the Supreme Court of Appeal.”*

[5] The test which was applied previously in applications of this nature was whether there were reasonable prospects that another Court may come to a different conclusion. What emerges from section 17(1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and is deduced from the words like, “would” and “only” used in the Section.

[6] In *Ramakatsa and Others v African National Congress and Another* ¹ the Court observed that:

¹ (724/2019) [2021] ZASCA 31 (31 March 2021)

“I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

[7] To turn then to the first ground - the Court erred in dismissing the Plaintiff's claims on the basis that the liability for which the Plaintiff sued was a statutory liability in respect of which there was no third-party claimant to compensate. This ultimately turns on interpretation of the language used in the contract of insurance. Transnet submitted that the Court assigned the plain meaning of the word, ‘compensation’, without having regard to context, purpose or background.

[8] Contrary to what Transnet believes, the court was, in addition to the plain language used, mindful of the context and purpose of the contract. The point is that the wording of the relevant clause in the contract in the *Verulam Fuel Distributors CC v Truck & General Insurance Company Ltd & Another*² case was different from the current. The Court was at pains to explain itself why it felt that it could not attach a similar meaning in circumstances where the two clauses conspicuously and deliberately deliver two distinct messages. 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.

[9] At paragraph 47 of the judgment, I explained that the difference is to be found in the indemnity being against all sums of money paid in undertaking the clean-up

² [2004] JOL 13042 (W)

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) ...

[10] In all the cases that I have cited in the judgment including Verulam, the Courts accentuate the significance of the manner in which the indemnity clause is formulated. Depending on how it has been couched, it would either exclude or include liability. The court is aware that Transnet attaches no value to the wording of the clauses and is persistent that the Court should not have dismissed the claim.

[11] I am awake to the fact that unless foreign case authority is infused or incorporated into our law, its importance will be no more than persuasive and may only followed where there is no guideline in our own legal system. My reference to the Australian case of *Hamcor (Pty) Limited and Another v Marsh (Pty) Limited and Another*³ Should have been understood against that backdrop and not that it was relied upon as binding authority on this Court. I disagree and do not believe that another Court would reach a different conclusion on this issue. However, since the wording of these clauses are likely to continue to bedevil High Courts, it constitutes a compelling reason to grant leave to the Supreme Court of Appeal to settle this question once and for all.

[12] Transnet also contended that the Court erred by holding that pollution damage was only indemnified by Santam if it arose out of a sudden unintended and unexpected happening during the period of the insurance and that the seepage in this instance had happened over an extended period. Transnet asserted the converse in this regard - the pollution damage arose out of a sudden unintended and unexpected happening during the period of the insurance and that it was of no moment that the seepage occurred over a long time.

[13] Again, the issue here is one of interpretation. Transnet reads the sudden, unintended and unexpected from its own perspective whereas Santam looked at it from

³ [2013] QCA 262

the angle of natural catastrophes where no human agents play part. In other words, where a person deliberately causes damage liability to compensate Transnet will not arise. The exclusion of liability in instances where the damage was deliberately caused makes business sense.

[14] Perhaps it is worth pointing out that there is a connection between the exclusion mentioned in Clause 1 of Part 2 of the contract and the other exclusions contained in the other clauses under Part 2. The only difference is that Clause 1 of Part 2 envisages exclusion of liability where Transnet's own personnel deliberately and intentionally fail to take reasonable steps to avert damage whereas the others refer to a happening that is sudden, unintended and unexpected but without the intervention of human agents.

[15] I reiterate that I found the authority of *African Products (Pty) Ltd v AIG South Africa Ltd* at paragraph 20 instructive on this point. In fact, the analogy is striking. I need to emphasise that in all the cases that I have referred to in the judgment, all of them underscore the significance of the wording in the contract. Depending on the wording, the insurer will or will not be liable to compensate. As in the case of the first ground, I do not believe that another Court would reach a different conclusion on this point but I regard the difference in the interpretation of the meaning of 'sudden, unintended and unexpected' as sufficiently compelling to warrant the attention of the Supreme Court of Appeal.

[16] In the circumstances, leave to appeal succeeds and I make the following order:

1. Leave to appeal is granted to the Supreme Court of Appeal; and
2. Costs will be those in the appeal.



B A MASHILE

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

APPEARANCES:

**Counsel for the Plaintiff:
Instructed by:**

**Adv G D Harpur SC
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**Counsel for the Defendant:
Instructed by:**

**Adv B Berridge SC
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Date of Judgment:

07 August 2023