

Reportable**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH**

Case No: 712/2011
 Date Heard: 17/06/11
 Date Delivered: 30/09/11

In the matter between

BIRCH, SIDNEY BONNEN
trading as LF BIRCH & SON

Applicant

and

SANTAM LIMITED

Respondent

JUDGMENT

REVELAS J

[1] The applicant took out a short term agricultural insurance policy with the respondent in April 2010. In August of 2010 he instructed his bank to withhold payment of all his debit orders because he had exceeded his overdraft and was experiencing cash flow problems. On 15 September 2010 certain valuable items insured under the policy were destroyed in a fire which broke out on his farm. The respondent rejected the claims submitted by the applicant in respect thereof on the basis that the insurance policy had been cancelled.

[2] In this application the applicant seeks a declarator to the effect that as 15 September 2010, the respondent's short-term insurance policy was applicable and "in force and of binding effect between them". In addition, the applicant also seeks an order directing the respondent to pay certain amounts to him, set out in his notice of motion as follows:

“2.1 R7 789 932.12
2.2 R 110 880.00
2.3 R 107 600.00
2.4 R 684 395.04”.

These amounts represent the insurance values of items the applicant claims had been destroyed in the fire of 15 September 2010.

[3] The respondent *in limine*, raised the point that the applicant was obliged, given the nature of the relief sought, to have proceeded by way of trial action, and not by way of application proceedings to pursue the relief he was seeking. The respondent also brought an application to strike out certain paragraphs and portions of paragraphs in the applicant’s founding affidavits.

Discussion

Point in *Limine*

[4] It is indeed so that where disputes of fact are anticipated, it is inappropriate to bring an application for claims sounding in money particularly for illiquid amounts. In such an event the litigant should proceed by way of trial action.¹ In this matter the applicant, albeit at a very late stage, indicated that he would only pursue the issue of the respondent’s liability in this application and if successful, prove his damages in a trial action. In cases where damages are claimed, the issues relating to quantification of damages are often, as a matter of course, separated in terms of Rule 33(4) of the Uniform Rules of Court, from the question of liability by agreement between parties. The court may also *mero motu* separate the issues.

¹ See: Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949(3) SA 1155 T.

[5] Whereas, the question of quantum would almost always be decided in trial proceedings, there are however instances where many facts are common cause and disputes of facts are hardly foreseen, so that issues pertaining to liability can be separately adjudicated upon the papers. In *CADAC (Pty) Ltd v Weber-Stephen Products Co and Others*,² the applicant claimed damages from the respondent, based on the unlawful seizure of goods in circumstances which the court found to be an abuse of the Counterfeit Goods Act 37 of 1997. In paragraphs [13]-[15] of the Court's judgment at 576B-577C, it was held by Harms DP that a person claiming damages for the wrongful seizure of goods may, in motion proceedings apply for an order for directions as to how to proceed with the quantification of his damages, because such a claimant is not seeking to have an illiquid claim settled in motion proceedings. The learned judge stated the following in paragraph [13]:

"I cannot see any objection why, as a matter of principle and in a particular case, a plaintiff who wishes to have the issue of liability decided before embarking on quantification, may not claim a declaratory order to the effect that the defendant is liable, and pray for an order that quantification stand over for later adjudication".

[6] In *casu*, this is what the applicant has done (having conceded that the monetary claim cannot be resolved on the papers) and I see no objection, in principle, against him doing so, provided it can be shown that there are no facts in dispute which are not capable of being resolved of the papers. In my view, the question of liability in this matter depends largely on the interpretation and inferences to be drawn from undisputed facts and is capable of being determined on the papers.

[7] The following facts are relevant to this application:

The applicant is the sole proprietor of a farming enterprise which conducts

² 2011(3) SA 570 SCA.

farming operations at the farm van Aardstkraal near Middleton since 2000. The main farming activity is ostrich farming. Unfortunately, when the fire broke out on the farm on 15 September 2010, it destroyed an ostrich incubator, the applicant's office, house, and one of his vehicles.

[8] Prior to March 2010, the applicant's short term insurer was Mutual and Federal. He had cancelled his insurance contract with the latter (after twenty four years) to take out insurance with the respondent as from April 2010. He did so because his broker advised him that the respondent provided for lower premiums.

[9] The cash flow problems experienced by him the applicant avers, were caused by the following factors: During 2008, he became involved in an empowerment project where he, as a trustee of his family trust concluded a joint venture agreement with the Middleton Workers Trust ('the trust'). Due to various problems the project floundered. One of these problems was that the Department of Rural Development and Land Reform did not make payment of the full amount of grant funding that had been approved in favour of the trust.

[10] During July 2010 the applicant exceeded his overdraft facility of R1 million. He alleged that this occurred while he was awaiting payment from the Department of R1.6 million in respect of farm equipment and vehicles purchased by the trust. His bank threatened with legal action. On Monday 2 August 2010, the applicant confirmed his request he had made to his bank manager the previous day (Sunday) to return all his debit orders and briefly set out the reasons for his cash flow problems in an e-mail. As a result of this e-mail to his bank, a copy of which was attached to the founding affidavit, the premium in favour of the respondent was not paid on his behalf by the bank when the respondent submitted the debit order against his account.

[11] After the bank heeded the applicant's instruction and the monthly premium payable to the respondent for August was not paid on his behalf by his bank, the respondent notified the applicant on 7 August 2010 as follows:

"The premium in respect of the above-mentioned policy, which was payable by a financial institution on your behalf, was not remitted to us. This has resulted in your policy being cancelled. In terms of your contract you do not have cover from the cancellation date shown below. Please contact your broker or nearest Santam office".

[12] The applicant did not query the above letter (Annexure G to the founding affidavit) at the time. He accepted its contents, i.e. that he did not have cover for August 2011 and thereafter. He later termed this letter illegal and "a purported cancellation". According to him, he did not read the policy documents sent to him by his broker in April 2010. He did so only after the fire broke out. The applicant did however ensure that before the end of August, the premiums payable in respect of his life insurance policies were met. He did not take the same precaution for his short term policy with the respondent. Therefore, the last premium paid in respect of his policy with the respondent, was in July 2010. The applicant's bank had also called up his overdraft policy on 18 August 2011.

The Arguments

[13] The applicant contended that the purported cancellation was illegal and in conflict with the respondent's own general conditions in its policy. In support of this contention the applicant placed strong reliance on the respondents "GENERAL CONDITION – CONTINUATION OF COVER WHERE

PREMIUM IS PAYABLE BY BANK DEBIT ORDER” and in particular general condition 3B which was amended to read:

- “(a) The premium is payable in arrear if the insured’s policy number is followed by the letters “AG”, otherwise it is payable in advance.
- (b) If the premium is not paid to the company upon request (on submission of the debit order against the payer’s bank account) then the insured will still have cover for the month for which no premium has been received. The premium is therefore still due to the company and can be settled in cash at any office of the company.
- (c) At the next request for payment two debit orders will be submitted (if the outstanding premium has not been settled in cash); the unpaid one, as well as the one for the new month. If only one debit order is paid, this money will be used to settle the original outstanding premium.
- (d) When an event occurs which results in a claim during the month for which the premium has not been paid, the insured will be required to first settle the outstanding premium before the claim can be processed.
- (e) If the premium for two consecutive months (on submission of two debit orders) are not paid, the policy will be cancelled with retrospective effect from midnight on the last day to where premium will be made.”

[14] Previously, before its amendment, the applicable General Condition read as follows:

“The premium is due in advance and, if not received by the insurer by due date, this insurance shall be deemed to have been cancelled at midnight on the last day of the preceding period of insurance, unless the insured can show that failure to make payment was an error on the part of his bank, or other paying agent. Due date will be the first day every calendar month.

[15] Subsequent to the fire, on 21 September 2011, applicant advised Mr Pierre Gerber of the respondent, that “Christine Coldicott of First National

Bank confirmed in the letter of Thursday 16 September 2010 that the reason that First National Bank never allowed the premium to be paid was due to insufficient funds and not that I had instructed them to permanently cancel the Debit Order”.

[16] The applicant emphasized that no specific instruction was given to the respondent that the policy was being cancelled as one might have expected. He also reiterated that his temporary problem with the facility limit at his bank was the only reason for the August 2010 premium not having been paid. In the same letter he pointed out that Ms Christine Coldicott of his bank had mentioned erroneously, that two premiums were unpaid, whereas in fact the unpaid August premium was the only one in issue.

[17] The applicant argued that in terms of the respondent’s amended condition 3B, which was applicable at the time, the respondent had no right to permanently cancel the policy on 7 August 2010, because it was obliged to process a double premium in September 2010. The respondent was obliged to wait until then. If, no payment was made on 1 September 2010, only then was the respondent entitled to cancel the agreement between them.

[18] The applicant also attached to his founding affidavit, in support of his argument a copy of the standard letter to the respondent’s policy holders, which is applicable when a premium had been unpaid for one month as was the case in this matter, where the August premium was not paid. The relevant portion of the letter reads as follows and incorporates the provisions of Condition B3 (as amended):

“Die finansiële instelling wat, premie of u polis oorbetaal, het u jongste debietorder onbetaald teruggestuur . . . en die rede word aangedui as: geen voorsiening gemaak.

By Santam verstaan ons hoe belangrik dit is dat u korrek verseker is.

Ons verstaan ook dat dit soms kan gebeur dat die premies met die beste van bedoelings nie betaal word nie. . . . U is wel steeds 'n premie aan ons verskuldig. Om die saak reg te stel, gaan ons met die volgende aanvraag twee debietorders vir betaling aanbied: en ten opsigte van die onbetaalde debietorder en een vir die nuwe maand. . . . Help ons asseblief om seker te maak dat daar voldoende fondse beskikbaar is om hierdie premies te dek.

Indien net een van die debietorders betaal word om watter rede ookal, sal die geld gebruik word om die oudste bedrag verskuldig te delg. Neem asseblief kennis dat ons beleid oor premie-betalings bepaal dat 'n polis gekanselleer word wanneer 'n debietorder vir twee opeenvolgende maande nie betaal word nie".

[19] The applicant contends that the aforesaid standard letter was the one which he should have received on 7 August and not the letter of cancellation (Annexure G) also quoted above.

[20] The respondent adopted the approach that the policy was cancelled by the applicant and therefore the applicant did not enjoy the protection of its Short-Term Rules, which includes condition 3B. Mr Gerber, who deposed to the respondent's answering affidavit, stated that in accordance with the "established practice of the bank and by reason of the fact that the instruction to stop payment had emanated from the Applicant, the reason given by the bank was just that, i.e. stop payment".

[21] Mr Gerber went on to explain that the respondent runs an ACB collection program with all banks nationwide. The various codes utilized by the banks and insurance companies in order to reflect non-payment of a debit order are the following:

- B – insufficient funds
- C – stop payment
- D – account closed
- F – insured deceased.

When the ACB is presented to the banks and a premium is not met, the bank in turn notifies the respondent of the reason for the non-payment of a particular debit order by way of reference to one of the codes listed in the previous paragraph. Therefore, if the reason for non-payment is code B or code D (insufficient funds, or the insured person closed his account with the bank in question) the matter is dealt with in accordance with the amended terms of general condition 3B and a letter such as the one quoted in Afrikaans above, is sent out to the policy holder (a code B letter). If the notification is code C stop payment, which emanates from the insured party, the respondent accepts this as notification by the insured, in terms of clause 3A of the general terms of the policy, for the immediate cancellation of the policy. This code system was not placed in dispute by the applicant.

[22] It was submitted by the respondent, that only the insured party is able to stop payment. It then follows that if indeed no alternative arrangements were made, (as foreshadowed in Annexure G) the respondent was entitled to view the "stop payment" or code C notification as an indication that the insured no longer wished to be bound by the terms of the insurance agreement and had repudiated or cancelled it. According to the respondent, the letter sent to the applicant (Annexure G) was an acceptance of the cancellation. In circumstances where the "stop payment" or code C instruction had been given a cancellation letter such as the one received by the applicant, is automatically generated by the computer Annexure G. Mr Gerber stated that such a letter is an acknowledgement of the cancellation of the policy by the insured party rather than a cancellation by the respondent. This is not actually how it reads and it is reminiscent of the wording of the policy before amendment. However, it is not inconsistent with the respondent's explanation.

[23] According to Mr Gerber, if the debit order was returned by virtue of there being insufficient funds in his bank account, the notification from his bank would have been in terms of code B, and the provisions of the amended General Condition 3B would have applied. It was also submitted that even if it was a matter of insufficient funds and condition 3B applied, the respondent would have been entitled to terminate the agreement on 1 September 2011 with retrospective effect, because the debit order would have been returned for a second time because the bank called up the applicant's overdraft facility on 18 August 2010. It was submitted by Mr Gerber that it was hardly likely that the applicant would have had his financial expectations met by the trust or the Department of Land Affairs, between 15 August and 1 September 2010. In my view, this proposition is somewhat speculative and ought to be discounted in my deliberations herein.

[24] The applicant described the respondent's distinction between "stop payment" and "insufficient funds" as specious, since the August debit order was returned for one reason only: The applicant had insufficient money in his bank account. The instruction to the bank, albeit a deliberate instruction, the applicant argued, was to stop payment for that period, not to permanently terminate the agreement. Therefore, the respondent was not entitled to view the stopping of payment as a cancellation.

Application To Strike Out

[25] The respondent's application to strike out certain paragraphs pertains to the founding affidavit and replying affidavit.

[26] In paragraph 30 of his founding affidavit the applicant condemned the respondent's cancellation of the insurance contract as "illegal" and "criminal". The respondent contends this paragraph is vexatious and

ought to be struck out. If the applicants' assertion that the premium was returned only because of insufficient funds were to be accepted, then the letter of cancellation (Annexure G to the founding affidavit) would be in breach of the Short-term Insurance Policy rules. The applicant also relied on certain provisions of the Policyholder Protection Rules (Short-term Insurance) of the Short-Term Insurance Act 53 of 1998, under the heading "Debit Orders".

[27] This legislation provides in Rule 7.2(b) that an "insurance party shall not unilaterally terminate any current debit order signed by a policyholder without having informed the policyholder in writing of the intention so to terminate the debit order at least thirty days before the effective date of such envisaged termination". Condition 3B and the wording of the code B letter quoted to above, were undoubtedly drafted with this rule in mind.

[28] Rule 7.5 of the Short-term Policy legislation provides that an insurer "shall ensure that a policy contains a provision for a period of grace for the payment of premiums of not less than 15 days after the relevant due date: Provided that in the case of a monthly policy such provision must apply with effect from the second month of the currency of the policy". (emphasis added)

Rule 9 goes on to label a contravention of the Act as an offence "and on conviction liable to a penalty or fine . . ."

If the applicant's argument is found to be correct, then Rule 9 would be applicable. In these circumstances, the impugned paragraph cannot be said to be vexatious. Accordingly it should not be struck out.

[29] The respondent also applied for paragraph 31 of the founding affidavit to be struck out. Therein the applicant refers to the fact that when the premiums on his other policies were returned, his other insurers

did not send him a cancellation letter, as the respondent had done. In my view, this paragraph may not be entirely relevant, but it need not be struck out.

[30] The next paragraph sought to be struck out was paragraph 32 of the founding affidavit wherein the applicant states that he did in fact pay the August instalment on his other (life) policies before the end of August 2010, despite the debit orders having been returned by his bank on 2 August. This paragraph played a significant role in my reasoning, as will appear later herein and it should not be struck out.

[31] Since paragraphs 44.2 and 44.3 of the founding affidavit amount to hearsay they are struck out.

[32] Paragraph 51 of the answering affidavit amounts to a disclosure of something specifically marked "without prejudice" in settlement negotiations, and it is therefore struck out.

[33] For the same considerations referred to above in dealing with paragraph 30 of the founding affidavit, I decline to strike out paragraphs 59, the last sentence in paragraph 64 and paragraphs 68.2 and 68.3 thereof, and also paragraph 5 of the replying affidavit.

[34] Because of my findings in this matter, it is not necessary to strike out paragraphs 71-72 of the founding affidavit which deal with the monetary part of the applicant's claim. The same applies to paragraph 8.2 of the applicant's replying affidavit.

[35] Paragraphs 22.7 of the replying affidavit deals with an accusation made in the answering affidavit regarding the inability of the applicant to pay his premiums after 18 August 2010, when the bank called up his overdraft facility. The applicant was entitled to make reference to his

other bank accounts to rebut this speculative accusation. Accordingly, this paragraph need not to be struck out.

[36] Even though only partially successful, the defendant is entitled to its costs in the application to strike out.

Liability

[37] The applicant deliberately prevented the premium due in August 2010 month from being paid. The instruction by the applicant to his bank was communicated to the respondent by the applicant's bank as a code C cancellation repudiation. The respondent then accepted the repudiation. The contract could only be revived if the applicant contacted the respondent as he was invited to do. He had also accepted the cancellation contained in the letter, and did not contact the respondent about it. "Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract he is said to 'repudiate' the contract. . . Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated . . ." ³

[38] Had the applicant simply done nothing about his financial situation and the debit order was returned with a notification from his bank to the respondent, explaining that the non-payment was due to insufficient funds (code B), then the respondent would have been obliged to comply with condition 3B (as amended).

[39] From the respondent's viewpoint, it did not matter why the debit order was stopped and the respondent was under no obligation to find out whether it was because the applicant had insufficient funds in the bank,

³ Per Corbett JA in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 A 22D-F.

or because he found another insurer who offered more competitive terms, or for whatever reason. The applicant's bank advised the respondent of a code C return of debit order ('stop payment'), and the respondent was therefore entitled to respond to the stopping of the payment as if it were a cancellation or repudiation. It was not obliged, in law, to remind the applicant that if he did not meet his next premium payment, his cancellation would be accepted. This is so, because the respondent did not receive a code B notification. Later communications by banking officials, after the fire, that the reason for stopping payment was due to insufficient funds did not alter what the codes had conveyed when the debit order was presented.

[40] The test for repudiation has been held to be an objective one. "The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach".⁴

[41] The argument that the difference between stopping the payment of a debit order, and a debit order being returned due to insufficient funds, was specious, is an attractive one on the face of it. Yet it does not avail the applicant. The distinction is a logical one.

[42] Condition 3B applies to the following situation: Where there are insufficient funds to meet the premium, it is the bank and not the insured, who refuses to pay the premium. This happens because the bank is

4 Per Nienaber JA in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at paragraph [16] 294 E-F.

See also: Wille's Principles of South African Law, 9th Ed at 866.

under no obligation to “loan” the premium money to its client. The bank is also not under any obligation to the insurer, to ensure that its due premiums are met. There is also no discernable intention on the part of the insured that he wishes to repudiate his insurance agreement in this scenario in which the insured could unwittingly find himself without insurance cover. That is precisely the situation which the amended condition 3B seeks to prevent. Hence the obligation to prompt a second payment on the next due date was introduced.

[43] Condition 3B is however not applicable to the following scenario: When the refusal to pay the premium emanates from the insured, (the bank’s client) who has instructed non-payment for a particular reason, which may or may not be because of insufficient funds, the bank advises the insurer that it has been instructed not to pay. The insurer is then entitled to regard the instruction as a cancellation, unless the insured party advises the insurer differently.

[44] In this case, the respondent created an opportunity to be advised differently by the applicant in its letter to the applicant and the latter did not avail himself of that opportunity, there can be no duty on the insurer to make a second attempt to collect its premium, in anticipation of a possibility that the insured did not really mean to cancel his premium.

[45] If the applicant wanted to continue with the insurance policy, having been informed in writing that he did not enjoy any cover, he should have contacted the respondent to make this intention known.

[46] In my view, the applicant elected not to have cover for August 2010 because he deliberately chose not to take up the invitation in the cancellation letter to contact the respondent. On his own version, he accepted that his insurance was terminated and he was without cover. This created the perception of a deliberate choice not to be bound by his

insurance contract. That impression is further compounded in my mind, by the fact that his other long-term insurance premiums were also stopped by him, but he especially provided for them to be paid eventually, and before the end of August 2011, but did not make the same provision for his short-term agricultural policy which he that stage, only had for three months. Sadly, these actions by the applicant militate against the argument that condition 3B applied to the facts of his case.

[47] The applicant's belated reinstatement of the policy in September 2010, after the fire, did not revive the terminated agreement either. Therefore I must conclude that on 15 September 2010, the date of his loss the plaintiff was uninsured.

[48] Accordingly the applicant's claim against the respondent is dismissed with costs. Such costs are to include the costs of the respondent's application to strike out certain averments in the applicant's affidavits.

E REVELAS
JUDGE OF THE HIGH COURT

Counsel for the plaintiff:

Adv K J van Huysteen
Houghton
Johannesburg
Friedman Scheckter

Instructed by:

Counsel for the defendant:

Adv Ford
Grahamstown

Instructed by:

Goldberg & De Villiers Inc

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