

In the Supreme Court of Appeal of South Africa

MEDIA SUMMARY –

CONSTANTIA INSURANCE LTD v COMPUSOURCE (PTY) LTD

From: The Registrar, Supreme Court of Appeal

Date: 2005-03-30

Status: Immediate

(1) A company involved in arbitration insured against losing the case and having to pay costs. It took out the policy, attracted by the insurer's sales slogan 'no win no pay'. It thought this meant it only had to pay the premium if it won the case. When it looked like losing and the insurer cancelled the policy but claimed the premium and sued for payment under a term of the policy which it said entitled it to do so. The company relied on the sales slogan and said it was unaware of the policy term which formed the basis of the insurer's case.

(2) On 30 March 2005 the SCA found, in the matter of the insurer, Constantia Insurance Ltd, and Compusource (Pty) Ltd, the company, that the insured was not bound by the term, because its representative did not actually agree to it and because the representatives of Constantia could not reasonably have thought that he did. The type of insurance, post-dispute or post-litigation insurance (PDL insurance), is novel in this country. The novelty is that it is sold when a dispute or litigation has already ensued.

(3) The arbitration involved a claim by Compusource against three companies referred to as CQP. It took out two PDL insurance policies with Constantia which insured both the costs of CQP up to R800 000 and its own costs up to R1m. The aggregate premium payable exceeded R1,3m. Compusource's representative, Mr Simon Rust, agreed that the policies would be subject to Constantia's standard PDL terms. Two standard terms gave rise to this dispute. In terms of the first the insurer was entitled to cancel the policy if something was discovered that seriously reduced the insured's prospects of success in the litigation. The second term provided that in the event of cancellation, the insurer would be entitled to claim the premium in full.

(4) The arbitration proceedings had reached an advanced stage when Constantia was informed that CQP had introduced new defences which substantially strengthened its case. Relying on the two clauses Constantia cancelled the policies and claimed the premium. In its defence Compusource said Rust had been unaware of the second clause relied upon by Constantia when he entered into the policy agreements on behalf of Compusource and that he therefore never actually agreed that Constantia could claim the premiums on cancellation. This defence succeeded in the Johannesburg High Court and Constantia's claim was dismissed with costs.

(5) On appeal the SCA held that Compusource would only be bound by a term to which Rust did not agree if Constantia's

representatives reasonably believed that he did in fact agree. After analysing the evidence at the trial, the SCA came to the conclusion that the reasonable person in the position of Constantia's representatives would not have thought that Rust had actually agreed to the second clause concerned. Constantia's appeal was dismissed with costs.