

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCA DIVISION, DURBAN**

CASE No: 9855/2015

In the matter between:

SIXBAR TRADING 645 CC

PLAINTIFF

and

**ABSA
DEFENDANT**

INSURANCE

COMPANY

LIMITED

ORDER

It ordered that judgment is granted in favour of the plaintiff against the defendant as follows:

(a) Payment of the sum of R1 200 000.00 (one million two hundred thousand rand)

(b) Payment of interest on the said amount at the rate of 15.5% per annum from 1 April 2014 to date of final payment.

(c) Cost of suit including costs consequent upon employment of senior counsel, costs of obtaining the transcripts of the evidence and the costs for preparation of written arguments.

JUDGMENT

Delivered on:

Mngadi J:

[1] The plaintiff instituted an action against the defendant claiming R1.2m for loss of rental a loss, (it claimed), was covered by an insurance cover issued by the defendant.

[2] The plaintiff is Sixbar Trading 645 CC, a close corporation registered and incorporated in terms of the law. The defendant is Absa Insurance Company Limited a company duly registered in terms of the company law of the Republic of South Africa.

[3] The plaintiff in the particulars of claim stated that a written policy of insurance between the parties was concluded in June 2012. In terms of the policy plaintiff paid certain premiums and defendant indemnified the plaintiff for any damages suffered by the plaintiff as a result of occurrence of certain events including the event which occurred on 2 September 2013 when a fire occurred at the plaintiff's premises situated at 1 Moodie Street in Pinetown. The fire caused damage to the premises resulting in the plaintiff suffering loss of rentals for R1.2m.

[4] The defendant in its plea admitted that it concluded the insurance policy with the plaintiff in terms of which it undertook to indemnify the plaintiff in terms and conditions contained in the insurance policy and its schedules. The defendant denied that the plaintiff suffered any damages arising from loss of rental in respect of the premises, and therefore it was not liable to the plaintiff in the claimed sum. In essence, the defendant

disputed that the plaintiff suffered loss of rentals relating to the premises damaged by fire for which it was liable to indemnify the plaintiff.

[5] The defendant admitted that the premises were owned by the plaintiff; were damaged by fire; were so damaged by fire that they needed to be rebuilt and that no rental could be obtained by letting the premises whilst they were damaged. The defendant contended that it could only be liable to indemnify the plaintiff for loss of rental in terms of the policy if at the time the premises were damaged by fire they were generating rentals for the plaintiff, which it contended, the plaintiff failed to establish.

[6] The plaintiff adduced evidence from two witnesses, namely, Mr. Jusuf Ebrahim Mansoor and Mr. Naeem Akthar. The defendant adduced evidence from three witnesses, namely, Mr. Roland Campbell, Mr. Gavin Maitre and Mr. Neel Fourie. During the course of leading of evidence documents bound into bundles were referred to. The parties having agreed in the pre-trial meeting that the documents will, without further proof, serve as evidence of what they purport to be without admitting the truth of the contents thereof and that copies may be used without the production of the original. A bundle written "Plaintiff's Trial Bundle Vol 1" was marked Exhibit A1. This bundle contained the following:

1. CK2 and CK2A of Sixbar Trading 645 CC.
2. CK2 of E Mart Home Improvement Centre CC.
3. Letter from MaxProp to Mam Hassim Family Trust.
4. Schedule of VAT for July/August 2013 of Sixbar Trading 645 CC together with purchases schedule.
5. VAT201 of Sixbar Trading 645 CC for tax period 2013/08.
6. VAT reconciliation schedule for Sixbar Trading 645 CC for September/October 2013 together with purchases schedule.
7. VAT201 of Sixbar Trading 645 CC for tax period 2013/10.
8. VAT statement of account for Sixbar Trading 645 CC of 1 March 2013 to 28 February 2014.
9. Trial balance of Sixbar trading 645 CC from 1 March 2013 to 28 February 2014.
10. Annual Financial statement of Sixbar Trading 645 CC for year ending 20 February 2014.
11. History statement of bank transactions in the account of Sixbar Trading 645 CC for the period June 2013 to September 2013.
12. Reconciliation of payments received from E Mart Home Improvement Centre CC by Sixbar Trading 645

CC for the period June 2013 to September 2013. 13. VAT reconciliation statement of E Mart Home Improvement Centre CC for June/July 2013 together with purchases schedule. 14. VAT Reconciliation statement of E Mart Home Improvement Centre CC for June/July 2013 together with purchases schedule.

[7] Volume 2, which was marked Exhibit A2, contained the following documents: 1. VAT returns for E Mart Home Improvement Centre CC for the period end July 2013. 2. VAT returns for E Mart Home Improvement Centre CC for the period end September 2013. 3. VAT statement of account for E Mart Home Improvement Centre CC 1 March 2013 to 28 February 2014. 4. Trial balance of E Mart Home Improvement Centre CC from 1 March 2013 to 28 February 2014. 5. Annual financial statement of E Mart Home Improvement Centre CC for year ending 28 February 2014. 6. Extract of general ledger for Sixbar trading 645 CC from 1 March 2013 to 28 February 2014. 7. Undated letter from Maitre and Associates. 8. Photographs of building at 1 Moodie Street prior to renovations. 9. Photographs of building at 1 Moodie Street after renovations. 10. Agreement of lease between Sixbar Trading 645 CC and E Mart Home Improvement Centre. Reconciliation of payments made by E Mart Home Improvement Centre CC to Sixbar Trading 645 CC for the period June 2013 to September 2013.

[8] In Exhibit B, there were the following documents in respect of both Sixbar Trading 645 CC and E Mart Home Improvement Centre. 1. SARS VAT statement of account. 2. SARS Income Tax return ITR 14. 3. Supplementary Declaration for Companies or Close Corporations IT14SD. 4. SARS Income tax notice of Assessment ITA34. 5. Statement of Account Assessed Tax ITSA. and the Reconciliation of payments made by E Mart Home Improvement Centre CC to Sixbar Trading 645 CC as well as Standard Bank bank statements of Sixbar Trading 645 CC from no. 122 to 146 (with no. 134 missing)

[9] Bundle marked Exhibit C contains mainly documents relating to developments subsequent to the fire on 2 September 2013. The documents in the bundle those relevant shall be referred to in the summary of the evidence. Exhibit D is the loss

adjustor's bundle. It contained reports made by the loss adjustor. In Exhibit B (the Gavin Maître's bundle) it contained for both Sixbar Trading 645 CC and E Mart Home Improvement Centre CC the following documents: Annual General Ledger from 1 March 2013 to 28 February 2014; Annual trial balance from 1 March 2013 to 28 February 2014, Annual Financial Statements 28 February 2014 Exhibit E is the defendant's supplementary affidavit.

[10] I shall start by summarising the evidence of Naeem Akthar although Mr Akthar was the second witness for the plaintiff. He testified that he was from Pakistani where he grew up and got his schooling. His language is Urdu which he reads and writes. He came to South Africa in 1997, when he arrived in South Africa he could not speak English. He has acquired some knowledge of English, which he speaks for general conversation, but he cannot read nor write in English. He started as a packer in a hardware store. He left the job and he sold goods to hawkers. He then opened a small shop selling clothes. In 2001, he opened a hardware store in Pinetown in Railway Road in the premises let to him by A K Ismal at a small rental. He used to work with AK Asmal at the hardware store. He owned the hardware store through a close corporation Sixbar Trading 645 CC (Sixbar) of which he was the sole member. He traded under the name Nu Pinetown Builders Suppliers. In 2007, he opened a second hardware store at 14/16 Chapel Street, Pinetown. This store he opened it under a close corporation with the name E Mart Home Improvement Centre (E Mart) in the premises that he had bought. It was situated on the back of Nu Pinetown Builders Suppliers. He remained the sole member of both the close corporations Sixbar and E Mart. He operated the businesses by buying in bulk and selling for cash. He sought suppliers with the best deals and he bought in bulk. He had more than fifty suppliers.

[11] Mr Akhtar testified that in about June 2012 a property at 1 Moodie Street in Pinetown, which was a factory, was placed on sale. The property was in a corner about 300 to 400 metres from his businesses. He decided to buy the property as an investment. He then renovated the property and he took an insurance through a broker for the premises. He consulted a property letting company Max Prop which advised him

and provided him with a report stating the market related rental for the property to be R190 000.00 a month. He referred to a letter in Exhibit A2 from Maxprop dated 20 December 2012. The letter confirmed instructions to find a tenant for the property constituting 173 square metres of office, 1 280 square metres of shops and storage and 804 square metres of yard and parking at a monthly rental of R191 845 excluding VAT. Mr Akthar stated that the agent advised him that potential tenants complained about the parking, he then opened up the parking. The premises were a proper showroom. He testified that before he could find a tenant for the premises A S Ismal told him that he shall not renew his lease which was due to expire in August 2014. He then decided to expand his premises of E Mart. The expansion, which was carried on whilst trading, was continuing meant that E Mart needed a space to store its stock. The premises at 1 Moodie Street were available since he would move to those premises when his lease with Ismal expired. The premises were more suitable in that the renovations of E Mart premises would be completed within a year and the premises were not far to the premises of E Mart. He then decided that E Mart shall lease the premises from Sixbar for a period of a year at a rental of R140 000 per month plus VAT. Mr Akthar testified that he was advised that the lease for tax purposes must be reduced into writing. His staff prepared the lease from a specimen made available. The person who typed the lease wrote the year 2014 instead of 2013, which was corrected when he signed the lease. The lease was for the period 1 July 2013 to 1 July 2014. In July 2013, E Mart started storing its stock at the premises at 1 Moodie Street. He signed the lease on behalf of both Sixbar and E Mart. He signed the lease and it was filed. He referred to the copy of the lease. It consists of twenty (20) pages with 32 clauses. The person who signed on behalf of the lessor and the lessee signed it. It signed by two witnesses who witnessed for the lessor and for the lessee. The three signees signed each page of the document. The year 2014 for the date is typed with 4 of 2014 deleted and on top of the deletion it is written 3. The typed lease left a space for the place, day month to be completed. The particulars are completed by long hand which suggests that when they were completed it was noted that the year typed 2014 was not correct and it corrected by deleting the typed 4 and writing 3 by long hand.

[12] Mr Akthar testified that a big signage depicted on the photos was put at the premises. It was in the name of E Mart to show that E Mart was using the premises. The photo shows the signage in blue yellow orange colours. It is a big board rectangular in shape which could be 3.5m x1.2m Its length runs upwards and it has its steel frame and it is affixed along the a big wall forming the front of the building. The word E Mart is written on the top part in big orange letters.

[13] Mr Akthar testified that he operated the bank accounts of both E Mart and Sixbar since he was the sole member of both entities. He transferred money by means of EFT from one account to the other and vice versa. He said he made bulk transfers when there was a need. The transfers included loans and loan repayments between the two entities. In the transfers he included the rent paid by E Mart to Sixbar. He explained what was included in the transfer to his accountant. The transfers appeared in the bank statements but he did not reference in the bank statement the transfer since he was the only person transacting on the bank accounts and he knew what was included in each transfer. The goods belonging to E Mart were stored in the premises at 1 Moodie Street. On 2 September 2013, the premises were damaged by fire. On the same day, the defendant as the Insurer was advised of the fire. The defendant took over the processing of the insurance claims. Eventually the defendant settled the claim for damage to the building and its contents. The claim for the contents was settled with E Mart since the stock damaged in the fire belonged to E Mart. The defendant required invoices for the goods damaged in the fire and it was furnished with the invoices. The defendant offered to settle the claim for loss of rental by paying R300 000.00 which was not acceptable to him. He had claimed loss of rental at R140 000. 00 per month. He claimed R270 000 for the stock and only R150 000 was paid. Some of the stock was not damaged. It was claimed that for the building he was underinsured, he expected to be paid R2.5 m. He claimed R70 000 for office furniture and he was paid R29 000. He claimed for loss of rental at R140 000 per month. The rebuilding of the premises was completed in November 2014. He moved Nu Pinetown Builders Suppliers to the premises in January 2015. He could not understand the reasons of the defendant to refuse to settle the claim for loss of rental in terms of the insurance cover.

[14] Mr Akthar testified that he sold building material for cash. In February 2014, his annual turnover was R12.5m and he made a gross profit of R1.4m as shown in the financial statements. He took the insurance in June 2012 through the broker M I Casim. The premises at that time were vacant. He cannot remember whether he told Mr Casim about the lease of the premises. His manager attended the putting in of the insurance claim. The persons attending to the claim from the defendant met with his staff most of the time. He did not know whether initially the claim was for the building only but he told the defendant's representative of all the loss. The accountant prepared the financial statements for both Sixbar and E Mart. It was about August 2007 when E Mart opened for business because they celebrate its birthdate in August. He understands that in 2014 the turnover of E Mart was R15 m with a gross profit of R4.4m. E Mart and Sixbar were selling more or less the same type of goods. The area of Sixbar was about 500 square metres since it was part of a hotel with a shop and a vacant area; some of the stock was kept outside. Ismal in 2013 charged him a rent of R40 000 plus VAT. He had a written lease with Ismal. Ismal told him in February 2013 that he would not renew the lease. He purchased the premises at 1 Moodie Street for R2 m and he took a bond for R1.4 m. He did renovations to the premises including entrance area and parking in the region of R2 m. The building measured about 1 245 square metres. He rebuilt the premises after the fire and he completed it in November 2014. The expansion of E Mart is not yet complete but E Mart operates in the completed part of the premises. He bought the land in which E Mart operates in 2005 and he completed the building in 2007. The floor space is more than 800 square metres the total area being about 1 200 square metres. There is an upstairs area. Three floors have been completed but he intends to add other floors. There is a storage area underground.

[15] Mr Akthar testified that on 2 September 2013 when the fire broke out there three people in the premises, namely; a security guard, a cleaner and a person who assisted with deliveries. His staff furnished the information required by the defendant. He also engaged later the services of a professional claims service provider. He is aware that a total amount of R1 776 000 was claimed for loss of rental but the amount of the claim

was reduced although he does not know exactly how it was calculated. His staff Ronnel and Rachel worked in the processing of the claims. He did not know when the lease agreement between Sixbar and E Mart was furnished to the defendant. The fax transmission indicates that it was furnished in February 2014. He had a meeting with the broker in the second week after the fire and he explained to him his loss due to the fire. Shaida Ismal is his manager and she has worked with him for a long time. She assisted him in preparation of the lease. He did not know that in January 2014, a claim for loss of rental was raised for the first time and the copy of the lease was furnished in February 2014. Ronnel who assisted in the typing of the lease is no longer working for him.

[16] Mr Akthar testified that he owned in his personal capacity the premises E Mart operates from. E Mart pays rental of R22 500 per month. Sixbar paid a rental of R40 000 per month which was increasing. He charged E Mart for the premises at 1 Moodie Street R140 000 which was less than R191 000 recommended by MaxProp. E Mart needed a warehouse near its business premises. It had to rent the entire premises at 1 Moodie Street. He claimed for the value of the stock damaged in the fire. He did not remember offhand the value of the stock that was not damaged. He started storing stock at the premises in June 2013. He prepared rent invoices, which he gave to the bookkeeper.

[17] The first witness called by the plaintiff was Yusuf Ebrahim Mansoor. He testified that he is a registered accountant holding a B. Com degree in accounting and Khan Salajee & Company employs him as an accountant. Khan, Salajee & Company is a firm of chartered accountants and auditors. He is the person in charge of keeping the books of account of both Sixbar and EMart. He prepares the general ledger, the trial balances, the necessary schedules and the financial statements. He in addition prepares the VAT returns. He confirmed that he prepared the documents in the bundles relating to both Sixbar and E Mart. In respect of Sixbar the VAT returns for the period July and August 2013 were due on 25 September 2013. He calculated a figure of R21 049.25. He arrived at the figure by taking into account total sales from the bank

statements, cash and rental invoices furnished by the client. He knew of the structure, the relationship and the fact that Mr Akhtar who was the client owned the entities. The rental received by Sixbar from E Mart for July and August 2013 amounted to R319 200 at R159 600 a month of which R19 600 was VAT. He did the reconciliation of input and output VAT and the amount paid to SARS was R21 049.25. The return was filed on 18 September 2013 and the payment was made on 27 September 2013. The same process was done for the September/October 2013 and the amount paid to SARS was R21 226.92. He stated that in November/December 2013 the amount paid was R20 344.04

[18] Mr Mansoor testified that he prepared the general ledger after every two months and the trial balance at the end of the financial year. The trial balance for Sixbar for the period from 1 March 2013 to 28 February 2014 showed sales of R12 100 585.96 and the rent of R420 000. The rental received for the property at 1 Moodie Street from E Mart for the months July, August and September at R140 000 per month exc. VAT is reflected in the income statement. The VAT schedule for E Mart for the period June/July 2013 records a rent invoice of R159 600 with R19 600 as VAT portion. There was no rent for June 2013 because the property was not rented out. He testified that E Mart VAT return period June/July VAT return was submitted on 23 August 2013. The E Mart reconciliation for August/ September 2013 shows rent of R159 600.00, which includes R19 600 VAT a month. The reconciliation was done and an amount of R40 982.66 was paid to SARS. The return was filed on 22 October 2013 and the payment made on 30 October 2013. The financial statement of E Mart shows a three-month rental as an expense and it appears in the trial balance in the amount of R542 500.00 which excludes VAT. He testified that E Mart paid rent to Sixbar by bank transfers. Mr Akhtar would explain to him what was included in the transfer and he prepared the schedules.

[19] Mr Mansoor testified that he started working on the books of the entities in 2012. He visited their business premises. He prepared the general ledger of Sixbar from the bank statements not from the till slips. He used journal entries to capture in the general

ledger items not in the bank statements including cash not deposited into the bank account e.g. the journal entry 4 dated 28 February 2014 relating to total cash sales not deposited into a bank account. He captured amounts in the general ledger inclusive of VAT because he captured them from the bank statements. He captured items from the bank statements to the general ledger and he did not check them against invoices. Item 261 shows rent paid by Sixbar to Pinetown Imperial Hotel but he was not shown the lease. The bank statement had the reference AK Ismal. He knew that EMart operated from its premises and at the premises at 1 Moodie Street, which premises were used as a warehouse. The item in the general ledger referring to rent received was done at the end of the year by a journal entry. Sixbar only received rental from E Mart. One entry refers to ADJ and INV001, which suggests that an invoice was given to him. An invoice would show that Sixbar called for the rent. All the transfers from Sixbar to E Mart had no particular reference. The schedules were prepared after every two months. There was no source document explaining each transfer. He relied on Mr Akhtar who explained what the transfer was for. In the annual trial balance, he reflected rental as revenue. In the financial statement, he explained that that rental falls under services. The financials relating to submission to SARS showed rental as part of revenue.

[20] Mr Mansoor stated that the general ledger of E Mart shows as a journal entry rental accrued to a member for a year, which was for the premises they traded from. It is in the amount of R122 500 from March 2013 to February 2014 and amount excludes VAT. The rental has since increased. E Mart was paying rent for two premises. The client gives the cash amount in the general ledger to him. The July/August rental is per invoices and for VAT purposes, it was enough to record rent accrued. The statement from SARS for the period 1 March 2013 to 28 February 2014 shows that payments were made as follows, on 13 May 2013 a sum of R20 967.62, on 31 July 2013 a sum of R21 306.16, on 27 September 2013 a sum of R21 049.25, on 21 November 2013 a sum of R21 226.91, on 25 January 2014 a sum of R20 344.04 and on 28 March 2014 a sum of R20 567.33. It is not strange that the amounts paid were constant in the region of R20 000. He used the Proc Acc software package, which was sufficient for the purpose. He prepared and submitted the income tax return and received the tax

assessment. He included rentals under revenue. He did not dispute that the transfers between the two entities were R285 000 in February 2013, R173 000 in March, R170 000 in May, R232 000 in June, R220 000 in July, R225 000 in August, R610 000 in September. They were during that period about thirty. The entries were purchases, rentals and loan repayments. There was no way Sixbar could allow E Mart to use its premises and not pay rent. Mr Akthar owned both entities and he could effect set offs. E Mart by occupying the premises at 1 Moodie Street it became liable to pay rent. In a letter dated 14 March 2014, he stated, an amount of R478 800 was for purchases but his colleague Khan said it was for loan repayments. Mr Akthar must have told him that it was purchases. He did not know why Khan said it was loan repayments. He did see the lease between Sixbar and E Mart. He admitted that the flow of funds between the entities with no source documents and precise referencing could create some confusion.

[21] The defendant first called Mr Roland Campbell. He testified that he was an insurance loss adjustor, and a professional claims handler on behalf of Insurers and Insurance Brokers. A claims handler receives appointment from the insurance company. He uses his expertise to manage the processing of the claim. He has been a loss adjustor for 30 years. He testified that relating to the fire damage of the premises at 1 Moodie Street; he received an appointment from the defendant. He familiarised himself with the nature of the insurance cover. He contacted Mr Akhtar because in a fire urgency is of importance. He met him client at his office at E Mart and became aware that he could not communicate well in English. He went with him to the premises at 1 Moodie Street. There was nobody from the broker. He conducted site inspection and he obtained information from those around. He recorded things to note in his notes. He concentrated on two areas of the building. There was a staircase to a double storey section and there was an office. There was a section damaged by smoke, a pile of new garage doors, a stack of wheelbarrows, which took about one fifth of the section of the building. The roof on the bottom area where the fire started had collapsed. There was a hip of sunawre and toilet seats, which had been stacked covering about 15 or 20 square metres of the area. There were in another area steel cages along the wall,

which were empty. There was an upstairs section with a lot of furniture, which was covered by soot of smoke.

[22] Mr Campbell testified that his appointment required him to focus on the building and not the contents of the building. He was not required to verify stock in the building at the time of the fire. It was only later that a claim for stock materialised. He as a loss adjustor does not formulate a claim for a client. It is the task of the broker to formulate a claim. He and his companion were informed that when the fire started there was a cleaner and a security guard in the premises. His colleague Brian Goodwin interviewed both the cleaner and the security guard. The building in their report was described as unoccupied commercial premises. He formed the view that the building was substantially empty but now he can withdraw substantially. No one mentioned loss of rental to him. He took the photos of his observation except photo 6 and 7, which he did not take, and they were not taken in his presence. He took the photos on 3 September 2013. He took many photos and some of those are not before court. In his second report dated 1 October 2013, he provided for a standard loss of rental. On 3 December 2013 in his report he provided that, a loss of rental claim is not subject to underinsurance determination. On 21 January 2014, he noted in his report that the building served as a storage of E Mart. He informed the client of the loss of rental claim and he called for the copy of the lease. He was furnished for the first time with the details that loss of rental was claimed at R140 000 a month. He recommended the settlement of the other claims. He thought the claim for loss of stock was overstated. Either the stock was not there or it was damaged by fire. He recommended that the claim for loss of rental be referred to an accountant.

[23] Mr Campbell testified that whenever he visited the site he made notes. He made about four visits. He saw two of the notes he made. He made the notes for his own record and when he consulted with defendant's attorneys, he had the notes he made. He recommended that R50 000 be reserved for the claim for loss of rental. It was not his duty to enquire about the claim for loss of rental. Even if the lease expired in September 2013, a claim for loss of rental was maintainable. It is not a requirement in

terms of the policy that there be an actual tenant at the time the premises are damaged. His estimation at R50 000 was quite low. It would take months to rebuild the premises after the claim has been investigated and settled. He is aware that the limit for a claim for loss of rental is R1, 2m. A sum of R300 000 was offered to settle the claim for loss of rental. He did not know on what basis the defendant made the offer. The offer was made in June 2014. He did not know when the site was handed back to Mr Akthar. The building was unoccupied but if it was a warehouse with people working there, it was not abandoned.

[24] Mr Campbell testified that he saw the E Mart signage displayed on the building of the premises at 1 Moodie Street. It was made of synthetic material on a steel frame installed up on a wall but that did not mean it was E Mart premises. No claim form needed to be completed to lodge a claim. He did not ask the client how much he claimed for loss of rental. The client was not at all times assisted by a broker. On 2 September 2013 when he visited the site, he did not know that the client had a cover for stock. The policy covering the stock was separate it was not with the policy covering the building, it was E Mart separate policy. E Mart had its own insurance policy with the defendant. He had dealings with the broker five months after the loss. The building claim was dealt with; it was followed by the claim for contents. He first asked for supporting documents in January 2014. He has no document to show what he requested on what date. The suspicion relating to the loss of rental claim was the result of the delay in claiming loss of rental. He did not see the geysers in the building damaged by fire, they may have been in another part of the building. The other photos do not show when they were taken but if you open them in a computer and right click, the date shall be shown. He received the bank account statement and the VAT return, which is all what he requested. He did not request rent invoices for the three months July/August/ September. Goods made of plastic material would be completely destroyed in a fire. He did not clear the debris. Shower doors were allowed as stock destroyed in the fire. He saw them but he did not take photos of them. There were many photos showing damaged goods which were not presented as evidence. He was aware before January 2014 of the potential claim for loss of rental.

[25] The defendant called Gavin Maitre as its second witness. Mr Maitre testified that he was a qualified registered accountant and auditor. He qualified to practice as a chartered accountant in 1986. He has been practising as a chartered accountant and auditor for 24 years and he is a member of the South African Institute of Chartered Accountants and of the Independent Regulatory Board of Auditors. He listened to the evidence of Mansoor. He has reviewed the books of account of Sixbar and E Mart relating to the year 2013/4. It was not normal to use bank statements for sale figures. Normally one uses invoices. A close corporation must operate an invoice based or till based system. A business of the size of Sixbar should use a computer software for its sales to transfer them to its accounting records. Cash would be money used for business purposes without having it deposited into a bank account. VAT on overheads was excluded. The financial statements indicate that they were prepared after the fact to reconcile with the amounts in the VAT returns. The manual calculations means that the figures were manipulated. . VAT figures are too consistent. VAT figures of the business of this size must vary. The figures according to him were manufactured.

[26] Mr Maitre testified that an annual general ledger is a working document used on ongoing basis to run the business to control its debtors, creditors and stock. Stock purchases and sales are transferred to the general ledger. To give an idea of how much is owed to the creditors. The general ledger prepared by Mansoor every two months for VAT calculation looks like it was prepared after the event. It appears the general ledger was not prepared contemporaneously; it was prepared at the end of the year not after every two months. If it were prepared every two months, they would reallocate VAT portion every two months. The use of journal entries is not correct. The accounting package determines VAT and allocate it to the VAT account. The bank statements entries have no reference numbers relating to rent transfers or rental of R159 600. The cash figure is not based on any source document. It used to arrive at the desired amount for VAT. It constitutes fraud. The accountant perpetrated fraud. He did not know whether he did so knowingly or unknowingly. He prepared his initial opinion based on the documents he had reviewed. He formed the view that the accountant

committed fraud when he reviewed the documents just before he testified after he had received further documents. He concluded that they were prepared to support a false claim for loss of rental. He cannot dispute that when he formed his earlier opinion he had all the documents he had requested. He restated that the general ledger was prepared after the event but he did not know for what purpose. He did not know why it was not put to Mansoor that he prepared the general ledger after the event and that he perpetrated fraud. He did not request to be furnished with the financials of the other years other than 2013/2014. He determined that the documents he received are the same documents submitted to SARS. He found it unusual that the VAT payments would be consistent around R20 000.

[27] Mr Maitre stated that he was asked to review the financials of the two entities, he was not asked to carry out an audit. He was given a set of documents. He did not ask for additional documents and he did not have a complete set of documents. He carried out the review by checking sales, VAT returns, general ledger and reconciliations. He did not state in his report that the documents were manufactured. He cannot explain why he did not pick up the discrepancies when he carried the review and prepared his report or when he consulted in preparation for trial. He agreed that a general ledger is an internal document and he cannot dispute it that the plaintiff did not require it as a control document. He did not examine the accounting package used by Mansoor. He said there is no problem with the manner Mansoor dealt with bank charges and he said the VAT return could have been manipulated for other purposes other than to support a claim for loss of rental. He did not ask for back up documents to support figures in the VAT return.

[28] The last witness called by the defendant is Neel Fourie. Mr Fourie testified that in 2013 he was in the employment of the defendant a regional claims manager in the KwaZulu-Natal region. He exercised oversight over all claims submitted to the defendant for payment. The claims submitted by Mr Akthar were part of the claims he was involved with. The claims could be lodged or reported in any manner. The defendant would record it and the claim processed. There was no prescribed manner to

claim. The records in his system indicate that claim 244091 with claim address 1 Moodie Street Pinetown relating a building on fire with the date of incident being 2 September 2013 was noted on 2 September 2013 and a loss adjustor was appointed to process the claim. The loss adjustor then furnished progress reports. The related records in the form of screen grabs indicate 14-16 Chapel Street reported on 10 December 2013 and then next record refers stock property and loss of rental reported on 7 March 2014 also related to incident on 2 September 2013.

[29] Mr Fourie testified that the claim for loss of rental on 7 March 2014 fell outside the period. The defendant had a view that the originating claim gave rise to the claim for loss of rental since the assessor's report referred to loss of rental claim. It held that everything must be done to assist the client and that a draconian approach be avoided and the client be treated fairly. He testified that in the end the claim was not accepted since the defendant was not satisfied that the plaintiff proved its claim. The matter was referred to the Ombudsman who came to the same conclusion. The delay in reporting the claim raised a question mark. There was also a problem relating to the lease agreement, and it appears that there was not much going on at the premises at the time. Mr Fourie testified that as a gesture of goodwill the defendant offered to pay the plaintiff R300 000 which the plaintiff did not accept. The broker owns the relationship between the client and the broker. The Insurer is under strict rules not to interfere with the relationship.

[30] It is clear, in my view, that the defendant disputes that the plaintiff suffered a loss of rental covered by the insurance policy in question. *South African Law of Insurance* by Gordon (2nd edition) page 75 states: 'Insurance is a contract nominate, consensual and of good faith, whereby in consideration of a certain premium, the losses which may arise from the danger to the property of another are undertaken to be made good.' The insurable interest in the loss of rental insurance cover is the risk to lose the right to claim rental. In this matter it is common cause that the plaintiff owned the premises at 1 Moodie Street, that the premises were commercial premises that could be let, that the

fire on 2 September 2013 damaged the premises rendering them unlettable, that the premises remained in that condition until they were rebuilt.

[31] The dispute between the parties is whether at the time the premises were damaged by fire were actually let. The plaintiff in this regard sought to rely on a lease agreement and on the financials of both the alleged lessor and the lessee and the VAT returns. The defendant challenged the alleged lease agreement disputing that it is a genuine lease agreement suggesting that it is a forged document created to substantiate a claim for loss of rental. Similarly, the defendant challenges the financials the plaintiff sought to rely on. It did so on the basis that they were not true financials reflecting the true financial position of the entities. It claims that they contained manipulated figures and no reliance can be placed on them, and that the schedules in support of VAT return figures were prepared to make it look like rental had been included in the output VAT figures. .

[32] The dispute relates to whether the premises were let at the time, not whether after the damage by fire were lettable or not. However, the plaintiff's claim is for loss of a right to claim rental for the premises for the period the premises were unlettable. It follows that it needs to be determined whether what is in dispute is something that needs to be proved in terms of the policy of insurance concluded by the parties. Does the policy of insurance require the insured at the time of the occurrence of the event to have actually let the premises? The relevant part of the Insurance Policy provides: 'Subject to the terms, exceptions and conditions (precedent or otherwise) and in consideration of, and conditional upon, the prior payment of the premium by or on behalf of the Insured and receipt thereof by or on behalf of Absa Insurance Company, Absa Insurance Company agrees to indemnify or compensate the Insured by payment or at its option, by replacement, reinstatement or repair in respect of the defined event occurring during the period of insurance and as otherwise provided under Sub-sections below up to the sum insured, limits of indemnity, compensation and other accounts specified'. The plaintiff's case is that at the time the premises were damaged by fire

they were lettable and they were actually let. On the other hand, the defendant does not dispute that the premises were lettable but disputes that they were actually let.

[33] In respect of Rent the policy provides: 'Loss of rent as a result of the insured buildings being so damaged by any of the insured events rendering them untenable, but only for the period necessary for the reinstatement and for the amount not exceeding 30 (thirty) percent of the sum insured on the affected building. The basis of the calculation shall be the actual rent receivable or payable immediately preceding the damage.' The evidence of Mr Akhtar that R140 000 plus VAT is a reasonable market monthly rental for the premises at the time they were damaged by fire is not disputed or challenged by any other evidence. The determination by MaxProp on which Mr Akhtar relied is supported by one made by Pam Golding Properties dated 17 March 2015 (page 126 of Exhibit C) which concluded that based on research conducted and experience, the market related rental of the premises as at 17 March 2014 was R155 000.00 ex VAT. It follows that based on a calculation on the basis of a monthly rental of R140 000.00, it is not disputed that the claim for loss of rental in the amount of R1.2m falls within the allowed limit.

[34] The question of what the plaintiff is required to prove to show that the basis of the calculation is the 'actual rent receivable or payable immediately preceding' must be looked at. The defendant in the closing address states : there was a debate during the course of the trial whether the plaintiff was entitled to claim loss of rental in the absence of any lease agreement at all on the basis that but for the fire it could have leased out the premises to a notional tenant. The plaintiff was in agreement that his was not the case which was brought. The plaintiff's case has always been that there was a lease agreement in place and the plaintiff's claim for rental was the rental arising from that lease' In my view, the plaintiff's claim is brought in terms of the insurance policy and the terms of the policy determines what the plaintiff needs to prove to succeed with its claim. The defendant contends that it is not enough to show that the calculation is based on the fair and reasonable rental for the premises at the time of the damage. The phrase 'actual rent receivable or payable' is not defined in the insurance policy. The

phrase must be interpreted following the trite canon of interpretation. In *Centriq Insurance Company Ltd v Oosthuizen and Another* [2019] ZASCA 112019 (3) SA 387 (SCA) para 17 the court held : ‘Insurance contracts are contracts like any other and must be construed by having regard to their language, context and purpose in what is a unitary exercise. A commercially sensible meaning is to be adopted instead of one that is insensible or at odds with the purpose of the contract. The analysis is objective and is aimed at establishing what the parties must be taken to have intended, having regard to the words they used in the light of the document as a whole and of the factual matrix within which they concluded the contract.’ In *Guardrisk Insurance Company Limited v Café Chameleon CC* (632/20) [2020] ZASCA 173; [2021] 1 All SA 707 (SCA) ; 2021 (2) SA 323 (SCA) (17 December 2020) Cachalia JA at para 13 held: In this analysis it must borne in mind that insurance contracts are ‘contracts of indemnity’. They should therefore be interpreted ‘reasonably and fairly to this end.’ In *Kliptown Clothing Industries (Pty) Ltd v Marine Trade Insurance Co of SA Ltd* 1961(1) SA 103 (A) at 107A-B Shreiner JA,(citing May on Insurance (4 ed) at 174-175) held: ‘No rule, in the interpretation of a policy, is more firmly established , or more imperative and controlling , than that, in all cases, it must be liberally construed in favour of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance , it was his object to secure. When the words are, without violence, susceptible of two interpretations that which will sustain the claim and cover the loss, must in preference be adopted.’

[35] In this case the phrase refers to ‘actual rent’, which suggests that there be rent changing hands. However, the phrase ‘actual rent’ is part of a phrase referring to ‘receivable or payable’ which includes due rental. Further, the phrase relates to the basis for calculation of a claim relating to the period when in fact no rental is receivable or payable because the premises are unlettable. The phrase cannot be interpreted to mean that if the premises were unoccupied because no tenant had been found a loss of rental claim is not maintainable. The phrase requires that the basis of the calculation be rental, which is a realistic rental for the premises. This can be proved by showing that the premises were rented out and the actual rental received or receivable in terms of the

lease or by other means. The evidence produced by the plaintiff relating to the nature and condition of the premises at the time, the fair and reasonable market related rental for the premises and the fact that essentially the plaintiff was entitled to receive rental by letting the premises are relevant factors. They form factors that constitute the proper basis for the calculation of the loss of rental claim.

[36] The defendant disputes that the plaintiff proved its claim. It based its conclusion partly in the delay in claiming for loss of rental. The defendant paid the claim relating to the damage to the building and the claim relating to the contents of the building. The defendant states that it was advised of the claim for loss of rental in January 2014. The defendant never rejected the claim for loss of rental on the basis that it was lodged out of time. It accepted that the claim originated from the fire on 2 September 2013 an incident reported to it on the same day and from that date it was seized with its investigation. It admits that it was aware of the potential claim for loss of rental since it was aware that the building was insured by it for loss of rental. It has not pleaded that it was misled by the plaintiff or that the plaintiff failed to disclose material facts to it or supplied it with misleading information when it claimed. It has not claimed that it was prejudiced by the late pursuing of the claim. Further, it had no prescribed procedure that was not followed for claiming in terms of its insurance policy. The plaintiff had no idea that having reported the event to the Insurer it would not investigate all the claims relating to the insured premises. The plaintiff did not withhold any information requested from it; on the contrary, it furnished whatever information was requested from it. In my view, there are no basis to blame the plaintiff for the defendant's failure to deal with the claim for loss of rental soon after it was reported to it that the premises for which it had issued a cover for loss of rental had been damaged by fire. It is significant that Mr Campbell in a letter dated 20 August 2014 writing on instructions from the defendant wrote as follows: 'We refer to the above matter and write under instructions from Absa Insurance Company, specifically relating to your loss of rent claim. You will recall that the matter was referred to independent accountants. Insurers have reviewed the matter and in view of certain discrepancies without prejudice they are prepared to settle the rental loss of claim for a maximum of R300 000 including VAT. The figure is not

negotiable.’ The defendant without being specific referred to certain discrepancies in the books of account and financials submitted by the plaintiff. In the summary of the expert evidence of Maître in terms of Rule 36(9) (b) it is stated as follows:

‘2. Maître reviewed the following documents which were discovered by the plaintiff:

‘2.1 the written agreement of lease between the plaintiff and E Mart Home Improvement Centre CC (E MART)

2.2 the detailed general ledger for the plaintiff and E Mart for the year ending February 2014;

2.3 the trial balances of the plaintiff and E Mart for the year ending February 2014;

2.4 the annual financial statements for the plaintiff and E Mart for the year ending February 2014;

2.5 the VAT statements of account for the plaintiff and E Mart;

2.6 the IT14’s for the plaintiff and E Mart for the year ending February 2014;

2. 7 the income tax assessments for the plaintiff and E Mart for the year ending February 2014; and

2.8 the bank statements for the plaintiff for the period from 19 June 2013 to 31 August 2018

3. It is Maître’s view that neither plaintiff’s nor E Mart’s detailed general ledger s were prepared contemporaneously with, or to assist in the running of, their businesses. In Maître’s view both detailed general ledgers were prepared after the fact.

4. The figures recorded in both detailed general ledgers inclusive VAT which is highly irregular.

5. The plaintiff’s annual financial statements for the period ending February 2014 do not record any rental income.

6. The plaintiff’s Income Tax Return (ITR14) for the financial year ending 28 February 2014 does not record any rental received.

7. Based on a review of the plaintiff’s VAT statement account, the VAT paid by the plaintiff each period remains dubiously consistent for a business of this nature. These figures do not appear to support the receipt of VAT on rental income from E Mart.

8. The plaintiff's bank statements record payments made by E Mart but do not record any payments in the amount of R157 000 being the monthly rental, inclusive of VAT (14%).

9. In Maître's view, the plaintiff and E Mart's books of account, SARS documents and bank statements do not support the conclusion of a lease agreement between them.'

[37] Mr Maitre in the report to the defendant, which he prepared at the request of Mr Campbell the insurance assessor, he stated as follows:

'I was approached by Roland Campbell of DRM and Associates to review the accounting records of Sixbar Trading 645 CC (Sixbar) and E Mart Home Improvement Centre CC (E MART).

The aim of the review was to determine whether there was any conflicting entries with regard to the rental paid by E Mart and the rental received by Sixbar in view of the insurance claim by Sixbar for the loss of rental income.

I requested the following documents from the client:

Sixbar

Trial balance for the year

Detailed sales ledger

Detailed rent received ledger

Detailed E Mart loan account

Detailed VAT control account

VAT statement of account for the year from e-filing

E Mart

Trial balance for the year

Detailed rent paid ledger

Detailed Sixbar loan account'

Detailed VAT control account

I received from Mr Campbell the following:

Bank statements of Sixbar for the year
VAT returns of Sixbar for the year
Sixbar VAT summary for the year
Lease agreement between Sixbar and E Mart

I reviewed the rental received and rental paid entries. These were all done by way of journal entries to rental received/ paid and the loan account. No actual rental payments were made but there are a lot of payments between the company loan accounts

A reconciliation was done between the detailed sales per the ledger and the detailed sales pre the VAT summary report. Had the client done the rental journal after they year-end then there should have been a discrepancy by the amount of the rental received which was R420 000 excluding VAT. However, the difference in the reconciliation was about R7000.

The VAT summary was agreed to the VAT return and also to the VAT statement of account from e-filing. All of them agreed to each other.

I looked at the accounting package used by Sixbar's accountant. With this package one is able to go back, make adjustments and delete the audit trail. I however have no evidence that this has happened.

Conclusion

There is no concrete evidence from the financial records that the entries relating to the rental received/paid were done in order to be able to make a claim against the insurance company.

There are other reasons as to why the rental entries were passed, ie shifting of taxable income between companies. However, I was not in possession of any final trial balance to be able to determine this.

It however appears that the lease agreement may have been drawn up at a date subsequent to the fire. I recommend that the lease agreement be reviewed by a specialist to determine if it is legal, as the lease agreement does not appear to be at arms length.

As per the insurance policy the claim can then be determined at market related rates for warehousing in the area.'

[38] In my view, it is clear that Mr. Maitre in his evidence is making a *volte-face* with no basis for doing so. In his report he indicated that from his review he found no evidence justifying a decision not to pay the claim, he recommended that the claim be paid. There is no evidence that anything was found wrong with the lease agreement.

[39] The defendant doubts that the plaintiff had leased the premises to E Mart. It does not dispute that on the premises there was signage for E Mart. It also accepted that the stock in the premises at the time it caught fire belonged to E Mart because it paid E Mart for the damage to the stock. E Mart and Sixbar were separate entities. E Mart could only use premises for the plaintiff by renting them. Both E Mart and Sixbar are business entities. It would have made no business sense for the plaintiff to let E Mart use its premises free. The defendant suspects that the lease agreement is not a genuine document. Its suspicion is based on the fact there is an alteration by deleting 4 and replacing it with 3 in the date. It further suspects that because the plaintiff furnished the lease in February 2014 after the claim for loss of rental was lodged in January 2014 it means it prepared it in order to use it to claim for the loss of rental. But the fact is that it requested the copy of the lease in February 2014. Therefore, there was no delay in furnishing it. Secondly, the alteration in the lease agreement is visible with no attempt to hide it. Thirdly, the error is something that could be discovered and it be corrected by those signing the lease. It is simple not enough to create any suspicion relating to the genuineness of the lease.

[40] The defendant criticised the plaintiff in the manner it kept its books of account and the consistency in the amounts paid for VAT. It is inconceivable that the plaintiff would have concocted the entire financials of two entities through a firm of chartered accounts to support a claim for the loss of rental. It can also not be disputed that VAT amounts paid to SARS were paid before the claim for the loss of rental. If the said amounts were calculated factoring the rentals relating to the premises, they prove that there was a

lease of the premises by E Mart. The shortcomings in the books of account and the financials would have been of some significance if they stood alone. In this case, the relationship between the two entities render them to be of no significance. In my view, the evidence viewed in its totality proves on the balance of probabilities that E Mart leased the premises from the plaintiff and it paid or was liable to pay rent to the plaintiff for the premises which is enough to entitle it to claim loss of rental in terms of the insurance policy from the defendant.

[41] The defendant relies mainly on the evidence of Maitre that the books of account presented by the plaintiff were compiled after the fact, were manufactured and were a misrepresentation tantamount to fraud. Mr Maitre's accusation was not put to Mansoor and to Akhtar. They appear to be an afterthought on his part. His evidence is in conflict with the reports he made. It falls to be rejected and no weight be given to it.

[42] The plaintiff owned the premises. E Mart signage and E Mart's stock show that E Mart used the premises. The use of the property in the absence of any other reason indicates that E Mart paid or was supposed to pay for using the premises. The premises were in a condition to be let and a market related rental of R140 000.00 per month. There was during the period in question an exchange of money between the plaintiff and E Mart which money or part thereof could be the rental for the premises. The books of account of both Sixbar and E Mart show entries that could relate to the rental of the premises. There is a document purporting to be the lease agreement in terms of which E Mart leased the premises from the plaintiff. There are VAT returns showing that the both the plaintiff and E Mart accounted to SARS for the VAT of rental relating to the premises. In my view, the plaintiff on the totality of the evidence has proved its claim on the preponderance of probabilities and it is entitled to judgement as claimed in the summons. The interest should accrue from the date the defendant could have paid the claim relating to the loss of rental.

[43] It is ordered that judgment is granted in favour of the plaintiff against the defendant as follows:

1. Payment of the sum of R1 200 000.00 (one million two hundred thousand rand)
2. Payment of interest on the said amount at the rate of 15.5% per annum from 1 April 2014 to date of payment.
3. Cost of suit including costs consequent upon employment of senior counsel, costs of obtaining the transcripts of the evidence and the costs for preparation of written arguments.

Mngadi, J

APPEARANCES

Case Number : 9855/2015

For the Plaintiff : F.M. Moola SC

Instructed by : Omar Attorneys
DURBAN

For the respondent : J. Nicholson

Instructed by : Beaumont Incorporated

DURBAN NORTH

Heard on : 12 October 2020-26 March 2021

Judgment delivered on : 19 APRIL 2022