IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.

DATE 10/8/2015 SIGNATURE

CASE NO: 32874/2013

DATE: 14/8/15

IN THE MATTER BETWEEN:

MECHANISED EQUIPMENT SALES (PTY) LIMITED **PLAINTIFF**

and

LION OF AFRICA INSURANCE COMPANY LIMITED **DEFENDANT**

JUDGMENT

KOLLAPEN J:

Introduction and background

1. The plaintiff who conducts the business of renting out of tower cranes for use in the construction industry, has issued summons against the defendant seeking payment of the sum of R1 990 000-00 as indemnification arising out of a contract of insurance with the defendant and following an incident on the 19th of January 2012 when a mobile crane, the property of the plaintiff, was damaged.

2. The defendant, while admitting the existence and validity of the contract of insurance, declined liability on the basis that the events and circumstances giving rise to the damage to the mobile crane fell outside the scope of the insurance cover that governed the relationship between the parties.

3. The parties were able to reach agreement on much of the factual issues that underpinned the dispute and the matter proceeded by way of a stated case in terms of the provisions of Rule 33 of the Rules of the above Honourable Court.

<u>The facts agreed upon</u>

4. The parties, as described in the particulars of claim, entered into a written agreement of insurance on the 25th of February 2011 which was regulated by, and consisted of, the following documents:

   i. A two page 'Confirmation of Renewal' document (Annexure A);
   ii. A schedule and supplementary schedule (Annexure B);
   iii. A two page set of annexures (Annexure C);
   iv. A contract works and public liability insurance policy wording (Annexure D).

5. At the time of contracting the parties were aware of the following background facts, as described in the Written Statement:

   5.1 The Plaintiff's business was that of the renting out of tower cranes for use on construction sites in the construction industry;

   5.2 Tower cranes would be transported to the construction sites in modular sections on semi-trailers, and then assembled on site and, at the close of the contract, disassembled on site and transported back;

5.3 The assembly and disassembly of the tower cranes involved the use of hydraulic mobile cranes owned by the Plaintiff;

5.4 The mobile cranes would be driven to the construction sites for the assembly and disassembly of the tower cranes, and then driven back from the construction sites thereafter.

6. The insurance agreement contains the following relevant provisions:

6.1 ***"INSURED CONTRACTS***

6.1.1 All contracts and work commenced after inception of this Policy or work undertaken by the Insured for which the Insured has agreed to effect insurance more specifically defined as:

REPAIRS TO AND RETURN OF MOBILE AND TOWER CRANES AND PASSENGER/GOODS LIFTS BELONGING TO THE INSURED OR OTHERS FOR WHICH THE INSURED IS LEGALLY LIABLE IN TERMS OF CONTRACT CONDITIONS" ("the schedule cover provision");

6.1.2 that the indemnity in respect of mechanised equipment contracts was limited to the sum of R2 000 000,00;

6.1.3 that the applicable deductible in the event of a claim under the contract works section of the insurance agreement amounted to R10 000,00;

6.2 *"INDEMNITY CLAUSE*

The Company will indemnify the Insured against physical loss of or damage to any part of the Property Insured

a. *Whilst in transit including loading and unloading or whilst temporary stored at any premises en route to or from the Contract Site within the Territorial Limits*
b. *From the time of unloading at the Contract Site and thereafter until the Property Insured has been officially accepted by the Employer and becomes his responsibility by means of a notice of completion certificate or similar evidence of legal transfer of risk*
c. *During the contractual defects liability or Maintenance Period which shall not exceed the period reflected in the Schedule but only insofar as the Contractors and/or Sub-Contractors may be liable for such loss or damage under the defects liability or maintenance condition/s of the Insured Contract";*

6.3 *"PROPERTY INSURED*

The Contract works (including free issue material if applicable) to be undertaken in terms of the Insured Contracts including all temporary works erected or in the course of erection and all materials and other things for incorporation therein.

'Temporary works' shall include all construction aids equipment, structures or works (not being part of the permanent works) the value of which has been included in the contract price or intended for use on the insured contract and which:

a. *Do not comprise mobile plant*
b. *Are not intended to be removed from the Contract Site on completion of the Contract other than scaffolding, shuttering and formwork as well as construction equipment specifically designed and/or constructed for any Insured Contract and which is not intended for immediate reuse on another contract;*

c. *Have no residual value at the completion of the Contract (other than scrap value) solely due to their specialised nature."*

6.4 EXCEPTIONS

"The Company shall not be liable for

1. ...

2. Loss of or damage to

a. ...

b. ...

c. any item of construction plant tools or equipment (or other plant defined herein as being "temporary works")"

("the exclusion provision").

7. On the 19th day of January 2012, a mobile crane:

7.1 of which the Plaintiff had at all material times been the owner;

7.2 whilst being used to place:

7.2.1 the head of a tower crane, which had been:

7.2.1.1 owned by the Plaintiff;

7.2.1.2 sold by the plaintiff to a third party ("the purchaser"),

("the new tower head");

7.2.2 onto a tower crane of which the purchaser was the owner ("the foreign tower crane"),

("the replacement operation"),

("the insured mobile crane") toppled over, in consequence whereof the insured mobile crane was damaged ("the operation damage")

("the incident")

8. The Plaintiff did not rent:

8.1 the new tower head;
8.2 the foreign tower crane,
to any lessee at any time material to this action.

9.
9.1

9.1.1 The insured mobile crane did not constitute work to be undertaken in terms of the replacement operation.
9.1.2 Nor did the insured mobile crane constitute a construction aid, equipment, structure or work:

9.1.2.1 the value of which was included in the contract price in respect of the replacement operation; or
9.1.2.2 which was not intended to be removed from the contract site on completion of the replacement operation; or
9.1.2.3 which was specifically designed and/or constructed for purposes of the replacement operation and was not intended for immediate re-use on another contract; or
10.1.2.4 which would, by virtue of its specialised nature, have no residual value (other than scrap value) at the completion of the replacement operation.

9.1.3 The insured crane was, moreover, an item of mobile plant.

9.2 If the insured mobile crane constitutes Contract Works or Temporary Works as defined, then the replacement operation falls within the ambit of the exclusion provision, in consequence whereof the liability of the Defendant to indemnify the Plaintiff:
(a) for the operation damage;

(b) pursuant to the insurance agreement,

would be excluded in the event of:

9.2.1 the Defendant being entitled to rely on the exclusion provision;

9.2.2 the Defendant being unable to establish that the exclusion provision ought to be regarded as *pro non scripto*.

<u>The dispute</u>

7. While the parties are in agreement that the agreement of insurance was intended to cover repairs to mobile cranes of the kind damaged on the 19th of June 2012, they are in disagreement as to the extent of such cover. The plaintiff's stance is that the insurance policy covered repairs to and return of mobile cranes in their entirety while the defendant takes the position that the policy only covered damage to mobile cranes when such damage occurred while the mobile cranes were in transit or in temporary storage while en route from a contract site.

<u>The plaintiff's contentions</u>

8. The schedule cover provisions which are to be found in the Supplementary Schedule describe the scope of the cover as:

> *'Repairs to and return of mobile and tower cranes and passenger/goods lifts belonging to the insured or others for which the insured is legally liable in terms of contract conditions'.*

The parties are in agreement that this cover extends to damage to the Plaintiff's tower cranes and mobile cranes.

9. Notwithstanding this, the exclusion provisions of the contract provides that the defendant shall not be liable for 'any item of construction plant tools or equipment (other than plant defined herein as being 'temporary works')' and when one considers this in the context of the definition of temporary works

provided for in the contract, its effect is to totally exclude all cover for mobile cranes, which could never have been and was in fact, not the intention of the parties.

10. Consequently the exclusion provision, if given effect to, would totally remove the sub-stratum of the contract the parties agreed upon, namely to cover damage to mobile cranes. Under such circumstances the exclusion provisions fall to be ignored in order to give effect to the contract. To do otherwise would defeat the purpose of the contract.

The defendant's contentions

11. While in agreement that the schedule cover provision afforded cover to the plaintiff in respect of mobile cranes and tower cranes, its stance is that the extent of the exclusion is not to nullify the mobile crane cover. In this regard it argues that the exclusion as read with the indemnity clause and the definition of property insured would have the consequence of still providing cover for mobile cranes while they were in transit to and from a construction site or whilst in temporary storage en route (to a construction site).

12. In its view the exclusion would accordingly not defeat the purpose of the contract but would have the effect that both the schedule cover and the exclusion provision could be given effect to and there would accordingly be no need to ignore the exclusion provision as the plaintiff would have the Court do.

Analysis

13. The resolution of the question of law in dispute essentially involves the interpretation to be given to the contract of insurance entered into between the parties. As such it may be useful to restate the approach to interpreting documents as crystallised by our Courts over time.

14. In ***FEDGEN INSURANCE LTD v LEYDS*** **1995 (3) SA 33 (AD)**, the Court held that:

'*The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise* (Scottish Union and National Insurance Co Ltd v Native Recruiting Corporation Ltd 1934 *AD 458 at 464-5*). *Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted* (Auto Protection Insurance Co Ltd v Hanmer-Strudwick *1964 (1) SA 349 (A) at 354C-D); for it is the insurer's duty to make clear what particular risks it wishes to exclude* (French Hairdressing Saloons Ltd v National Employer's Mutual General Insurance Association Ltd *1931 AD 60 at 65; Auto Protection Insurance Co Ltd v Hanmer-Strudwick (supra at 354D-E). A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the* contra preferentum *rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy* (Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd *1961 (1) SA 103 at 108C*).' (at page 38A-E)

15. In ***SCOTTISH UNION & NATIONAL INSURANCE CO., LTD v NATIVE RECRUITING CORPORATION, LTD*** **1934 AD 458** the Court held that:

'*If, however, the ordinary sense of the words necessarily leads to some absurdity or some repugnance or inconsistency with the rest of the contract,* *then the Court may modify the words just so much as to avoid that absurdity or inconsistency but no more*'. (at page 465 to 466)

16. Finally In ***NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY* 2012 (4) SA 593 (SCA)** WALLIS JA summarised the present state of our law with regard to the interpretation of documents, including legislation, as follows:

'*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*' (at 603F-604D)

17. The crisp question for determination is whether the insured mobile crane constitutes the Contract Works or Temporary Works as defined. If it does then the exclusion can be reconciled with the cover provisions. If it does not then the exclusion nullifies the cover provision, would not be reconcilable with the cover provisions which in such event would have the result that the exclusion provision would have to be jettisoned in favour of the cover provisions in order to give the contract of insurance meaning and purpose.

18. In this regard the plaintiff concedes that if the mobile crane can definitionally be included in the Indemnity Clause read with the definition of the Property Insured, then the exclusion clause will not nullify the purpose of the contract, while on the other hand the defendant makes a similar concession that if the mobile crane cannot be definitionally included in the Indemnity Clause read with the definition of Property Insured, then the exclusion clause will have the effect of nullifying the purpose of the contract.

19. The exceptions to the policy include, as provided for in Clause 2(c), 'any item of construction plant tools or equipment (other than plant defined herein as being "temporary works")'.

In Section 1 titled 'Contract Works', there is an undertaking to indemnify against physical loss or damage to any part of the Property Insured under certain conditions. The sub-section 'Property Insured' then proceeds to include under its scope Contract Works and Temporary Works. Neither Contract Works nor Temporary Works are expressly defined and it may be useful, regard being had to the tools and method of interpretation to which reference has already been made, to consider what may be the plain, ordinary and popular meaning of these terms.

20. In the publication *Construction All Risks Insurance* (2014) published by Sweet & Maxwell, the learned author Paul Reed QC in dealing with the broad area of construction insurance makes the observation that generally construction

insurance falls into two distinct categories – property and liability. The former covers contract works and materials including the cost of remedying accidental damage caused to physical property.

21. In acknowledging that there exists no single generic Construction All Risks policy wording, the learned author makes the point that Underwriters have developed their own policies over time in response to changing market requirements. He however makes the following general observations in this regard:

    a) Every contract is to be interpreted by reference to all its terms;
    b) Where a clause (or an interpretation of a clause) would defeat the fundamental purpose of the contract, the clause should be rejected;
    c) Where more than one interpretation of a clause is possible, a construction of an insurance agreement that leads to an absurd result must be rejected in favour of a construction that produces a more reasonable result;
    d) In contracts where there is a mix of standard terms and bespoke terms, and where there is a conflict between them, priority is given to bespoke terms.

22. None of the above principles appear to be contentious. If anything they accord with the principles of interpretation to which reference has been made. (See also ***Sentinel Mining Industry Retirement Fund and Another v Waz Props (Pty) Ltd and Another*** **2013 (3) SA 132** and *Principles of the Interpretation of Contracts in South Africa* (2002) by S J Cornelius, published by Butterworths.

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'Permanent Works. What constitutes the Permanent Works will usually be straightforward, either as a matter of common sense, as set out in the construction contract or in a schedule to the policy. However, more difficult questions can arise in seeking to distinguish between the Permanent Works and the pre-existing site. These distinctions can be crucial, because damage to the pre-existing site will not be covered by the policy.

Temporary Works. Temporary Works are those structures erected for the purpose of building the Permanent Works but that will not form part of the final build. For example, on a road-construction project, temporary drainage structures that will not be incorporated into the final drainage scheme would constitute Temporary Works. The definition would also typically include any structures necessary for access to or for the support of the Permanent Works, or that are required in their construction.

Contractor's Plant. Insured Property will also invariably include the Contractor's Plant, machinery, apparatus, tools, equipment and temporary buildings, offices and site huts such as are necessary for the construction of the Works. The definition will usually expressly extend to include all such plant that is owned by or in the control or custody of the Contractor, or for which they are otherwise responsible. There will often be provision for the inclusion of employee's tools and effects, albeit usually subject to a more modest policy limit.

24. Reed discusses the question of the possible overlap between items that might be considered either Temporary Works or part of the Contractor's Plant. It would seem that if anything is intended to be re-used, such as a crane, it would more readily be considered as Contractor's Plant. This would also accord more easily with the definition of Contractor's Plant as including machinery, apparatus and so forth.

That being so it is difficult to understand how a mobile crane could conceivably form part of the Contract Works, or the Temporary Works for that matter, and the stated case appears to accept this. Temporary Works specifically excludes a mobile plant and the stated case accepts that the insured crane was a mobile plant.

25. From this it must follow that definitionally there is simply no room in the indemnity clause as read with the definition of the Property Insured to conceivably include the insured mobile crane. Therefore the argument that it was covered in terms of these provisions but only to the limited extent contended for is unsustainable. If it was not covered at all, which is what I am compelled to conclude, there can be no suggestion of a limited cover simply in order to give the clause some relevance. That would have the Court making the contract for the parties, something which our Courts are enjoined not to do.

26. A mobile crane would then, both logically and if regard is had to the ordinary meaning of the words as well as the context in which it is used, form part of the construction plant, tools and equipment. Cover for loss of or damage to these items is however excluded by the Exceptions provision in Clause 2(c) with the result that a situation arises where a bespoke provision that is common cause between the parties – namely that the schedule cover afforded insurance cover to the plaintiff in respect of damage to the plaintiff's tower cranes and mobile cranes, is not only contradicted but effectively nullified by a standard term (the exclusion provision).

27. There can be little doubt, and counsel for the defendant conceded as much in his heads of argument, that under such circumstances where a reconciliation is not possible, the exclusion provision is to be jettisoned as a last resort.

28. In the circumstances the cover provision would prevail, the Exceptions provision would be ignored and as a consequence it would follow that the

cover provision would in fact have been operational at the time of the damage to the plaintiff's mobile crane. The stance of the defendant in declining liability is not sustainable and it must accordingly follow that judgment in the sum of R1 999 000-00 should be entered in favour of the plaintiff.

Interest and the date from which it is to be computed

29. The parties were in agreement that interest at the rate of 15,5% per annum should attach to the claim but disagreed about the date from which it should run. The plaintiff sought interest from May 2012, being the reasonable date by which the defendant should have accepted liability for the claim. Alternatively it sought interest from the 30th of May 2013, being the date of the service of summons. The defendant on the other hand, argued that interest should only run from the date of judgment.

30. Having concluded that the repudiation of liability was not justified, the plaintiff would have, all things being equal, been entitled to receive compensation during May 2012 or thereabouts.

31. Our Courts have in numerous instances ordered arrear interest on insurance claims and this appears to be a case where such an order would be justified, if not from May 2012 then certainly from May 2013, when summons was served.

32. The parties were in agreement that the nature of the issue in dispute warranted the employment of Senior Counsel and that costs to be awarded should include the costs of and associated with the drawing up of the Stated Case as well as the heads of argument.

ORDER

33. I accordingly make the following order:

i. The defendant is liable to indemnify the plaintiff in the amount of R1 990 000-00, together with interest thereon at the rate of 15,5% per annum calculated from and including 30 May 2013 up to and including the date of payment thereof;

ii. The defendant is ordered to pay the plaintiff's costs, including the following costs:

- The plaintiff's costs of employing Senior Counsel;
- The costs of and associated with the drawing up of the Stated Case; and
- The costs of heads of argument.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

32874/2013

HEARD ON: 15 JUNE 2015
FOR THE PLAINTIFF: ADV. J F MULLINS SC
INSTRUCTED BY: SAVAGE JOOSTE & ADAMS INC (ref: N Marshall/TM/WP 85)
FOR THE DEFENDANT: ADV. H B MARAIS SC and ADV. S STRYDOM
INSTRUCTED BY: STRYDOM BESTER INC. (ref: JS Strydom/bg/H261/12)