THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Hearing Dates: 28 and 29 January 2019; 18 March 2019
Judgment Delivered: 27 June 2019

Appeal Case No: A163/2018

Case No: 17084/2010

In the matter between:

OCTOFIN (PTY) LTD **Appellant**
(Defendant in the Court *a quo*)

and

HUGENOTE COLLEGE **Respondent**
(An association incorporated under Section 21) **(Plaintiff in the Court *a quo*)**

JUDGMENT

BOZALEK, J et LE GRANGE, J et SIEVERS, AJ

[1] This is an appeal, with the leave of court *a quo*, against the judgement and order whereby Respondent (the college) was awarded damages in an action based upon the alleged breach by

Appellant (Octofin) of its contractual obligations as the college's short-term insurance broker. The court held Octofin liable for the full extent of the college's alleged loss and ordered it to pay an amount of R17 152 981 together with interest and costs.

[2] During the night of the 12th to the 13th May 2008 a unique historical building in Wellington in the Western Cape, named Cummings Hall, was partially destroyed by fire. Cummings Hall was owned by the Dutch Reformed Church of South Africa and was being utilized at the time as a student hostel by the college. The college was in possession of Cummings Hall pursuant to an agreement with the church in terms of which the college was responsible for its maintenance and its insurance against loss or damage.

[3] Cummings Hall was under insured at the time of the fire. The insurer applied average and the college recovered substantially less than the costs of reinstatement estimated by the insurer. The college accordingly sued Octofin, its short-term insurance broker at the time, alleging that Octofin had breached its agreement(s) with the college hereby causing it loss, to the extent to which it was underinsured.

[4] The college pleaded three agreements. Firstly, it alleged that during November 2013 it appointed Octofin as its insurance broker with the express, alternatively tacit, alternatively implied material terms including that Octofin would renew the comprehensive insurance cover for the buildings at the premises, which included Cummings Hall; that Octofin could and would recommend replacement building cost values for the buildings and value the buildings; that the difference between the replacement cost values and the values of the buildings would be

minimal, that any under insurance would *"not be an issue"* in respect of any claims submitted; and that defendant was able to give recommendations with regard to valuations (upon which the respondent could rely) due to its experience, expertise and research.

[5] In November 2003 the policy with Santam contained a survey of insurable interests conducted on the premises of the college in November 2003. Under the heading 'comprehensive insurance: buildings, general' it is stated:

> *"A.1 Die kollege se onderskeie geboue bestaan uit outydse geboue met hoë plafonne en dik mure, sommige van klip (bv. Die hoofgeboue, huis Cummings en ander) asook meer modern geboue. Om vervangingswaardes te bepaal word hedendaagse boukoste in ag geneem. Dit is dus moontlik dat ons aanbevele waardes kan verskil van die werklike vervangingswaardes maar die verskil is van so 'n aard dat onderversekering tot 'n minimum beperk word en, na ons mening, nie enige eise nadelig sal beinvloed nie.*
> *A.2 Alhoewel ons nie amptelike waardeerders is nie, is ons wel in staat om aanbevelings te doen na gelang van inligting verskaf deur die professionele bestrekopnemers Davis Langdon Farrow Laing en soos aangevul deur die BFO te Stellenbosch. Ons waardes soos aanbeveel kan dus effens verskil maar die verskil is van so 'n aard dat onderversekering nie 'n belangrike rol sal speel nie."*

[6] The college pleaded that in 2003, "due to budget constraints at the time", it did not insure the buildings, including Cummings Hall at the replacement building costs values then recommended by Octofin.

[7] Secondly, the college alleged that in July/August 2006 it concluded a further oral renewal agreement, subject to the same terms, for the renewal of the insurance for the period 1 August 2006 to 31 July 2007. It pleaded that it was agreed that the buildings which were insured at

replacement building cost values less than those recommended by Octofin, would be adjusted and increased for the period of the next renewal, for which period the buildings, including Cummings Hall, would be insured at Octofin's recommended replacement building cost values.

[8] Thirdly, the college alleged that in July 2007 a final agreement was concluded for Octofin to arrange and renew the insurance cover for the period 1 August 2007 to 31 July 2008. It was during this period that the fire occurred, on 13 May 2008. The college expressly pleads that it instructed Octofin to renew the insurance of the buildings for the replacement building cost values as determined by Octofin. Octofin denied this and denied that it undertook any contractual obligation to furnish replacement building cost values for the buildings.

[9] It is common cause that on 27 July 2007 Octofin presented the college with a written summary of insurance for the period 1 August 2007 to 31 July 2008. On page two thereof the college was expressly warned (with an example being given) of the danger of under insurance. On the schedule of properties set out in the summary of insurance Cummings Hall is reflected as being 1843 m² in extent, with a present replacement cost per m² of R4200, giving an insured amount of R7740 600. Under the heading 'important notes in respect of fire insurance' it is recorded that the average replacement/building costs for hostels was between R5200 and R6400 per m². Immediately below that was a box setting out the insured average replacement/building costs at R4500 per m². This summary accordingly clearly reflected that House Cummings was significantly under insured, at between 20 to 45 %.

[10] A copy of the agenda of a meeting held between the representatives of the parties on 8 August 2007 records "Die hernuwingsvoorlegging is kortliks bespreek asook die nuwe

vervangingswaarde wat nog nie heeltemal in die kol is nie. Met volgende hernuwing sal dit moontlik regtrek."

[11] On 10 August 2007 Octofin wrote to the college recording what had been discussed during its visit the previous week. It recorded, inter alia, that the insured values of the buildings were not yet completely representative of the true replacement values but that the agreement at the time was that they would systematically adjust the values until they were sufficient. This is not in dispute.

[12] These facts cannot be reconciled with the case pleaded by the college.

[13] The case pleaded by the college is that had Octofin informed the college of the actual replacement building cost values for the buildings situated on the premises, as it was obliged to do, the college would have instructed Octofin to insure the buildings at the actual replacement cost values. As a result the college would have been paid out the full loss, being the full replacement/restoration costs of Cummings Hall.

[14] This claim cannot succeed for two reasons. Firstly, the college was at all times aware that it was under insured. This was confirmed by Professor Viljoen who testified on behalf of the college. Professor Viljoen joined the college at the start of 2006 as its rector and CEO. He confirmed that the college was aware that there was a level of under insurance. It might not have been aware of the degree or extent of under insurance but that is not the claim pleaded.

[15] Secondly, it is unlikely that the college would have insured the buildings at their actual replacement value cost as this would have involved an increase in premiums in excess of 300 %. In 2003 the college intentionally did not insure at the value recommended by Octofin due to

'budget constraints at the time'. Professor Viljoen's evidence that he would have gone to the board of the college to reconsider the budget in July/August 2007 does not mean that the board would have authorised part or all of the increase in premiums. If there were indeed funds available for higher premiums one may legitimately ask why these funds were not utilised previously when the college was aware that it was under insured.

[16] Another consequence of the college's acquiescence in respect of being under-insured is that it has not established the quantum of its alleged loss. The quantum would have to be reduced to the extent that the college had agreed to be under-insured. The degree of under insurance acceptable to the college was neither pleaded nor proved. Accordingly the judgment of the court *a quo* that the college is to be compensated for loss calculated by deducting the amount actually recovered from the amount which would have been recovered if the building had been insured at its full replacement value cannot stand.

[17] As a result this claim must fail and the appeal succeed at least in large part.

[18] The college did claim, in the alternative, payment in the amount of R389 314, together with interest and costs. In Octofin's reply to the college's request for trial particulars Octofin admitted that in respect of the insured value for Cummings Hall it had presented the college with a renewal amount of R8 293 500 (which had been accepted by the college) but that it had erroneously entered an amount of R7 740 600 on the insurer's system for the period 1 August 2007 to 1 August 2008. In its plea, Octofin admitted that had the correct amount been inserted the college would have been entitled to a payment from the insurer which was R389 314 greater than the payment it received.

[19] Mr Pienaar, a broker employed by Octofin testified on its behalf. He conceded that Octofin had made a mistake in calculating the cover for Cummings Hall at R4200 per m^2 whereas it ought to have done so at R4500 per m^2. Octofin accordingly advised its own professional indemnity insurer that, while on the official renewal and all subsequent endorsements on insured value of R7 740 600 was indicated, the college had in its possession a presentation which indicated an insurance value of R8 293 500. This directly resulted in the college receiving R 389 065 less that it would have received. This claim does not relate to the fact that the college was underinsured but rather to Octofin loading the incorrect amount on the system. Pienaar testified that it was not denied that there was such an error. Two defences to this claim were pleaded by the appellant, the first being that it received a tacit instruction to retain the insurance cover at its previous level. No evidence was led to support this defence however. The alternative defence raised was that the respondent was estopped from alleging that the renewal of the insurance cover was effective on any basis other than that set out in the endorsement finally furnished to the appellant. Again no evidence was led to prove the elements of the alleged estoppel and this defence too must fail.

[20] The college would accordingly be entitled to payment of this amount of R 389 314, 00 which was claimed as an alternative in its particulars of claim.

[21] This raises the issue whether this court can find in favour of the college on an alternative claim in the absence of a cross appeal. As regards the circumstances in which an issue of cross appeal is necessary, the general rule is expressed thus in LAWSA[1]:

[1] Vol 4: Civil Procedure: Superior Courts para 792.

> *"A cross appeal is necessary if the respondent desires a variation of the order appealed against because a court of appeal may not vary an order in favour of the respondent without a cross appeal . . . Without a cross appeal a respondent is entitled to seek to convince the court to uphold the judgment or order on other or additional grounds . . . Whether a cross appeal is necessary depends upon the substance of the order and not upon the way it was drawn".*

[22] The principle that a cross appeal is necessary only where the respondent desires a variation of the order appealed against was confirmed by the Appellate Division in *Municipal Council of Bulawayo v Bulawayo Waterworks Company Ltd*[2]. The appeal concerned a decision by the court *a quo* to uphold the first of two exceptions but which then proceeded to deal with the second exception although it was not necessary to do so. Innes CJ, who arrived at the same conclusion as the court *a quo* but for different reasons, had the following to say regarding whether a cross appeal was necessary in the particular circumstances of the matter[3]:

> *"My conclusion, however, is based upon the assumption that it is competent for this Court to deal with the first paragraph of the second exception. I think that it is; but the question is not without difficulty in view of the form of the order below, which in terms disallowed that paragraph, and against which there is no cross-appeal. In the view which I take of the matter that order must be varied; and the rules require that a respondent who desires the variation of an order appealed against must duly notify his intention of applying for it. But the position here is exceptional, and is not such as was intended to be covered by rule. The defendant meant his first exception to extend to all the relief asked for by the declaration, including the prayer for damages; indeed, he claimed an order setting aside the declaration in its entirety on the ground of that exception. And the learned Judge upheld that claim, and allowed the first exception as prayed. Having done that, it was quite unnecessary for him to consider the other exceptions, or to make any order upon them. And the fact that he did so could not alter*

[2] 1915 AD 611.
[3] at page 624/625.

the effect of his order upon the first exception, which gave the defendant all it asked. Having obtained all it asked there was no call on the respondent to vary the order."(*our underlining*)

[23] Applying these principles to the present case, it must first be noted that the respondent obtained judgment for the full amount it claimed under its main claim with the result that it was unnecessary for the trial court to deal with its second alternative claim. That claim was based on the appellant's failure to give effect to its own recommendation to the respondent regarding the amount for which Cummings Hall should be insured during the relevant period and the damages claimed for this breach were subsumed into the main claim for damages upheld by the trial court. On appeal, the respondent defends the Court *a quo's* findings and seeks no variation in its order but, in the event that it is unsuccessful, it seeks to persuade this Court that, at the very least, its second alternative claim should be granted.

[24] In contending that a cross appeal was necessary the appellant sought to rely on *O'Shea NO v Van Zyl and others NO*[4] and *Bayly and others*[5] *v Knowles and others*. In *O' Shea* the Court upheld an appeal against a final order of sequestration. It declined to consider whether it should grant a provisional order of sequestration at the instance of the intervening creditor which had obtained no substantive relief before the Court *a quo* and which entered into the appeal only to oppose the appellant's appeal against the order admitting it as an intervening party. The Court found that since the bank, the intervening creditor, had noted no conditional cross-appeal against the failure of the Court *a quo* to make an order in its favour, that precluded relief on appeal. This, in my view, was a quite different situation to that in the present matter.

[4] 2012(1) SA 90.
[5] 2010 (4) SA 548 (SCA).

[25] The sole authority relied on by the court in *O'Shea* for its ruling was *Bayly*. In that matter the Supreme Court of Appeal upheld an appeal against an order directing and regulating the disposal of shares in a proprietary company where the alternative relief sought in the Court *a quo* was a liquidation order. On appeal counsel for the respondent "*perhaps appreciating the weakness of his case for the purchase of Bayly's shares concentrated on the relief of liquidation on the just and equitable ground*." Citing no authority, the Court declined to entertain consideration of such relief since the Court *a quo* had not made such an order and no conditional cross-appeal had been noted against its failure to do so. Again, in my view, the matter is not on all fours with the present, the relief sought in the alternative being completely different to the main relief granted. If successful, the order made on appeal would not simply have been a downwards variation of an order for contractual damages, as in the present case.

[26] In *Standard Bank of SA Ltd v Stama (Pty) Ltd*[6] Trollip JA confirmed that the "*well-established rule is that ordinarily a judgment or order cannot be varied against an appellant, i.e.to his prejudice, in the absence of a necessary cross-appeal by the respondent*" (*our underlining*). Applying this principle the court declined to consider a variation of the order granted by the Court *a quo* by extending certain dates *inter alia* because this would have been prejudicial to the respondent and the appellant had not cross-appealed against the order.

[27] In *MM v MN* the Constitutional Court, dealing with the question of whether a cross-appeal was necessary, stated as follows:

> *"[22] It has long been accepted in our law that an appeal court may support the order of the court of first instance on a basis different from the reasoning of that court. No*

[6] 1975(1) SA (AD) 730 at 745

cross-appeal by the successful party in that court against any particular but adverse part of the reasoning of the judgment of the lower court in its favour is necessary. The reason for this is that the adverse part of the reasoning of the lower court does not amount to a separate 'judgment or order' within the meaning of s 20(1) of the Supreme Court Act that needs to be altered or amended. It seems this may have been overlooked by, or not drawn to the attention of, the Supreme Court of Appeal".

[28] In *Minister of Police v Van der Vyver*[7] Brand JA stated as follows:

"Ooreenkomstig hierdie verduideliking is 'n appèl en derhalwe ook 'n kruisappèl, gerig teen die bevel van die verhoorhof en nie die hof se beredenering nie. Wanneer 'n respondent dus tevrede is met die verhoorhof se bevel, maar dit op ander gronde wil verdedig as waarop die hof gesteun het, is 'n kruisappèl nie nodig nie. Die feit dat daardie gronde deur die verhoorhof verwerp is maak aan hierdie beginsel geen verskil nie. 'n Kruisappèl word slegs vereis wanneer die respondent die hof se bevel in sy geheel of gedeeltelik aanveg." . . . Die respondent is tevrede met die bevel van die Hof a quo in sy geheel. Gevolglik was dit nie vir hom nodig om 'n kruisappèl te loods ten einde die feite daar rondom die vingerafdruk as basis vir sy saak te steun nie."

[29] In the present matter, since it upheld the respondent's main claim for contractual damages in full, the Court *a quo* did not even address the respondent's second alternative claim for a much more limited award for such damages, based on different facts. The respondent has defended the court's order, but maintained its reliance on its alternative claim in the event it should be unsuccessful on appeal in its main claim. In my view, to require the respondent to have cross-appealed makes no sense. Bearing in mind that the trial court did not deal with the claim (because it saw no need to) one might well ask what order or findings would the respondent have been appealed against? Apart from these practical difficulties, to require respondents in similar circumstances to cross-appeal, even conditionally, could lead to a proliferation of applications

[7] 1861/2011[2013] ZASCA 39 (28 March 2013)

for leave to cross-appeal against non-existent findings and orders where trial courts, for good reason, have found it unnecessary to deal with alternative claims.

[30] In the present matter the respondent can hardly claim prejudice should the contractual damages awarded to the respondent be reduced to a fraction of those initially awarded based on an alternative claim fully ventilated before the Court *a quo* and fully addressed by the respondent in its heads of argument on appeal without any objection from the appellant. Indeed, before us the respondent's counsel initially did not take issue with the basis for the alternative claim and in effect conceded its merits until the point that a cross-appeal by the respondent might be necessary was raised from the bench. Respondent's counsel then embraced this point and withdrew all concessions made, contending that the alternative claim could not be considered in the absence of a cross-appeal.

[31] For all these reasons, we consider that leave to cross-appeal was unnecessary and that on appeal this Court is entitled to deal with the respondent's second alternative claim. It follows that the respondent is entitled to judgment against the appellant in the sum of R389 314.00.

[32] With regard to costs the appeal has been substantially successful with the capital amount awarded being reduced from R17 152 981.00 to R389 314.00. Whilst the appellant never tendered payment of this amount, this claim would not have required any expert evidence nor have occupied the court for more than a day or two. On the other hand, much time was taken up on trial dealing with a number of preliminary points taken by the appellant. These included whether the respondent had *locus standi* to bring its claims and whether it had an insurable interest. None of these points proved to have any substance. Having regard to these factors the most appropriate costs order on trial would be that the respondent be awarded only half of its

costs. Since it was unsuccessful in its main claim, in respect of which both parties led the evidence of expert witnesses, it would be appropriate to disallow such costs for the respondent but to allow them in respect of the appellant. Turning to the appeal, which was argued over three days, the respondent's alternative claim required limited argument although it did entail the time-consuming issue of whether a cross- appeal was necessary for it to be considered. In the circumstances the most appropriate costs order on appeal would be, we consider, that the appellant be awarded its costs on appeal but limited to two of the three day hearing.

[33] It is accordingly ordered:

1) The appeal is upheld in part.

2) The order of the trial court is replaced with the following:

"(a) Plaintiff's main and first alternative claims are dismissed;

(b) Plaintiff is awarded the sum of R389 314.00 in respect of its second alternative claim, together with interest at the prescribed rate *a tempore morae*;

(c) Plaintiff is awarded half of its costs of trial, as taxed or agreed, excluding the qualifying costs of any expert witnesses called on its behalf. The defendant is awarded the qualifying costs of any expert witnesses called on its behalf."

3) The respondent shall pay the appellant's costs on appeal (including the costs of two counsel), but with the respondent's liability in respect of the appeal hearing being limited to two days.

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L J BOZALEK, J
Judge of the High Court
Western Cape High Court

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A LE GRANGE, J
Judge of the High Court
Western Cape High Court

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F SIEVERS, AJ
Acting Judge of the High Court
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