IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 85613/2017

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

SIGNATURE [redacted] DATE **14/03/2022**

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In the matter between:

DISCOVERY INSURE LIMITED **PLAINTIFF**

and

TSHAMUNWE MASINDI **DEFENDANT/REPONDENT**

LEAVE TO APPEAL- JUDGMENT

N V KHUMALO J

Introduction

[1] This is an application for leave to Appeal to the Supreme Court of Appeal or full bench of this court against a Judgment and order of this court delivered on 08 September 2021, partly upholding the Applicant's claim for repayment of benefits the Applicant paid in settlement of

Respondent's claim for a loss that he allegedly suffered due to a storm and flooding of his residence.

[2] The claim was based on a written contract of insurance that the Applicant, Discovery Insurer (as the insurer) concluded with the Respondent, Mr Masindi (as the insured) in terms of which the Applicant provided the Respondent with insurance cover for, *inter alia*, the specified incident.

[3] The Applicant had settled the Respondent's various claims of loss arising from that single incident of flooding of his residence. One of the loss the Respondent claimed and Applicant settled, that of accommodation, was fraudulent in that no such loss was suffered. The invoices for the fraudulent claim were submitted after payment on the credible losses was already made (prior the breach).

[4] It is trite that the bar of the test that an Applicant in an Application for leave to appeal has to meet as set out in s 17 (1) (a) of the Superior Court Act 10 of 2013 has been raised. A court may grant leave to appeal only when it is of the believe that the appeal would have reasonable prospects of success. The Applicant will therefore have to persuade the court that the appeal would have reasonable prospects of success, upon which the court would be compelled to grant leave; see *Stroud Riley & Co Ltd v Secretary for Inland Revenue* 1974 (4) SA 534 (E) at 539A-540D.

[5] The use of the word **"would"** in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against; see *The Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC). In *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015[2015] ZASCA 176 (25 November 2016) the court held at par [17] that:

> "[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[6] The court is also compelled to grant leave if it is of the opinion that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. What would be compelling would be in each Application decided on its own facts. It had been decided that the substantial importance of the case to the Appellant or to both parties constitutes a compelling reason why an appeal should be heard; see Erasmus Superior Court Practice Volume 1 A2-56 Update Service 9- 2019.

[7] The Application for leave to appeal is considered within the ambit of s 17 (1) (a) and the consequential doctrines arising therefrom.

Grounds for leave to Appeal

[8] The grounds on which the Applicant seeks leave to appeal are that the court erred:

[8.1] when it found, on the basis of the Judgment of *Lehmeckers Earthmoving and Excavators (Pty) Ltd) v Incorporated and General Insurance* 1984 (3) SA 513 (A) that the Plaintiff was not entitled to claim back all amounts/benefits paid under claim number: 134 0670 (including amounts paid out in respect of portions of the claim which were not tainted by fraud) for the reason that:

[8.1.1] The court had correctly found that in this claim all of the benefits paid to the Defendant arose from a single incident, therefore the principle of *Lehmeckers Earthmoving Equipment*, namely that an insured cannot be found to have forfeited an earlier separate claim (which was not tainted by the fraud) can have no application to this action.

[8.1.2] There was only one claim. As a result, if the claim was forfeited, this necessarily meant that the Applicant could claim back all the payments made from the Defendant (since all amounts comprised of the payment made under the single claim), <u>including the earlier separate claim for losses which was not tainted, upon the occurrence of a fraud</u>.

[8.1.3] Unlike in *Lemhecke*, the forfeiture clause in question was not vague and ambiguous in relation to which amounts would be forfeited. Clause 5.13 is explicit in providing that the entire claim is forfeited. The court is therefore not entitled to go beyond the express wording of the policy and only enforce a partial forfeiture. Further that the court erred by finding that the forfeiture clause 5.13 only entitles the Applicant to claim back the amounts paid in respect of the fraudulent portion (and not all the amounts paid under the claim) as this reasoning effectively renders the clause nugatory.

In response

[8.1.3.1] The distinction between an incident that gives rise to the claim/s and the various losses arising therefrom need to be clarified and emphasised. Although *in casu*, there was a single incident/occurrence, it gave rise to various types of losses/ benefits that were all insured under the policy. The Respondent submitted claims for various specified losses/benefits at different times and by the time of the breach the claims for credible losses had already been validly settled.

[8.1.3.2] It is also clear when reading the Judgement that the Applicant's argument was considered in relation to the relevant authorities and the principles applicable which are binding to the court. Moreover, taking into account the fact that at the time of the breach, the benefits on the insured risk that the Applicant sought to be forfeited had already accrued and been validly claimed and settled, therefore inviolate. It is further acknowledged that the parties bound themselves to the application of the forfeiture clause. The forfeiture clause was, from that perspective, a penalty. Applicant is referred to paragraph 31, 34, 35 and 36 of the Judgment.

[8.2] by relying upon a passage in Vol 25 of Halsbury's Laws of England (4th edition cited in Lehmbecker as a basis to refuse ordering the Defendant to repay all amounts paid to him pursuant to the partially fraudulent claim, that reads:

"A condition subsequent affecting the policy is a condition relative in its essence to duties after the inception of the policy which by necessary intendment or express agreement affects the continued existence of the policy in the sense that if there is a breach, the other party may treat the policy as at an end. The avoidance of such a policy can only date from the breach; up to that date the policy is fully effective so as to entitle the assured to recover in respect of any loss which occurred before the breach." (his underlining.)"

[8.2.1] the passage relates to a standard condition subsequent (resolutive condition) which brings an agreement to an end upon its occurrence. The passage does not deal with the term which expressly provides for the termination of the agreement with retrospective effect from the date of the incident (and repayment of all the amounts paid subsequent to that retrospective termination date). Consequently, it was incorrect to conclude, on the basis of the above passage, that the Applicant was not entitled to claim back all the amounts paid to the Respondent subsequent to the retrospective termination

[8.2.1.1] The Applicant's selective quoting from the passages the court referred to in the matter of *Lehmbecker* and the misconception of how the principle has been considered in relation to the Applicant's situation is glaring. The Judgment is clear that what was being outlined in the quoted passages of the mentioned judgment was the general principle applicable in cases of breach (false claims clauses) bar the forfeiture clause, in order to characterise or determine the nature and extent of the applicable forfeiture *in casu*, together with its legal implication. Paragraph 28 of the Judgment is very instructive on the significance of the literal connotation of the wording of the forfeiture. Reference is also then made to paragraphs 29 where it is recognized that in circumstances like *in casu,* the clause for forfeiture of valid or honest claims that have accrued prior the breach is punitive in nature, thus amounting to a penalty.

[8.3] The Applicant further criticises the court's finding on paragraph 30 that "the avoidance of the policy can only be from the date of the breach" and that the Defendant was entitled to benefit under the policy up until the breach, as *in casu*, clause 5.13 expressly provide for the policy to be terminated retrospectively to the earlier of either the reported incident which in this case is 11 November 2016 or "the actual incident date" which is 10 November 2016. The Applicant terminated retrospectively from 10 November 2016.

[8.3.1] Firstly there is no finding that is made on paragraph 30 but an evaluation of the circumstances of the present matter vis a vis the various principles mentioned. Hence the following statement was made "A breach committed when claiming benefits of a loss that has accrued prior thereto, following the reasoning as per mentioned authorities, should not taint the part of the claim that is credible since the loss (entitlement to claim/recover) accrued prior the breach."

[8.3.2] The issue of the effect of the forfeiture clause in the present matter given the mentioned principles is raised in paragraph 32. See also paragraphs 34 and 35 of the Judgment. The retrospective enforcement of the forfeiture clause (affecting valid losses/claims prior the breach) is punitive and considered in that context; see paragraph 29, 31, 35 and 36 of the judgment.

[8.3.3] The above mentioned comments also take care of the Applicant's 5th ground of appeal. It is commonplace that retrospective forfeiture of valid claims tainted by subsequent fraud constitute a penalty.

[8.4] The Applicant has also alleged that the court erred by relying on the Conventional Penalties Act as a basis to reduce the amounts repayable to the Applicant when in order to reduce a penalty the Respondent must allege and prove that the penalty is excessive. The Respondent also did not plead any reliance upon the Conventional Penalties Act nor did he adduce any evidence to establish that the penalty was excessive. This allegation is repeated by the Applicant in his seventh ground of appeal.

[8.4.1] The forfeiture that the Applicant seeks to enforce amounts to a penalty, and as a result the Conventional Penalty Act would apply. See paragraph 20 of the Judgement regarding Defendant's opposition to complete forfeiture that includes valid claims arising from a genuine loss.

[8.5] A statement is made that the extent of the penalty in this case cannot be described as fraudulent.

[8.5.1] The context of that statement is quite unclear as nothing to that effect was suggested.

[8.6] Further the court is said to have erred for the reason that its conclusion in relation to the legal issue (at paragraphs 30 to 36 of the Judgment) is contrary to the principle in *Schoeman v Constantia Insurance* 2003 (6) SA 313 (SCA) that where there is a single claim and the claim is partly fraudulent and partly genuine and there is an express forfeiture clause, then it is not open to the insured to argue that he should only forfeit the fraudulent portion of the claim.

[8.6.1] See paragraphs 22 and 23 and 28 of the Judgment.

[8.7] Finally, that the court erred in failing to make a determination in respect of paragraph 7 of Ranchod J's judgment.

[8.7.1] According to paragraph 6 of Ranchod J's order of 2 October 2020, Mflatele Attorneys, the Defendant's erstwhile attorneys, withdrew on the date of the order which was the date of the trial. Mr Mflatele was, in his absence, ordered to file an affidavit within 30 days of the date of the Court Order explaining, inter alia, why he should not pay the costs occasioned by the postponement of the trial bonis propriis on an attorney and client scale.

[8.7.2] On paragraph 7 Ranchod J ordered that the costs occasioned by the postponement shall be payable on an attorney and client scale by either the Defendant or his erstwhile attorneys Mr Mfatele and the question whether such costs are to be payable by the Defendant or his erstwhile attorney Mr Mfaletele

reserved for determination at trial. A copy of the order was to be served on Mr Mflatele by the Plaintiff by sending a copy to the following email address info@mflateleinc.co.za.

[8.7.3] The proof of service of the Order by the Applicant on Mr Mflatele via email on 6 October 2020 is filed of record. A notice of set down of the trial on 4 February 2021, when the issue of the costs was also to be decided was however not served on Mr Mflatele even though he was to be affected by the order.

[8.7.4] An order was made against the Defendant for payment of the costs of suit on an attorney and client scale. No cost order was considered against Mr Mflatele.

[8.7.5] It is the basic rule of our law that an award for costs is in the discretion of the court, which discretion must be exercised judicially. In *Kruger Bross & Wasserman v Ruskin,* 1918 AD 63 at 69. Innes CJ held that:

> "The rule of our law is that all costs –unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order without his permission."

[9] Accordingly, having considered the Applicant's grounds for leave to appeal, there are no prospects of another court arriving at a different conclusion.

Under the circumstances the following order is made:

1. The Application for leave to appeal is dismissed with costs

[redacted]

N.V. Khumalo

Judge of the High Court

Appearances:

For Plaintiff/Applicant	:	Fider L M
Instructed by	:	Keith Sutcliffe & Associates Inc Ref: KJ Sutcliffe/6000948 Email: keegan@ksalaw.co.za
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