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Case No 53/1991

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

S Z TOOLING SERVICES CC — Appellant

and

SOUTH AFRICAN EAGLE INSURANCE COMPANY LIMITED — Respondent

CORAM: VAN HEERDEN, NESTADT, EKSTEEN, NIENABER JJA et KRIEGLER AJA

HEARD: 8 SEPTEMBER 1992

DELIVERED: 18 SEPTEMBER 1992

JUDGMENT

VAN HEERDEN JA:

The appellant was the insured in terms of a "Multi-Peril Policy" issued by the respondent. During July 1988, when the policy was in force, the appellant allegedly suffered damage to certain equipment and submitted a claim which, if valid, was covered by the policy. The claim was, however, rejected by the respondent on 24 November 1988.

During January 1989 the appellant commenced motion proceedings in the Witwatersrand Local Division. It sought an order declaring that the respondent was obliged to indemnify it under the policy in respect of the damage to the equipment. Kriegler J dismissed the application which had been opposed by the appellant. He did so on two grounds, viz, i) that the appellant had unjustifiably resorted to piecemeal litigation and ii) that a defence raised by the respondent could not, on the papers before him, be rejected as unfounded. The gist of that

defence was that the damage had been caused intentionally by, or at the instigation of, the appellant's sole shareholder.

During June 1989, some two months after the dismissal of the application, the respondent instituted action against the respondent in the same Division. It again sought a declaratory order but also claimed payment of the sum of R460 000. The appellant alleged that that amount represented the cost of repairing the damaged equipment and attendant expenditure. The respondent raised various defences, one of which was that all benefits under the policy had been forfeited because of the appellant's failure to institute the action within three months after the rejection of its claim. In this regard the respondent relied upon condition 6(c) of the policy which is quoted below.

After the close of pleadings the parties

formulated a written statement of agreed facts. It was also agreed that at the trial only the following questions were to be resolved, viz, whether:

> "3.1 As contended for by the Plaintiff [the appellant] that the commencement of the original action by way of motion proceedings, which was compliance with Condition 6 of the policy, had the effect that the provisions of Condition 6 thereafter ceased to apply to this claim;
>
> 3.2 As contended for by the Defendant [the respondent] that the running of the time bar period in terms of Condition 6 was not interrupted by the unsuccessful motion proceedings commenced by the Plaintiff as referred to therein."

The statement concluded as follows:

> "4.1 If this Honourable Court rejects the Defendant's contentions, it will order that the action proceed against the Defendant and that the Defendant pay the costs of determining the issue of the time bar.
>
> 4.2 If this Honourable Court upholds the Defendant's contention, this Honourable Court will dismiss the Plaintiff's claim and order that the Plaintiff pay the Defendant's costs."

It is apparent that at the hearing of the trial Spoelstra J gave effect to the parties' agreement. Having heard argument he found in favour of the respondent and consequently dismissed the action with costs.

Condition 6(a) of the standard policy provides inter alia for the submission by the insured of full details of a claim under the policy. The claim must be submitted as soon as practicable after the happening of the event giving rise to it. Condition 6(b) and (c) read as follows:

> "(b) No claim (other than a claim under the consequential loss section, if applicable) shall be payable after the expiry of twenty four months or such further time as the company may allow from the happening of any event unless the claim is the subject of pending legal action or is a claim in respect of the insured's legal liability to a third party.
>
> (c) In the event of a claim being re-

> jected and legal action not being commenced within 3 months after such rejection all benefit under this policy shall be forfeited."

It will have been observed that the motion proceedings were initiated within three months of the date of rejection of the appellant's claim by the respondent, but that the action was instituted only some seven months after that date. Spoelstra J was of the view that proceedings in which only declaratory relief is sought do not constitute "legal action" within the ambit of condition 6(c). His reasoning ran along these lines: The only claim that the appellant could have made under the policy in respect of damaged equipment, was one for payment of compensation. Clause 6(c) envisages only one action, and that is an action for the enforcement of the claim lodged with the insurer under clause 6(a). That being so, only a process by which compensation

for the loss suffered by the insured is claimed, i e, payment of a monetary amount, can be a "legal action". Hence the launching of proceedings for declaratory relief only did not satisfy condition 6(c).

In this court counsel for the respondent rightly conceded that, as was apparently common cause in the court a quo, "legal action" can be commenced by way of notice of motion (cf Collett v Priest 1931 AD 290, 300; Kempton Park Bombay (Pty) Ltd v Kempton Park Municipality 1956 (1) SA 643 (T) 647, and Danzas Trek (Pty) Ltd v Du Bourg and Another 1979 (4) SA 915 (W) 919). He did, however, contend that it was only during June 1989, when it was too late, that legal action within the meaning of condition 6(c) was instituted.

I am prepared to accept that condition 6(c) is open to the construction put on it by the trial

judge. In my view, however, it also admits of another interpretation. There can be no doubt that, generally speaking, a party commences legal action when he issues summons, or starts motion proceedings, for the purpose of obtaining a declaratory order, whether or not he also seeks consequential relief. Supporting the reasoning of Spoelstra J, counsel for the respondent submitted, however, that the phrase "legal action" should not be construed in isolation. Those words, so it was argued, have reference to the enforcement of the rejected claim, and a claim in respect of damage to equipment must necessarily be a claim sounding in money. Hence condition 6(c) envisages the institution of legal proceedings for the recovery of a sum of money.

Counsel went on to draw a distinction between property and liability insurance. He pointed out that the policy in question provides cover in

respect of both types of insurance and submitted that it is only when the liability section is invoked that a claim for an indemnity, unaccompanied by a claim for payment of a specific amount, may be made. But, it was also submitted, if a claim is preferred under the provisions relating to property insurance - as happened in the instant case - it must be a demand for compensation for damage caused to the property concerned.

The flaw in this line of argument is the presupposition that there cannot under condition 6 be a claim in respect of damage to property unaccompanied by details of the monetary extent thereof, and that hence only a claim sounding in money can be rejected by the respondent. Condition 6(a)(iii) does provide, it is true, that the insured must as soon as practicable after the happening of an event which may result in a claim under the policy "submit ... full

details in writing of any claim". It is quite feasible, however, that an insured may submit a claim for an unspecified amount because he is not at that stage in a position to quantify his loss. The insurer may then immediately repudiate liability and thus reject the claim, because, e g, of material misrepresentations made by the insured in the proposal form. It appears to me that if in such a case the insured should fail to commence legal proceedings within three months after the date of rejection, he would be hard pressed to contend that condition 6(c) did not become operative because there had not been a claim for payment of a specific amount. (Cf Thompson v Goold and Co (1910) AC 409 (H L) 410-11, 416, 419 and 420.) On the other hand, if in the postulated case the insured had to institute action for payment of a sum of money within the stipulated period he could well be compelled to claim a fictional amount of

which no particulars could be provided by him. All this provides a strong pointer to the conclusion that the "legal action" contemplated by condition 6(c) need not necessarily be proceedings for the enforcement of a claim sounding in money.

Counsel for the respondent also submitted that the overriding purpose of condition 6(c) is to make time of the essence in the lodging of claims and the prosecution of actions against the respondent. The obvious reasons for the incorporation of the relevant provisions, so the argument continued, are to give the respondent early notice of legal proceedings against it, and to enable it to investigate claims as soon as possible, to preserve evidence and to allocate funds for a contingent liability. All this is true, but in my view it does not have a decisive bearing on the construction of condition 6(c). If, as happened in the present case, proceed-

ings for declaratory relief only were to be instituted against the respondent, it would know that those proceedings, if successful, would almost inevitably lead to an action for payment of a specific amount. It would therefore be alerted to the need to preserve evidence and to conduct such further investigation of the validity of the claim as might be deemed necessary. It might not always be possible to calculate the amount which should be allocated for the contingency of an ultimate judgment debt, but if the insured failed to provide full details of the measure of his claim as soon as practicable after the relevant event occurred, the respondent could obviously rely on non-compliance with clause 6(a)(iii).

A further contention of counsel for the respondent was that no purpose would be served by condition 6(c) if it does not require an insured to

initiate proceedings which, if successful, will result in judgment for a specific amount. I cannot agree. If the insured fails to commence any proceedings within the three month period such liability as the insurer may have incurred under the policy will obviously come to an end. The condition will in such a case constitute a complete bar to further proceedings.

I should mention that counsel for the appellant placed some reliance on condition 6(b). I agree, however, with counsel for the respondent that that condition does not throw any meaningful light on the import of condition 6(c).

In the final analysis the appellant sought to enforce its alleged rights under the policy when it instituted the motion proceedings. True, it could not in those proceedings obtain an executable judgment in its favour. But, had it obtained declaratory

relief the liability of the respondent under the policy - as opposed to the extent thereof - would no longer have been in issue (cf Cape Town Municipality and Another v Allianz Insurance Co Ltd 1990 (1) SA 311 (C) 331). In a very real sense, therefore, the initiation of those proceedings constituted the commencement of legal action directed at enforcement of the rejected claim. Put differently, the proceedings constituted a step formally involving the respondent in a preliminary process aimed at the eventual recovery of compensation for the loss to which the appellant's claim related.

I should also point out that acceptance of the respondent's contention could in casu have produced a curious result; viz, that even if the appellant had obtained the declaratory relief sought in the motion proceedings, it could not institute action for consequential relief if more than three months

had lapsed since the date of rejection of the claim.

I am accordingly of the view that, at best for the respondent, the language of condition 6(c) is open to two more or less equally plausible constructions. The first is the one favoured by the court a quo, and the second an interpretation that legal action may also be commenced by the institution of proceedings for a declarator that the insurer is liable under the policy to compensate the insured for such loss as he may have suffered. That being so, this court "should incline towards upholding the policy and against producing a forfeiture" of the appellant's alleged rights under it. An application of the rule verba fortius accipiuntur contra proferentem obviously leads to the same result: Pereira v Marine and Trade Insurance Co Ltd 1975 (4) SA 745 (A) 752H.

The final, and alternative, submission of

counsel for the respondent was that condition 6(c) barred the appellant from bringing fresh proceedings after the dismissal of its application and the lapse of three months from the rejection of its claim. I cannot agree. Condition 6(c) does not peremptorily stipulate that any legal action against the respondent must be commenced within the said period; it merely prescribes the consequence of a failure to bring such action timeously. The condition therefore ceases to be of application once legal action has been commenced within that period. In particular it does not profess to deal with the situation brought about by a failure of the action. Hence, unless such failure gives rise to a plea of res judicata, the insured is at liberty to institute fresh proceedings. The only limitations on this right flow from the provisions of the Prescription Act 68 of 1969, and of clause 6(b) which becomes determinative only after

the expiry of 24 months from the happening of the event in question.

It may be that the phrase "legal action" in condition 6(c) should be construed as "valid legal action", and that e g a process brought in the wrong forum or which does not disclose a cause of action, does not serve to satisfy condition 6(c). It is, however, unnecessary to express a view in that regard. I say so because it has rightly not been suggested that as a matter of law the declaratory relief sought in the motion proceedings could not have been granted on the strength of the averments in the founding afidavit.

The appeal is allowed with costs, including the costs of two counsel, and the following is substituted for the order of the court a quo:

"(1) It is declared that the plaintiff may proceed with its action against

the defendant.

(2) The defendant is ordered to pay the costs occasioned by the determination of the issue set out in para 3 of the statement of agreed facts."

H J O VAN HEERDEN JA

NESTADT JA
EKSTEEN JA
NIENABER JA
KRIEGLER AJA

CONCUR