THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 659/2007

In the matter between:

AFRICAN PRODUCTS (PTY) LTD **APPELLANT**

and

AIG SOUTH AFRICA LIMITED **RESPONDENT**

Neutral citation: *African Products (Pty) Ltd v AIG South Africa Ltd* (659/2007) [2009] ZASCA 27 (27 March 2009)

CORAM: **MPATI P, BRAND, CLOETE, CACHALIA JJA et BOSIELO AJA**

HEARD: **3 MARCH 2009**

DELIVERED: **27 MARCH 2009**

SUMMARY: Insurance – Interpretation of policy containing expression 'unforeseen and sudden' – to avoid tautology 'sudden', which also bears meaning of unforeseen, to be given its temporal meaning, ie 'abrupt', 'occurring quickly' or 'happening all at once'.

ORDER

On appeal from: High Court of South Africa (Johannesburg)
(Joffe J sitting as court of first instance.)

The appeal is dismissed with costs, which are to include the costs of two counsel.

JUDGMENT

MPATI P (BRAND, CLOETE, CACHALIA JJA and BOSIELO AJA concurring):

[1] The issue in this appeal is whether loss of gross profits, suffered by the appellant company, due to loss of production as a result of electrical failure, is covered under a policy of insurance issued by the respondent.

[2] The appellant is a subsidiary of Tongaat-Hulett Group Ltd. It owns and operates a maize milling facility situated at Kliprivier, known as the Kliprivier Mill ('the Mill'). The Mill was designed and constructed by Fluor SA (Pty) Ltd and production commenced in 1998, soon after completion of the construction process. The designing of the Mill included the installation of electricity substations and layout of electricity cables which transmitted power from an Eskom power point to, and past, the substations to the machinery in the plant. It is common cause that all the equipment (machinery) used in the operation of the Mill is powered by electricity.

[3] It is not in dispute that at 04:50 on 11 September 2002 a cable failure was detected at the Mill when a certain switch tripped. Further cable failures were experienced during the course of the day. Technicians who were called in discovered that cables under one of six substations, substation two, were

heating up. They had been laid in sand under a concrete slab and bent at a 90° angle beneath the substation before entering it. A total of 650 cables were connected from the substation to the Mill. The cables beneath the concrete were not at all visible from above. So also the cables inside the substation. To get to them, the concrete slab had to be excavated. Temporary cables had in the meantime been connected so as to ensure continued production at the Mill.

[4] After the concrete slab had been broken up, closer inspection of the cables beneath it revealed that the cables had been laid close to each other. Because of this the heat generated by the electric current which passed through the cables did not dissipate sufficiently. The result was that the polyvinylchloride (PVC) insulation covering the copper conductors had softened and worn away. Consequently, some of the copper conductors came into contact with each other and this caused the cable failure. It was also discovered that a substantial number of cables which had not as yet come into contact with each other had functionally failed because, having regard to the wearing out of the insulation as a result of the excessive heat, they were dangerously close to each other and would imminently come into contact and fail electrically.

[5] By 19 September 2002 it became clear to the appellant that operations at the plant could not continue since, in the view of the management, it had become unsafe to do so. Pending the redesign of the cables from substation 2 to the Mill, temporary measures were taken by laying cables in such a manner as would bypass the failed ones. For this operation a decision was taken to shut down the Mill from 19 September 2002. It was reopened on 15 October 2002. It is the loss of production during this period of shut down which the appellant seeks to recover under the indemnification provided for in the contract of insurance.

[6] At the commencement of the trial before the court below (Joffe J), an order was made, by agreement between the parties, in terms of which the issues of the merits and quantum were separated. The trial accordingly

proceeded on the issue of the merits of the case only, which the court a quo decided in favour of the respondent. It consequently dismissed the appellant's claim with costs. This appeal is with its leave.

[7] In terms of the contract of insurance the respondent agreed to indemnify or compensate the appellant ‘by payment or, at [the respondent’s] option, by replacement, reinstatement or repair, in respect of the Insured Events occurring during the period of insurance . . .'. The insured event in this case is defined in section 3 of the insurance policy, headed 'Business Interruption', as:

'Loss following interruption of or interference with the business in consequence of damage occurring during the period of insurance in respect of which payment has been made or liability admitted under:

. . .

Section 2: Engineering.'

The Engineering section then defines the insured event as '[u]nforeseen and sudden physical damage to the machinery described in the schedule from any cause . . . whilst it is at work or at rest . . .' and goes on to provide that:

'Machinery shall mean all plant and machinery and/or electronic equipment including that equipment being an integral part of controlling machinery, property held in trust or on commission and foundations supporting machinery . . . .’

In order to succeed in its claim, therefore, the appellant would not only have had to prove that the electrical cables that failed constituted machinery as defined, but also that the damage it relied on, was 'unforeseen and sudden'.

[8] In opposing the appellant's claim the respondent submitted that (a) the electricity cables did not constitute machinery as defined in the Engineering section; (b) that the physical damage relied on may have been 'unforeseen', but it was not 'sudden'; and (c) that in any event the claim was excluded by specific exception 4 of the Engineering section of the policy, which reads:

'The Insurers shall not be liable to indemnify the Insured irrespective of the original cause in respect of:

. . .

4. wastage of material or the like or wearing away or wearing out of any part of the machinery caused by or naturally resulting from ordinary usage or working or other gradual deterioration.'

On the specific exception, it was contended on behalf of the respondent that the damage to the cables was due to wearing away or wearing out caused by gradual deterioration of the PVC insulation and that the appellant's claim for indemnification was therefore excluded.

[9] I am prepared to accept, without deciding, that the electricity cables fall under 'all plant and machinery' in the definition section and thus constituted machinery as defined in the policy document. It is perhaps convenient at this stage to give a closer description of the design of the cables with which we are here concerned. Although evidence was led before the trial judge, no transcript of it formed part of the appeal record in this court. It appears that the evidence was not mechanically recorded during the trial. The parties were agreed, however, that the facts are essentially common cause and have been accurately summarised in the judgment of the court a quo. In its judgment the court summarised the evidence of Dr Peter Carstensen,[1] a chemical engineer, on the description of the cables as follows:

'Carstensen testified that electrical cables are designed to either convey electrical energy (these cables are called power cables) or electrical signals (these cables are called control cables) from one point to another. The power cables relevant to the present matter consist of four copper or aluminium conductors. Each aforesaid conductor is covered by an intact sheath of plasticised polyvinylchloride ("PVC") which serves to insulate the one conductor from the other. The four conductors are twisted together to make a core and are kept together with a polyester tape. A PVC bedding is extruded over the tape. The bedding is in turn covered by galvanised steel wire armour. The steel wire armour is utilised for mechanical purposes. It, in turn, is covered by a PVC outer sheath. According to Carstensen, the electrical properties and the thickness of the insulation layer determines the voltage which can be imposed on the cable. The cross-section of the conductor determines the resistance of a conductor and hence the maximum allowable current that can be carried by the cable.'

[1] Dr Carstensen was one of four witnesses who testified on behalf of the appellant.

[10] It is not in dispute that if the copper conductors conveying the electricity come into contact with each other the cable will fail. And if the PVC insulation wears away, the conductors will come into contact with each other.

[11] Counsel for the appellant submitted that damage to the mechanical properties of the cable does not in and of itself lead to a failure of the cables. The proposition was that it is only when the electrical properties of the cable fail, that is, when the copper conductors come into contact with each other, that the cable fails. Counsel accordingly contended that even though the damage to the copper wires may have flowed from the softening of the PVC insulation, physical damage in this instance occurred when the copper conductors came into contact with each other and that this happened instantaneously. The cables could still be used even though there was damage to the PVC. The physical damage thus relied upon in support of the appellant's claim is that when the copper cables failed, ie when the copper conductors touched, this constituted actual and independent damage, which, says the respondent, was unforeseen and sudden.

[12] In construing a policy of insurance the ordinary rules relating to the interpretation of contracts must be applied, so as to ascertain the intention of the parties. As was said in *Fedgen Insurance Ltd v Leyds*,[2] '[s]uch intention is . . . to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise. . . Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted; . . . for it is the insurer's duty to make clear what particular risks it wishes to exclude . . . . A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the *contra proferentem* rule, which requires a written document to be construed against the person who drew it up, would operate against . . . [the] drafter of the policy.'[3]

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[2] 1995 (3) SA 33 (A) at 38A.
[3] *Ibid,* at p 38.

[13] Since the words 'unforeseen' and 'sudden' are joined by the conjunctive 'and', the physical damage to the cables must have been both unforeseen and sudden, and because the two words may, depending on the context, bear the same meaning, they must each be given a meaning that will avoid tautology or superfluity. In *Wellworths Bazaars Ltd v Chandler's Ltd*[4] this court quoted with approval the following passage from the decision of the Privy Council in *Ditcher v Denison*:[5]

'It is a good general rule in jurisprudence that one who reads a legal document whether public or private, should not be prompt to ascribe – should not, without necessity or some sound reason, impute – to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.'

A court should thus be slow to conclude that words in a single document are tautologous and superfluous.[6]

[14] The Shorter Oxford English Dictionary gives the primary meaning of the word 'sudden' as 'happening or coming without warning or premonition'; 'taking place or appearing all at once'. The Collins Thesaurus (New) defines 'sudden' as 'quick, rapid, unexpected, swift, hurried, abrupt, hasty, impulsive, unforeseen'. 'Unforeseen' is defined as 'unexpected, unanticipated, unpredicted, surprise/ing, sudden, startling, accidental, abrupt, out of the blue, unlooked for, unenvisaged'. In the Collins English Dictionary the word 'sudden' is defined as 'occurring or done quickly or unexpected'. 'Unforeseen' is given the meaning of 'not anticipated or predicted'. The Concise Oxford Dictionary defines 'sudden' as 'occurring or done unexpectedly or without warning, abrupt; hurried; hasty'. 'Unforeseen' is defined as 'not foreseen'.

[15] Counsel for the appellant submitted that there is no reason, in this case, not to give the word 'sudden', in the context of the policy of insurance, the meaning of 'happening or coming without warning'. This submission was predicated on another contention by counsel that the question was whether or

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[4] 1947 (2) SA 37 (A) at 43.
[5] (11 Moor PC 325 at 357).
[6] *Wellworths Bazaars,* fn 5 at p 43.

not the policy could have contemplated that any physical damage ought to have been 'sudden' from an objective perspective or from the perspective of the insured. It could hardly have been the intention of the parties, counsel argued, that the insured upon whom physical damage was suddenly sprung in circumstances where it could have taken no steps to avoid such damage, would be deprived of protection of the policy because something was manifesting itself over a period of time which could not have been known to or come to the attention of the insured. To interpret the word 'sudden' in a way other than that contended for by him, counsel contended, would be to deprive the policy of the sound commercial principles and good business sense referred to by Boruchowitz J in *Grand Central Airport (Pty) Ltd v AIG SA Ltd.*[7] In that case the following was stated:

'An insurance policy should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application. The literal meaning of words must not be permitted to prevail where it would produce an unrealistic and generally unanticipated result, as, for example, where it would absolve the insurer from liability on the chief risks sought to be covered by the policy. (MacGillivray and Parkington *On Insurance Law* 8th ed paras 1077 and 1078).'[8]

[16] Counsel accordingly submitted that to give the meaning of 'instantaneous' to the word 'sudden' would be unnecessarily restrictive and would defeat the object of the policy, because it would exclude indemnity where there was nothing the appellant could have done to avoid what was encountered by it in this case. Counsel also relied for these submissions on the decision of the Supreme Court of the State of Rhode Island (United States of America) in *Textron Inc v Aetna Casualty & Surety Co*.[9] In that case the court dealt with the meaning of the expression 'sudden and accidental' in a pollution clean-up policy of insurance that excluded liability for personal or bodily injury or loss of or damage to property due to pollutants or contaminants into or upon land. The exclusion would, however, not apply if

[7] 2004 (5) SA 284 (W).
[8] *Ibid,* para 9.
[9] 754 A 2d 742 (2000).

the discharge or release of such pollutants was 'sudden and accidental'. In ascribing a meaning to the word 'sudden' the court reasoned as follows:

'While the modern word certainly has acquired a secondary, temporal meaning, the original and still perfectly functional meaning of the word is happening without warning or anticipation. Thus, reading the word "sudden" in the context of insurance policies to mean "unexpected" not only harmonizes with its context but also remains true to the word's original meaning. Our present interpretive problem with this word may arise from our modern forgetfulness that it is often used to describe a subjective state, that is, the mental state of the person visited by the event.'[10]

[17] The court a quo, however, preferred the approach of the Supreme Court of the Australian Capital Territories in *Vee H Aviation (Pty) Ltd v Australian Aviation Underwriting Pool (Pty) Ltd*,[11] a case concerning the interpretation of the words 'sudden and unforeseen damage' in an insurance policy indemnifying the breaking down of an aircraft engine. There the court said:

'31. "Sudden", to my mind, is to be contrasted with "gradual". Synonyms are "abrupt" and "quick". It is often a connotation of the word that the event it describes should be "unforeseen", or "unexpected", or "without warning" but these words, alone or in conjunction, do not express its denotation.

. . .

33. In the ordinary, every day meaning of the word, "sudden" is not the same as "unforeseen and unexpected".'

The court went further to say[12] that the requirement that the damage should be both sudden and unforeseen was not tautologous; that the words have different meanings, and that the requirements that they express were cumulative. The court a quo accordingly held that the word 'sudden' in the policy of insurance in the present matter 'is to be interpreted as meaning temporally abrupt'.

[18] Although in *Textron* the Rhode Island Supreme Court referred to a number of supporting decisions of the Supreme Courts of other American

[10] At para 9.
[11] [1996] ACTSC 123.
[12] At para 34.

States, counsel for the respondent referred to decisions of yet other States which have taken a contrary view on the meaning of the word 'sudden' in the expression 'sudden and accidental' in pollution exclusion clauses in pollution coverage insurance policies. The Supreme Court of Michigan, for example, held as follows in *The Upjohn Company v New Hampshire Insurance Co:*[13]

'We conclude that when considered in its plain and easily understood sense, "sudden" is defined with a "temporal element that joins together conceptually the immediate and the unexpected".'[14]

[19] In this court counsel for the appellant accepted that anything happening without warning or unexpectedly (the meaning they contend should be ascribed to 'sudden') is also 'unforeseen'. The interpretation contended for would, in my view, amount to surplusage as the expression 'sudden and unforeseen' would, in effect, mean 'unforeseen and unforeseen'. That would be contrary to the view this court approved in *Wellworths Bazaars,* that one should not be prompt without necessity or some sound reason, to ascribe tautology or superfluity to the language of a legal document. It follows that I agree with Joffe J, in the court a quo, that the word 'sudden' in the expression 'unforeseen and sudden' in the context in which it is used in the insurance policy concerned, should be understood in its temporal sense, meaning 'abrupt' or 'occurring quickly' or 'taking place all at once'.

[20] When a temporal sense is ascribed to 'sudden', the requirement that physical damage be both unforeseen and sudden is not tautologous. Indeed, the intention of the parties becomes clear. Were a motor which drives a conveyor belt in the production line in the plant to stop running suddenly and without warning (unexpectedly) and it is subsequently discovered that a new screw inside the motor had snapped, causing other parts to be dislodged, the insurer would be liable to indemnify the insured for lost production while repairs to the motor were being effected. The physical damage that would

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[13] 438 Mich 197 at 207.

[14] See also *Northville Industries Corp v National Union Fire Insurance* 89 NY 2d 621; *Northern Insurance Co of New York v Aardvark Associates Inc.* 942 F 2d 189 CA 3 (Pa) 1991); *Lumbermen's Mutual Casualty Co v Belleville Industries Inc* 407 Mass 675; *Olin Corp v Insurance Company of North America et al* 762 F Supp 548; *Freedom Gravel Products Inc v Michigan Mutual Insurance* 819 F Supp 275.

have occurred as a result of the snapping of the screw would have been both unforeseen and sudden. Were it to be found, however, that a screw inside the motor had broken as a result of wearing out over a period, then the physical damage, though unforeseen, would not have been 'sudden'. The wearing out would have happened over time but would only have manifested itself when the screw eventually broke. In this scenario the insurer would not be liable to indemnify the insured for loss of production. The fact that the physical damage (wearing out) was undiscovered until the screw broke does not make the breaking sudden.

[21] I can find no reason why giving a meaning with a temporal element to the word 'sudden' would not be in accordance with sound commercial principles and good business sense. While I do not question the soundness of the view expressed by Boruchowitz J[15] that the literal meaning of words must not be permitted to prevail where it would produce an unrealistic and generally unanticipated result, it must be remembered that the learned judge was not dealing in that case with the interpretation of an expression that contains words that may bear the same meaning as in the present matter. He was dealing with the question whether an exception in a clause in a policy of insurance excluded liability where the insured had incurred no expenses as yet in replacing or reinstating damaged property.[16] But the paramount object in construing an insurance contract is to ascertain the intention of the parties which is to be gathered from the words used and which must be given effect to, if clear when the words are given their plain, ordinary and popular meaning.[17]

[22] It also follows that I do not agree with the submission on behalf of the appellant that this court should find the expression 'unforeseen and sudden' in the insurance policy concerned to be ambiguous. As I have attempted to demonstrate above, there is no ambiguity when 'sudden' is given a meaning

[15] In the *Grand Central Airport* case, above fn 7.
[16] The exception reads: 'Until expenditure has been incurred by the insured in replacing or reinstating the property, the company shall not be liable for any payment in excess of the amount which would have been payable if these conditions had not been incorporated herein.'
[17] *Fedgen Insurance Ltd v Leyds* above fn 3.

with a temporal element such as 'abrupt' or 'taking place all at once'. Nor do I agree that physical damage must have been sudden from the perspective of only the insured. An objective perspective seems to me to be in accordance with sound commercial principles and good business sense. I say this because if the unforeseen physical damage occurs suddenly, viewed objectively, the insurer will become liable. If, on the other hand, it is not sudden from an objective perspective no liability will attach. It would otherwise be difficult, if not impossible, to dislodge an assertion by a claimant that, viewed subjectively, physical damage was sudden even though such damage may be shown to have been gradual and to have occurred over a long period. In my view, this could never have been the intention of the parties.

[23] Counsel for the respondent sought to argue that because there was documentary evidence that the first cable failure occurred during July 2002, the events of September 2002 cannot, on the probabilities, be regarded as either unforeseen or sudden. I am unable to agree. One cannot conclude that merely because of an earlier cable failure the subsequent events of cable failure would have been, or must have been, foreseen. I am in any event prepared to accept, for present purposes, that the cable failure on 11 September 2002 was unforeseen. The question that remains to be answered is whether the damage to the cables was sudden.

[24] I do not agree that the 'physical damage' to the cables (machinery) only occurred when the copper conductors came into contact with each other, as submitted on behalf of the appellant. It is true that the cables failed, in the sense that as a result of the copper conductors touching, a switch tripped. But as counsel for the appellant correctly contended, electricity could still be transported through the copper conductors even when the PVC insulation and covering was wearing away. It was only when the copper conductors touched, due to the damage (physical) to the PVC, that the cables failed. Clearly, therefore, the damage to the cables occurred when the PVC wore away, resulting in the copper conductors becoming exposed, with the inevitability of them coming into contact with each other.

[25] Photographs of the cables taken after the concrete slab had been broken up displayed many cables in an advanced state of deterioration. The insulation appears discoloured and brittle. In his expert report Dr Carstensen described the cables as being 'mechanically stressed' and as having been 'exposed to high temperatures . . . for periods so long that the insulation had discoloured and the polyester tape . . . disintegrated'. (My underlining.) The physical damage to the cables was therefore not sudden. It is the manifestation of the damage that was sudden and not the actual damage, which had occurred over a lengthy period of time as observed by Dr Carstensen.

[26] It follows that the appeal must fail. In view of this conclusion it becomes unnecessary for me to consider the other questions raised by counsel for the appellant, viz the issue whether the events in question were insurable; causation and whether the claim is excluded by specific exception 4 of the Engineering section of the policy of insurance.

[27] In the result the appeal is dismissed with costs, which are to include the costs of two counsel.

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Appearances:

For Appellant:	A E Bham SC D G Leibowitz Instructed by: Mervyn Taback Inc Johannesburg Correspondence: Webbers Bloemfontein
For Respondent:	A E Franklin SC B Berridge Instructed By: Webber Wentzel Marshalltown Correspondence: Mcintyre & Van Der Post Bloemfontein