

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

In the matter between:

Case No: 2921/2017

Date heard: 17 March 2020

Date delivered: 28 April 2020

**GAMBLE INVESTMENTS (PTY) LTD**

**Plaintiff**

**AND**

**SANTAM LTD**

**First Defendant**

**PSG WEALTH FINANCIAL PLANNING (PTY) LTD**

**Second Defendant**

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**JUDGMENT**

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**Goosen J:**

[1] The plaintiff claims damages from the second defendant which it suffered pursuant to a fire which destroyed a building owned by it. The claim against the second defendant is premised upon the fact that the second defendant, as an insurance intermediary, failed in its duties to the plaintiff. As a result of these breaches the property damaged in the fire was underinsured. In consequence, the first defendant, being the insurer, paid out an amount less than the insured value of the property based on an application of the average condition contained in the insurance policy. The plaintiff accordingly seeks payment of the amount by which the first defendant reduced the claim, being an amount of R3 079 224.70.

[2] The plaintiff instituted action against both the first and second defendant. The plaintiff's action against the first defendant was settled and the trial proceeded only in respect of the claim against the second defendant. At the close of the plaintiff's case the second defendant applied for absolution from the instance. Full argument was presented and, on 3 December 2019, I reserved judgment on the application. A few days later I was approached by counsel in chambers. It was indicated to me that the plaintiff intended to bring an application to re-open its case. This application would be opposed. I was, therefore, requested to withhold judgment on the application for absolution pending finalization of the application to re-open.

[3] The application to re-open was filed on 12 December 2019. A notice of opposition was filed on 9 January 2020. This was followed, on 5 February 2020, by the filing of the second defendant's answering affidavit. The reply was filed on 26 February 2020. By agreement the application was thereafter argued before me on 17 March 2020.

[4] The papers filed in the application are quite voluminous. The essence of the plaintiff's case however, is that the plaintiff's representatives were taken by surprise by the second defendant's argument for absolution since they *bona fide* assumed that the quantification of the plaintiff's claim was not in dispute. The application for absolution was based on the argument that the plaintiff had failed to adduce sufficient evidence to prove two elements of its case, namely the quantum of its damages and causality.

[5] Once a party has closed its case it will not generally be allowed to lead further evidence save in rebuttal. The court, however, has a discretion, to be exercised judicially, to allow a party to re-open its case and to lead such further evidence. Several considerations are to be weighed in the exercise of the discretion.

[6] In ***Mkwanazi v van der Merwe and Another***<sup>1</sup> which dealt with the discretion to permit further evidence to be led in terms of Rule 28(11) of the Magistrates' Courts Rules, the court held that the Supreme Court (as the High Court was then named) has an inherent discretion to allow a party to re-open its case. Reference was made to ***Oosthuizen v Stanley***<sup>2</sup> where the following is stated:

"Several considerations have a bearing on the exercise of such discretion, for instance, the reason for the plaintiff's failure to call the witness before, the danger of prejudice to the opposite party owing to his being no longer able to bring back his witnesses, and, of course the materiality of the evidence. In an application for leave to lead fresh evidence in this court the test as to materiality laid down in *Colman v Dunbar* (1933 AD 141) is that the evidence tendered and such that it would be practically conclusive. In a trial court, however, in my judgment, the test of materiality should be held to be satisfied where the evidence tendered, if believed, is material and likely to be weighty."

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<sup>1</sup> 1970 (1) SA 609 (A) at 616B-E

<sup>2</sup> 1938 AD 322

[7] **Oosthuizen's** case and that of **Colman** were both cases in which leave to lead further evidence was sought on appeal. It is in this context that the test in respect of materiality must be viewed. As pointed out in **Oosthuizen** a less stringent assessment as to materiality applies at the stage of trial. It is sufficient if the court is satisfied that the evidence sought to be tendered is likely to be weighty if believed.

[8] A reading of both **Oosthuizen** and **Colman** indicates that the admission of fresh evidence at the stage of an appeal i.e. once the case has been tried and decided, will only be allowed where special grounds exist and the admission of such evidence would not unfairly prejudice the other side and would allow justice to be done between the parties.<sup>3</sup>

[9] The general considerations which are to be taken into account in the exercise of the discretion are set out in **Mkwanazi**<sup>4</sup> as follows:

- "(i) The reason why the evidence was not led timeously.
- (ii) The degree of materiality of the evidence.
- (iii) The possibility that it may have been shaped to relieve the pinch of the shoe.
- (iv) The balance of prejudice, i.e. the prejudice to the plaintiff if the application is refused, and the prejudice to the defendant if it is granted. This is a wide field. It may include such factors as the amount or importance of the issue at stake; the fact that the defendant's witnesses may have already dispersed; the question

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<sup>3</sup> *Colman v Dunbar* 1933 AD 141 at 160

<sup>4</sup> *Ibid* at 616G-617D

whether the refusal might result in a judgment of absolution, in which event whether it might not be as broad as it is long to let the plaintiff lead the evidence rather than to put the parties to the expense of proceedings de novo.

- (v) The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been led on both sides and, just before judgment is delivered, the plaintiff asks for leave to lead further evidence, it may well be that he will have a harder row to hoe, because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of throwing the whole case into the melting pot again, and perhaps also the convenience of the court which is usually under some pressure in its roster of cases. On the other hand, where a plaintiff closes his case and, before his opponents have taken any steps, asks for leave to add some further evidence, the case is then still in medias res as it were.
- (vi) The healing balm of an appropriate order as to costs.
- (vii) The general need for finality in judicial proceedings. This factor is usually cited against the applicant for leave to lead further evidence. However, depending on the circumstances, finality might be sooner achieved by allowing such evidence and getting on with the case, than by granting absolution and opening the intermediate way to litigation de novo in all its tedious amplitude.
- (viii) The appropriateness, or otherwise, in all the circumstances, of visiting the remissness of the attorney upon the head of his client."

[10] The party seeking the indulgence of re-opening its case must establish that the evidence it seeks to present was not available to it or could not reasonably be acquired. If it was available an acceptable explanation must be furnished as to why it was not presented.

[11] The plaintiff in the present instance seeks to lead the expert testimony of a Quantity Surveyor, Mr Elliott relating to the assessment of the costs of replacement of the damaged property. It is not in dispute that the evidence the plaintiff seeks to lead is material to the issue to be decided. This evidence, it is asserted, was available to the plaintiff at trial or could have been available with relative ease. The key question to be considered at the outset, therefore, is the plaintiff's explanation for not presenting that evidence prior to the close of its case.

[12] The explanation tendered by the plaintiff is that the plaintiff's legal representatives *bona fide* assumed that the quantification of the plaintiff's claim was not in dispute. They accordingly did not lead evidence which it now wishes to lead to establish (a) the true value at risk of the buildings which was damaged in the fire; (b) the actual sum insured of the building; (c) the value of the loss suffered by the plaintiff, inclusive of the costs of demolition; and (d) the effect of the application of the average conditions on the plaintiff's insurance claim.

[13] The plaintiff states in its founding affidavit that its legal representatives were taken by surprise by the argument advanced by the second defendant in the absolution application. They based their assumption upon the fact that the second defendant's plea consists of a non-admission rather than a specific denial. It is stated also that in the course of pre-trial engagements which *inter alia* sought to define the

issues for trial, the second defendant did not alert the plaintiff that it was disputing the quantum of the plaintiff's claim.

[14] Still another explanation for what is now accepted to be an erroneous assumption is the role that the second defendant, in the person of Wait, the broker, played in the settlement of the plaintiff's insurance claim with the first defendant. In this regard the plaintiff alleges that Wait, who continued to participate as an insurance intermediary, facilitated the submission of the insurance claim and was present at and a party to the negotiated settlement. It is accordingly asserted that Wait "*represented*" the plaintiff as an agent and is accordingly precluded from now denying the quantification of said claim, including the effect of the application of the average condition.

[15] The plaintiff further contends that it was "*led up the garden path*" so that at the stage of absolution second defendant could "*deliver its knock-out punch*". The contention is that by not drawing plaintiff's attention to the dispute; by not itself qualifying an expert to challenge the quantification of the claim; and by constructing its cross-examination of the plaintiff's witnesses in a manner which enabled it to make the argument an absolution, the plaintiff was misled.

[16] It is appropriate to preface the consideration of the plaintiff's case for re-opening and the position adopted by the second defendant with some general observations. Civil litigation is adversarial in character. The conduct of the adversaries is regulated by procedural rules, codes of practice and professional ethics, and by substantive rules of law. The adversarial contest seeks a legally

cognizable result in accordance with law. The conduct and prosecution of a party's case, however, is premised upon autonomy. A party is free to decide how it wishes to prosecute its case subject only to the overriding legal and ethical obligations which mediate such autonomy. In exercising this autonomy the party and the legal representatives appointed by it, is responsible. The adjunct to autonomy is accountability. A party is bound by the choices it makes or those which are made on its behalf in the conduct of the litigation. It is for this reason that a re-opening of a case is not there for the asking. An application to re-open invariably raises the balance between accountability of the legal representatives and the interests of justice. It is in the balancing of these that the considerations set out above came to the fore.

[17] The plaintiff's contention that its representatives *bona fide* assumed that the quantification of the claim was not in dispute must be considered against the backdrop of the pleadings, since these primarily define the issues to be tried.

[18] The plaintiff formulated its claim against the second defendant, having pleaded certain breaches, as follows:

"In so doing the Second defendant underinsured the plaintiff's immovable property in particular by failing to advise that the Plaintiff's sum insured in respect of property insured under the policy was equal to its replacement value plus an amount equal to Value Added Tax, which resulted in the application of the average condition to the loss as set out below.

Upon adjudication of the loss, the First Defendant applied the average conditions to the claim, resulting in a loss of R3 079 224.77 to the Plaintiff as calculated in paragraph 53 *infra*."

[19] The calculation set out in paragraph 53 of the particulars is the following:

"The plaintiff's loss of R3 079 224.77 is calculated as follows:

Average in respect of demolition contract:

|                  |                    |
|------------------|--------------------|
| Quantum          | R867 808.80        |
| Less Average (1) | <u>R779 968.31</u> |
| TOTAL            | <u>R 87 840.48</u> |

|                       |                       |
|-----------------------|-----------------------|
| Reinstatement quantum | R19 301 647.41        |
| Less Average (2)      | <u>R 2 299 256.45</u> |
| TOTAL                 | <u>R17 002 390.96</u> |

|                         |                       |
|-------------------------|-----------------------|
| Total average component | R 779 965.32          |
| Average (1)             | <u>R2 299 256.45</u>  |
| TOTAL                   | <u>R3 079 224.77"</u> |

[20] In regard to the preceding paragraphs, the second defendant pleaded a denial. It also pleaded that the plaintiff furnished the second defendant with specific instructions regarding the insured value of the insured property. It denied that the property was underinsured and further pleaded that in the event that it is found to be

underinsured, said underinsurance arose as a result of a direct instruction given to the second defendant.

[21] In relation to the quantification of the loss (paragraph 53), the second defendant pleaded that it made no admissions and put the plaintiff to the proof thereof.

[22] It is this latter "*non-admission*" which the plaintiff says induced its representatives to assume that the quantification was not in dispute. The reasons advanced are threefold. Firstly, it is stated that such "*non-admission*" does not indicate a "serious" dispute. This, presumably, on the basis that no countervailing factual averments are made. There is, in my view, no substance to the contention. A fact is either disputed or it is not. If it is not disputed no evidence need be presented at trial to prove that factual averment. Whether a party can advance a contrary version or not does not alter the situation. Evidence must either be led to prove the averment or it need not be. In this instance, the plea clearly indicated that evidence would be required to be led to prove the factual averments embodied in the paragraph setting out the calculation.

[23] The second ground of the assumption is founded on the role played by the broker, Wait. As already indicated the allegation is made that Wait acted as the plaintiff's agent in the negotiations with the first defendant at the stage it was adjudicating the plaintiff's insurance claim. On this basis the plaintiff now contends for some form of acquiescence or waiver to be applied.

[24] This case is not pleaded either in founding its claim against the second defendant or in replication to the second defendant's plea. Of particular significance in this regard is the fact that the plaintiff pleads the facts relevant to the agreement of loss by which its insurance claim against the first defendant was settled. The second defendant denies that it was a party to or bound by this settlement agreement. The plaintiff does not, in replication, set out the contentions it now seeks to advance against the second defendant. Accordingly no doubt could have existed as to the second defendant's stance in relation to the basis upon which the agreement of loss was concluded.

[25] The third basis for the assumption is that, in the pre-trial process, the second defendant did not "*alert*" the plaintiff to the fact that the quantification of the claim was a "*material*" dispute. Reference is made to an exchange of correspondence and the interaction of the parties in telephonic or other pre-trial discussions. Reliance is also placed on the fact that the second defendant indicated, prior to the matter being declared trial-ready at the roll call hearing, that it did not intend to call expert witnesses. Based on this the plaintiff asserts that it assumed that "*the calculation of the average as contained in the settlement agreement was not in issue*" and therefore only qualified its expert to deal with the loss of rental claim against the first defendant. The plaintiff further states that since the quantum aspect was not addressed in the discussion of "*the broader issues*" in dispute, namely the mandate and the duties that attach thereto, it was entitled to assume that the quantum was not in dispute.

[26] The principal difficulty with this explanation is that it ignores not only the terms of the pleadings but also the recorded definition of the issues to be tried. The latter records that the issues in dispute are those set out in the pleadings.

[27] In argument before me it was submitted, on behalf of the plaintiff, that the explanation advanced by the plaintiff must be accepted. It was pointed out that the second defendant is unable to gainsay the assertion by the legal representatives as to their subjectively held beliefs.

[28] Counsel for the second defendant, however, argued that, objectively viewed, the plaintiff's representatives misconstrued the case that the plaintiff had to prove. It was submitted that there can have been no doubt that the plaintiff was required to prove the quantification of its loss. That did not merely require proof of the calculation by which the settlement amount was arrived at but each of its elements. Thus, it was submitted, the plaintiff was required upon a plain reading of the pleadings to prove the value of the property at risk, the costs of demolition and the value of reinstatement of the insured building. These factors together with the insured value would permit determination of the effect of the average clause if applied.

[29] Support for a finding that the plaintiff's representatives misconstrued what was required to be proved is to be found in the argument advanced in opposition to the application for absolution. That argument proceeded on the basis that the plaintiff had, at least *prima facie*, proved its loss by presentation of the evidence relating to the insurance settlement; the insured value together with provision for VAT thereon;

and the factual evidence of Elliott in which he confirmed the calculation of the loss. It was argued that had the plaintiff been under the mistaken assumption that quantum was not in dispute it would have raised that issue in argument. It was accordingly argued that the failure to lead such evidence as it had available must have been deliberate, on the basis that it was not considered necessary, rather than as a consequence of inadvertence or even a *bona fide* held but mistaken belief.

[30] There is, in my view, considerable force to the argument that the objective facts do not accord with the assertion of a reasonably held subjective belief that the issue of quantum was not in dispute. The pleadings and the pre-trial definition of issues do not support the formulation of such belief.

[31] The position of the plaintiff, as set out in its replying affidavit was this:

"As is evident from my founding affidavit, the *bona fide* assumption of the Plaintiff and its legal representatives' *bona fide* assumption that the quantification of the Plaintiff's claim could not be a material dispute was not based on one single document, event or "theme" but on the whole train of events that led up to the hearing, as well as what occurred at the hearing itself."

[32] This is an important qualification of its "*bona fide assumption*" since it encompasses an appraisal of the conduct of the litigation as a whole. It marks a shift, as Mr Nepgen argued, in the plaintiff's position from that adopted in its founding

affidavit. By the time of the trial hearing, the plaintiff had already decided that it was unnecessary to lead expert evidence in respect of the quantification of its claim other than that relating to its rental claim against the first defendant. It is difficult therefore to understand what, in relation to the hearing, could have played a role in "*facilitating*" its assumption.

[33] It must be accepted that the plaintiff's representatives considered that the evidence presented (as also that which they procured for production) was sufficient to prove the plaintiff's case. Whether such subjective assessment was induced by a mistaken assumption as to what was required to be proved or arose because the representatives misconstrued the case they were required to prove is of little moment in the present instance. The mistaken assumption or misconstruing of the case led to certain evidence not being procured and that evidence not being led at trial. In my view this does not fall within the ambit of what otherwise be considered to be inadvertence.

[34] I accept, on the basis of the objective facts relied upon by the second defendant that the error in assessment of the plaintiff's case could have been avoided. In its founding affidavit the plaintiff states that in respect of the second defendant's "*non-admission*" in relation to the quantification of the claim, it filed a notice to remove a complaint preliminary to an exception. A decision by the plaintiff to amend its particulars of claim, however, intervened and the exception was not pursued at that stage. When the second defendant retained the "*non-admission*" in its consequential amended plea, the plaintiff elected not to pursue an exception. It

also did not deal with its uncertainty as to the ambit of the dispute by framing an appropriate request for trial particulars. Had it done so the true nature of the dispute might have been properly elucidated.

[35] The acceptance that the error was as a consequence of deliberation on the part of the plaintiff's legal representatives does not, *ipso facto*, mean that the plaintiff's request to re-open its case cannot be granted. As indicated earlier in this judgment the exercise of the discretion to allow a plaintiff to re-open involves consideration of numerous factors. The explanation for the default is but one of those factors.

[36] The application to re-open the plaintiff's case was prosecuted on the basis of an acceptance, by the plaintiff, that but for the re-opening of the case the matter would be determined by absolution of the defendant. The fact that the court would, if it did not allow the plaintiff to re-open, grant absolution from the instance serves to underscore the prejudice which would be suffered by the plaintiff. To this was added the fact that, in the circumstances on this matter, the granting of absolution would in all probability result in the plaintiff being unable to further pursue its claims as a result of the prescription of the claims.

[37] In the light of these considerations it was argued that a refusal of the application to re-open the plaintiff's case would give rise to significant and insurmountable prejudice to the plaintiff. In contrast, so it was submitted, the prejudice to the second defendant would be minimal, since it would have the

opportunity to deal with the further evidence to be tendered and meet such evidence when opening its case.

[38] Mr Nepgen argued however, that the prejudice to the second defendant was very significant. It was submitted that apart from the proposed evidence of Elliot, which would still need to be procured, the plaintiff proposed to introduce an amendment to its particulars of claim to introduce an entirely new issue, namely the alleged acquiescence of the second defendant in the quantification of the claim or its waiver of a right to dispute same. This, coupled with the need to qualify Elliot as an expert would significantly expand the issues to be tried. It would also, so it was argued, in all probability require the recalling of the plaintiff's key witness, Mrs Kraak, in relation to the nature and extent of the building as it existed prior to the fire. The case that the plaintiff would have to advance in this regard would place the second defendant in the invidious position of being unable to deal with such evidence since the building has subsequently ceased to exist. At the very least it would give rise to the need to investigate the matter by way of extensive discovery processes.

[39] In the light of this, it was submitted that the prejudice to the second defendant is substantial. In essence it would be required to meet a whole new case.

[40] It should be stated that there is considerable force in these submissions. The re-opening of the plaintiff's case even if confined to the terms of the order set out in the notice of motion will give rise to a broadening of the evidence in dispute. However, as Mr Beyleveld correctly submitted, the issues in dispute on the pleadings remain unchanged. By allowing the plaintiff to re-open its case for the purpose of

presenting the expert testimony of Elliott on the issues identified will not alter the case that the second defendant is required to meet.

[41] Insofar as the proposed amendment of pleadings is concerned, that is a matter to be dealt with by this court at an appropriate stage and in accordance with its assessment of the consequences that may then flow from such an amendment. Whilst I accept that the possible amendment may introduce questions as to the materiality of the evidence to be presented, for the present the evidence which the plaintiff proposes to lead is material. If it is allowed to re-open its case to present that evidence it will be confined by the terms of the order. What may yet arise in the litigation is a matter to be addressed at the stage that it arises.

[42] In my assessment the prejudice that the plaintiff will suffer if it is not permitted to re-open its case outweighs the prejudice to be suffered by the second defendant. The nature of the prejudice to be suffered by the plaintiff is, in my view, also decisive in the balance to be struck between accountability of the legal representatives and the interests of justice. Mr Nepgen alluded in argument to that fact that this balance may also be struck on the basis of acceptance that the plaintiff may have other remedies available to it. I do not think that it is appropriate to engage the question of other notional remedies. It is in this case that the balance must be struck and it is in this case that a discretion must be judicially exercised.

[43] In the view I take of the matter the judicial exercise of the discretion requires that the plaintiff be granted leave to re-open its case in the terms sought in the notice of motion.

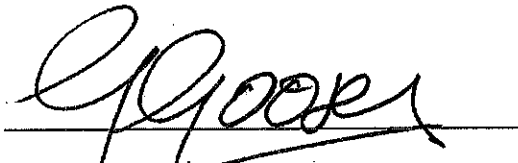
[44] What remains to be considered is the aspect of costs. It was accepted by the plaintiff that what it seeks is an indulgence and that, ordinarily, it should bear responsibility for the costs of such application or the wasted costs occasioned thereby. It was argued however that the opposition was unreasonable and that, accordingly, the second defendant should be ordered to pay the costs. In the alternative, it was submitted that the costs should be reserved for determination at trial. The second defendant submitted that the opposition was not unreasonable. Thus, even if the application succeeds the second defendant should be indemnified regarding costs. This should include the wasted costs occasioned by the application for absolution.

[45] As is apparent from what is stated earlier in the judgment, I consider the second defendant's opposition to the application reasonable in the circumstances. There is no reason why the costs should be reserved for later determination. This court will, in due course, be in no better a position than it presently is to determine the question of costs. I am also in agreement that such wasted costs as arose in consequence of the application for absolution from the instance ought also to be borne by the plaintiff. I do not think it appropriate to impose a punitive costs award.

[46] In the result the following order will issue:

1. The plaintiff is granted leave to re-open its case.
2. The plaintiff is granted leave to recall and qualify its expert witness, Mr D Elliot, and lead his evidence relating to:

- (a) The true value at risk of the building owned by the plaintiff which was damaged by the fire which occurred in June 2016;
  - (b) The value of the loss suffered by the plaintiff as a result of the damage by fire in June 2016, such value of loss to include the cost of demolition and debris removal;
  - (c) The effect of the application of the average condition on the plaintiff's claim.
3. The plaintiff is ordered to pay the costs of the application to re-open its case.
4. The plaintiff is ordered to pay the wasted costs occasioned by second defendant's application for absolution from the instance.

  
**G. G. GOOSEN**  
**JUDGE OF THE HIGH COURT**

*Obo the Applicant:*

*Adv A. Beylebeld SC*

*Instructed by*

*Schoeman Oosthuizen*

*Ref: Mr Oosthuizen*

*Obo the Respondent:*

*Adv J.J Nepgen*

*Instructed by*

*Pagdens*

*Ref: J J Eksteen*