IN THE KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO.16164/08

In the matter between

CHEMICAL SPECIALITIES LIMITED Plaintiff

and

HOLLARD INSURANCE COMPANY LIMITED Defendant

J U D G M E N T

Del.26 May 2011

WALLIS J.

[1] The plaintiff manufactures paint. In 2007, when the events giving rise to this litigation occurred, it did so from three separate manufacturing facilities in the Durban area, two in Rossburgh and one in Phoenix. Apart from those facilities it had two warehouses in the Durban area and one in the Western Cape. The plant and machinery and stock and materials in trade situated at these various premises were insured by the defendant against, *inter alia*, the risk of loss by fire.

[2] On 30 August 2007 a fire occurred at the Phoenix plant and substantial quantities of stock and materials were destroyed or damaged. The plaintiff made various claims under the policy and has been paid a little over R24 million in respect of these claims. Only one item remains outstanding. It is an amount of R1 340 684 being the balance of the claim in respect of stock and materials and clean-up costs. In refusing to pay this amount Hollard relies upon the average

clause in the policy.

[3] The issue between the parties is not one of valuation. When the policy was issued the sum insured for fire risks in respect of stock and materials at the Phoenix plant was R12 million. The value of the stock and materials on the premises of the Phoenix plant at the time of the fire is agreed at slightly less than R12 million. The problem arises in respect of a warehousing facility situated in Aberdare Drive, Phoenix, where further stock emanating from that plant was being stored at the time. If the value of this stock is included then the plaintiff was underinsured and average applies. If it is excluded then the plaintiff is entitled to be paid the balance of its claim.

[4] When the policy was issued the plaintiff's operations did not extend to the Aberdare Drive warehouse. On 30 July 2007 the then managing director of the plaintiff, Mr Wood, telephoned the company's insurance broker, Mr Deon Schoeman, and asked him to arrange to extend cover to the Aberdare Drive premises. These were premises rented by the plaintiff for storage purposes. The difficulties that have arisen between the parties flow from the manner in which Mr Schoeman carried out his instructions.

[5] Mr Schoeman is an experienced insurance broker. At the time he had worked in the field for 29 years and the plaintiff had been a client for 22 years. At 12h43 on 30 July 2007 he sent an e-mail to Mr Malcolm Marshall, the technical manager of Factory & Industrial Risk Managers (Pty) Limited who represented Hollard. Mr Marshall is, if anything, even more experienced in the insurance field, where he has been working for some 50 years. The e-mail refers to the plaintiff's policy and is copied to Mr Bruce MacKinnon, the financial director at the time of the plaintiff. It reads as follows:

'Hi Malcolm,

Please extend the situation of risk with immediate effect.
The client has rented warehouse space to accommodate primarily finished product from the Phoenix factory (mostly decorative paints).
Situate 230 Aberdare Drive, Phoenix, Durban,
Kindest regards,
Deon.'

A little over an hour later, and without query or further communication with Mr Schoeman, Mr Marshall forwarded this e-mail to an underwriter in order to prepare the addendum to the policy. When that was issued it recorded in the memorandum to the fire section of the policy:

'SITUATION ADDED
230 ABERDARE DRIVE, PHOENIX, DURBAN.'

[6] The plaintiff pleaded its case in relation to the insurance policy and the events of 30 July 2007 in the following terms:

'4.6 At the time of the conclusion of the said agreement a group of properties were included in the list of premises set out therein to which the agreement applied, including plaintiff's factory.

4.7 On or about 30 July 2007 the parties agreed that the premises to which the agreement would apply would include the plaintiff's warehouse at 230 Aberdare Road (sic), Phoenix, KwaZulu-Natal.

4.8 The variation agreement referred to in paragraph 4.7 was concluded orally by the said Schoeman, duly authorised by plaintiff and M Marshall of Factory & Industrial Risk Managers (Pty) Limited defendant's duly authorised agent in Durban, KwaZulu-Natal.'

Hollard admitted these allegations save that it averred that the variation agreement was embodied in Schoeman's e-mail and the revised policy schedule issued in response thereto.

[7] In its replication the plaintiff alleged the following:

'3.1 Schoeman, duly authorised by the Plaintiff, requested an extension of the policy to include a situation of risk being a warehouse at 230 Aberdare Drive, Phoenix, Durban which would be used as a store for finished product made at the Phoenix factory at 31 Hunslett

Road, Durban.

3.2 This request was made by email and sent to Defendant's duly authorised agent, Malcolm Marshall by Schoeman (referred to as "Deon") on 30 July 2007.

3.3 This request was accepted by Defendant impliedly or by conduct by an advice to "Sandra" in underwriting by forwarded email dated 30th July 2007 in which Defendant instructs the underwriting department to process the request made by Schoeman on Plaintiff's behalf. This email is Annexure "P1" to Defendant's Plea.

3.4 The amended policy schedule which is annexed to Defendant's Plea marked "P2" was purportedly signed by Defendant on 23rd August 2007, seven days before the fire, and was not sent to Plaintiff or its agent until after the said fire on the request of Schoeman.

3.5 The said amended policy schedule:-

3.5.1 does not correctly reflect the agreement of variation concluded on 30th July 2007;

3.5.2 was not made known to Plaintiff before the fire which gave rise to the disputed claim;

3.5.3 is not the agreement between the parties.

3.6 The said agreement added a situation of risk to the policy only and had no effect on the agreement relating to average.'

[8] On the pleadings the plaintiff's case was that the effect of Mr Schoeman's e-mail and of Mr Marshall acting thereon was to vary the terms of the policy of insurance by providing fire cover in respect of the contents of the warehouse at 230 Aberdare Drive. It alleged that the basis of the cover was that the goods stored in this warehouse would be finished product emanating from the Phoenix factory. The plaintiff's pleaded case is that Hollard was at risk in respect of stock and materials in trade stored at this warehouse. It did not, however, allege that an additional premium was paid for this cover nor did it allege that the extent of the cover in respect of these premises was separately specified.

[9] These allegations create an obvious difficulty for the plaintiff. On the one hand it is accepted that cover was sought and granted in respect of the stock and materials in trade stored at the Aberdare Drive warehouse. On the other hand no separate value was ascribed thereto and no separate premium was paid for this

cover. The logical and only inference is that the additional cover was an extension of one of the existing heads of cover under the policy. In that way the parties could achieve their manifest intention of insuring the contents of the Aberdare Drive warehouse, without paying an additional or fixing a sum insured in respect of the warehouse. The only problem lies in identifying that head of cover. It is not expressly stated in the revised policy schedule because the reference to the Aberdare Drive property is not linked to any of the properties in respect of which cover already existed in the fire section of the policy.

[10] In those circumstances both counsel agreed that it was legitimate to have regard to the request for cover addressed by Mr Schoeman to Mr Marshall. That takes one back to the e-mail of 30 July. As one would expect it is a request that the existing situations of risk be extended. The e-mail identifies 230 Aberdare Drive as warehouse space rented by the plaintiff. Its purpose is 'to accommodate primarily finished product from the Phoenix factory (mostly decorative paints)'. That links the new warehouse to the storage of stock emanating from the Phoenix factory. The natural inference is that some of the existing stock at the Phoenix factory, which had an insured value of R12 million, would be moved to the new warehouse under the existing cover extended to include the new premises. Unless there was reason to believe that the existing sum insured of R12 million in respect of the Phoenix plant was insufficient to cover the goods stored in both premises (and no such suggestion was made) there was no need to specify a separate sum insured for the new premises. All that was required was for the existing situation of risk at the Phoenix plant to be extended to the Aberdare Drive warehouse. Hollard contends that this is precisely what the e-mail meant and that the cover in respect of the Phoenix factory set out in the fire section of the policy was extended to include the Aberdare Drive. Accordingly, so it contends, the sum

insured of R12 million applied to the combined contents of the Phoenix factory and the Aberdare Drive warehouse.

[11] The plaintiff sought to escape this conclusion by suggesting that the word 'primarily' in this e-mail was not used to indicate that the goods stored in the warehouse would consist mainly, but not necessarily exclusively, of finished product from the Phoenix factory, but was used to indicate that most, but by no means all, of the finished product stored in the warehouse would come from the Phoenix factory. In effect it sought to contend that this sentence of the e-mail should have read:

'The client has rented warehouse space primarily (but not exclusively) to accommodate finished product from the Phoenix factory (mostly decorative paints)';

or

'The client has rented warehouse space to accommodate finished product primarily (but not exclusively) from the Phoenix factory (mostly decorative paints)'.

To this end Mr Schoeman was asked what he meant by the word 'primarily' but it is clear that such evidence is inadmissible and Mr Dickson SC for the plaintiff accepted this. Mr Dickson was on stronger ground when saying that the indications in the correspondence were that the warehouse was only to be used for storing finished products so that there would be no point in Mr Schoeman saying that *primarily* finished products would be accommodated thereby leaving open the possibility that other products might be stored there. His second point was that Phoenix factory only produced decorative paints and therefore by saying that the finished products to be stored in the warehouse would be 'mostly decorative paints' this conveyed that some of the products would have been automotive paint or wood coatings emanating from other factories. For those reasons he argued that the word 'primarily' must be given a different meaning not referring to the nature of the products but to their origin in the Phoenix factory. He stressed that Mr Schoeman is not 'a professor of

English' and that e-mails are a relatively informal method of communication in which strict rules of grammar and syntax are not always followed.

[12] These points are not without weight but in my view they do not suffice to justify departing from the natural meaning of the language used by Mr Schoeman. There is nothing to indicate that the e-mail was informally couched and its language belies that suggestion. It was a formal request by an experienced broker to an experienced risk manager setting out in clear and simple terms the additional cover being requested. Its language indicated that the goods to be stored in the warehouse were to emanate from the Phoenix factory. The e-mail, as it stands, is entirely appropriate to convey that goods already covered under the policy when situated at the Phoenix factory will remain covered if stored in the Aberdare Road warehouse. The plaintiff's case posits that for all his experience Mr Schoeman dealt with this matter on behalf of a long-standing client in a slapdash and incompetent manner. A simpler explanation is that as an experienced broker aware of the problems that could arise if raw materials or some other items were stored in the warehouse and a claim arose Mr Schoeman covered that situation by his reference to 'primarily finished products'. Likewise the reference to the goods being 'mostly decorative paints' can be readily explained as a cautious approach to ensuring that in the event of a claim Hollard could not repudiate on the grounds that some of the goods stored consisted of something other than decorative paints.

[13] The correspondence after the fire supports this approach. The first e-mail in the bundle is dated 8 September 2007. It is an e-mail addressed by Mr Schoeman to a Mr Muller at Factory & Industrial Risk Managers. Like the earlier e-mail it was copied to Mr MacKinnon at Chemical Specialities. Its purpose is to confirm certain details in regard to the Aberdare Drive warehouse. It contains the following sentence:

'However, as you are aware, the utilisation of these premises are as a result of overflow from the 31 Hunslett Road [Phoenix factory] premises and now also accommodates the salvaged finished product.'
(My insertion)

This is a clear statement that the warehouse premises were intended to overcome storage problems in respect of finished product from the Phoenix factory. There is no suggestion that anything else was intended. It is wholly consistent with the plaintiff's pleaded case as set out in the replication, namely that what was required and given was:

'an extension of the policy to include a situation of risk being a warehouse at 230 Aberdare Drive, Phoenix, Durban which would be used as a store for finished product made at the Phoenix factory at 31 Hunslett Road, Durban.'

[14] Two months later Mr Schoeman wrote to his own professional indemnity insurers giving notice of a possible claim against him. He said the following:

'My client, Chemical Specialities (Pty) Limited, had a major fire on 30 August 2007 at their factory situate at 31/37 Hunslett Drive, Phoenix.

We had extended the policy on 30 July 2007 to include a warehouse situate at 230 Aberdare Drive, Phoenix, for finished product emanating from this factory but in our instructions had neglected to provide a sum insured at the new address.

Our insurers, Factory and Industrial, whilst having provided a substantial sum in interim payments for the stock lost, are now wanting to incorporate the actual stock value at 230 Aberdare Drive … into the stock that was at 31/37 Hunslett Drive …

We are arguing that, as it was intended to be an interim measure, we would have provided a stock value at our quarterly stock declaration at the end of September 2007.

If they are successful in their application of the condition of average, it will mean a loss to my client of in the region of R880 000.'

Once again Mr Schoeman states expressly that the purpose of the warehouse was to accommodate finished product emanating from the Phoenix factory. There is no reference to any other product.

[15] Lastly on 26 May 2008 after Chemical Specialities had indicated to

Mr Schoeman that they would make a claim against him for any shortfall arising from the application of average, he wrote to his attorneys giving a brief summary of the events that took place. That letter contains the following:

'On the 30 July 2007 I was contacted by Mr S M Wood (then managing director) to extend the situations of risk to provide for 230 Aberdare Drive, Phoenix, Durban.

He explained that there was a congestion of finished product at 31 Hunslett Road and these stocks would need to be moved to alternative premises in order that Chem Spec could comply with Sprinkler requirements in Hunslett Road. …

I forwarded an e-mail to underwriters (copy attached) to extend the situations of risk.'

Once again it is clear that the extension of the risk to the warehouse in Aberdare Drive related only to the storage of finished product emanating from the Phoenix factory. I will revert to the omitted portion of this e-mail in paragraph [18] below.

[16] To sum up on this aspect neither the initial e-mail of 30 July 2007 nor any subsequent explanation by Mr Schoeman relating to his instructions, contains any suggestion that it was contemplated that goods other than stock emanating from the Phoenix factory would be stored in the Aberdare Drive warehouse. His evidence that he was aware that there might be overflow stock from other factories arising from a conversation with Mr Tracy Robinson after the fire does not affect this. The principal contention advanced in argument, that the extension of risk to Aberdare Drive was to accommodate goods emanating from all factories operated by the plaintiff, not only the Phoenix factory, has no factual basis. The factual matrix[1] surrounding the request for an amendment of the policy is wholly inconsistent with this contention. It is also inconsistent with the plaintiff's pleaded case. There is therefore no reason to construe the e-mail as relating to goods emanating from other factories. It follows that there is no reason to construe the cover extended to Aberdare Drive as falling generally under the existing fire cover for all three factories so that in applying average

1 *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) para 39

the total sum insured for all three factories of R43 million should be used. All the evidence demonstrates that this was not in accordance with Mr Schoeman's instructions nor was it what he had in mind when requesting extended cover for the Aberdare Drive warehouse. I should add that Mr MacKinnon, who received copies of the relevant e-mails to Factory and Industrial and who was the financial director at the time and is now the managing director did not give evidence to support this new contention.

[17] The alternative approach adopted by Mr Dickson SC was based upon evidence given by Mr Schoeman that Mr Wood had told him, when giving the original instructions, that the value of the goods to be stored at Aberdare Drive was some R3 million. Building on that foundation he submitted that Mr Schoeman's intention was to obtain cover in that amount and because he inadvertently omitted to mention this figure in his e-mail there was no proper meeting of the minds between the insured and its insurer. In consequence, so he submitted, there was in fact no valid amendment to the contract, and the Aberdare Drive premises were in reality uninsured. Accordingly the contents of that warehouse were not to be taken into account in determining the question of average. Once again this is a novel contention inconsistent with the plaintiff's pleaded case, which was that there had indeed been an agreement to extend cover to the Aberdare Drive warehouse.

[18] In support of Mr Schoeman's claim that he had been instructed by Mr Wood in regard to the value of the stock to be kept in Aberdare Road reliance was placed on the following sentence from the letter of 26 May 2008 addressed by Mr Schoeman to his attorneys. After dealing with the initial instructions it goes on:

'He confirm (sic) that he estimated an amount of R3 million worth of stock would be kept in Aberdare Drive.'

…
My email made no mention of a sum insured of R3 million that was to be kept at these premises.'

[19] I have grave reservations about these statements. Mr Schoeman did not explain how he, a highly experienced insurance broker who had been told to secure R3 million worth of cover in respect of goods stored at new warehouse premises, could have omitted to mention this figure in his e-mail implementing that instruction. The moment a valuation was ascribed to the goods to be stored in the Aberdare Drive warehouse the question would arise whether there needed to be a downward adjustment of the sum insured in respect of the Phoenix factory. In addition it would have been apparent that this would not simply be to 'extend the situation of risk', but would create a new risk in respect of the new premises attracting an additional premium. I find it difficult to believe that an experienced insurance broker would overlook these items but include the cautiously qualified statement that the goods in storage would consist of 'mostly decorative paints'. After all the nature of the insured's business was already known to the insurer. Had he been given this instruction the need to obtain cover for a specified amount would have been at the forefront of his mind. It is hard to see how he could overlook it in what is a very simple e-mail to the insurer's agent.

[20] Mr Schoeman did not produce any note or record of his conversation with Mr Wood to support this proposition. In addition the letter of 26 May 2008 is cautiously worded and the word 'confirm' is clearly erroneous and should either read 'confirms', which would refer to the time that the letter was written, or 'confirmed' which would refer back to the date of the original instruction and would have no bearing on that instruction. I asked Mr Schoeman which was intended and his answer was not immediate. It was only after a lengthy pause

and a careful consideration of the wording of the letter that he proffered the answer that this should read ‘confirmed’. The manner in which he gave this answer did not inspire confidence in its veracity.

[21] My other difficulty in accepting the factual accuracy of the statements in this letter is that they are inconsistent with what Mr Schoeman wrote to his own professional indemnity insurers on 31 October 2007. He does not say in that letter that he had specific instructions to obtain insurance cover in the amount of R3 million. Indeed he does not refer to his instructions from Mr Wood at all. What he says that in the instructions he gave to Mr Marshall he ‘had neglected to provide a sum insured at the new address’. There is no suggestion that this ‘neglect’ was a breach of his instructions from Mr Wood or arose from a failure to include a reference to the R3 million in the e-mail. What is more the e-mail goes on to say that he and his clients were arguing with Hollard that ‘as it was intended to be an interim measure, we would have provided a stock value at our quarterly stock declaration at the end of September 2007’. That is inconsistent with his having been told that the sum insured should be R3 million. I asked Mr Schoeman three times to explain on what basis he and his client could advance this contention if the truth of the matter was that he had negligently failed to specify that the plaintiff wanted additional and separate cover of R3 million in respect of stock stored in the Aberdare Drive warehouse. He was unable to give any satisfactory answer.

[22] There are other difficulties. The e-mail of 30 July does not refer to an interim situation but to the immediate establishment of coverage at the Aberdare Drive premises. Had it been ‘intended’ that a value should be furnished at a later date with retrospective effect it seems to me inconceivable that it could have been omitted from the 30 July e-mail. After all that would involve asking the insurer to cover a risk of unknown extent for a period of two months during

which period it would not know its potential liability and for which it would not have received any premium. It was not suggested to Mr Marshall that Hollard (or indeed any insurer) would be willing to assume a risk on that basis.

[23] For those reasons, I hold that Mr Schoeman had no specific instructions from Mr Wood in regard to the extent of the cover to be obtained for the Aberdare Drive premises. That conclusion disposes of the alternative argument that by virtue of an error on the part of Mr Schoeman to mention this amount the parties did not agree on an amendment to the policy, a proposition inconsistent with the pleadings. However, even if I am incorrect in making that finding it does not assist the plaintiff. The reason is that Mr Schoeman's authority to act on behalf of the plaintiff was not in dispute. The plaintiff is accordingly bound by the terms of the request that Mr Schoeman made to Hollard. That request was to extend the existing cover in respect of stock and materials in trade at the Phoenix factory to include the Aberdare Drive warehouse. Hollard agreed to and implemented that request. Even assuming that Mr Schoeman erred in couching his request in those terms and should have asked for cover in a specified sum, together with a tender to pay any additional premium arising therefrom, the fact of the matter is that he did not do so. Hollard cannot be criticised for granting cover in accordance with his request and the plaintiff cannot avoid the consequences of its having done so.

[24] That brings me back to the ordinary and natural meaning of the request in the e-mail of 30 July 2007. It was a request to extend an existing head of cover under the existing policy to include the warehouse premises at Aberdare Drive. As the extension was for the purpose of storing finished product from the Phoenix factory it is proper to construe the request as being a request that this head of cover should be so extended. That is what happened and that is in substance the case that the plaintiff pleaded, but sought to avoid during the trial.

The consequence is that the sum insured of R12 million in respect of the Phoenix factory included the insured stock stored at Aberdare Drive. The value of that stock must therefore be taken into account in deciding whether average is to be applied. Once it is taken into account the attitude of Hollard in applying average in accordance with the policy is plainly justified.

[25] In the result the plaintiff's claim is dismissed with costs.

DATES OF HEARING	23 MAY 2011
DATE OF JUDGMENT	26 MAY 2011
PLAINTIFF'S COUNSEL	MR A J DICKSON SC
PLAINTIFF'S ATTORNEYS	GEYSER DU TOIT LOUW & KITCHING INC
DEFENDANT'S COUNSEL	MR G R THATCHER
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