



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Magic Eye Trading 77 CC & another v Santam Limited & another (775/2018) [2019] ZASCA 188 (10 December 2019)

Today the Supreme Court of Appeal (SCA) handed down judgment in which it upheld an appeal with costs of two counsel and substituted the order of the Western Cape Division of the High Court, Cape Town (the court a quo) with an order dismissing the third party's special plea and referring the matter back to the court a quo for adjudication of the remaining issues.

The question on appeal is whether an insured's contingent right to claim indemnification under an insurance policy is capable of becoming prescribed in terms of s 12(1) of the Prescription Act 68 of 1969 before the liability, and its extent, is determined.

The appeal arises from a delictual claim by Imperial Cargo Pty Ltd (Imperial) claiming damages to its truck, which was allegedly forced off the road on 21 March 2009 by the driver of another truck, Mr Perumal Chetty. Imperial issued summons alleging Mr Chetty, acting within the course and scope of his employment with Magic Eye Trading 77 CC t/a Titanic Trucking (Magic Eye), was solely responsible for the incident. Mr Chetty and Magic Eye denied all liability. Santam Limited (Santam) was joined as a third party after the close of pleadings. The third party notice was premised on an insurance policy issued by Santam in favour of Magic Eye which included indemnity insurance against loss suffered by Magic Eye by way of liability to third parties as a benefit under the policy. In the third party notice, it was claimed that, by virtue of certain clauses in the policy, Magic Eye had a contractual right to claim indemnity from Santam for any liability to the injured party attributed to them. Santam

filed a special plea of prescription contending that upon the occurrence of the defined event, alternatively when Mr Chetty and Magic Eye became aware of the event further alternatively when Santam repudiated the claim, a right to indemnity against the contingent future monetary consequences of the accident became vested in the Magic Eye. Because Magic Eye failed to serve the notice of joinder on Santam within three years of any of the above dates, any third party claim that they may have against Santam has prescribed. In reply to the special plea it was averred that prescription commences to run only after the claim has been paid or at least once the insured has firmly committed itself to making payment.

The court a quo upheld the special plea, relying on *Truck and General Insurance Co Ltd v Verulem Fuel Distributors CC* where it was held that the liability of the insurer to the insured arises as soon as the insured suffers the loss. This would be when all events have occurred which give rise to the liability towards a third party, even if the amount has not been quantified. In a judgment written by Nicholls JA, the Supreme Court of Appeal disagreed. Relying on an established line of authorities, it found that to conclude that a contingent right can prescribe prior to a determination of the right upon which it is contingent, would result in an absurdity. Indemnity insurance can only be against actual loss as opposed to the mere possibility of loss. The debt, for purposes of prescription, becomes due only when the insured is under a legal liability to pay a fixed and determinate sum of money.

The appeal was upheld with costs including costs of two counsel, where employed.