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UNION NATIONAL SOUTH BRITISH INSURANCE CO LTD

and

SIVANANDAN ARUMUGAM PADAYACHEE and ANOTHER

MILLER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between :-

UNION NATIONAL SOUTH BRITISH
INSURANCE COMPANY LIMITED

Appellant

and

SIVANANDAN ARUMUGAM PADAYACHEE

First Respondent

UMHLALI SAW MILLS (PTY) LIMITED

Second Respondent

CORAM: MILLER, CILLIÉ, VILJOEN, BOTHA, JJA,
et VIVIER, AJA

HEARD: 2 NOVEMBER 1984

DELIVERED: 27 NOVEMBER 1984

J U D G M E N T

MILLER, JA :-

On 16 September 1978, premises at Umhlali,

owned by the first respondent and occupied for purposes

of /

of its business by the second respondent, were virtually destroyed by fire, which also caused extensive damage to other items of property which need not be specified.

Property of the kind thus destroyed or damaged was insured against loss by fire in terms of a policy issued by the appellant to the respondents "for their respective rights and interests". At the time of the fire and at all relevant times, the policy was operative and of full force and effect.

Clause (2) of the policy, under the heading "Conditions" and under the sub-heading "Claims", reads as follows :

(2) (a) /

(2)(a) On the happening of any destruction or damage the Insured shall at his own expense :-

(i) forthwith notify the Company in writing of any claim together with particulars of any other insurances on any property hereby insured;

(ii) within 30 days after such destruction or damage (or such further time as the Company may in writing allow) submit to the Company full details in writing of any claim;

(iii) give to the Company such proofs, information and sworn declarations as the Company may require.

(b) No claim under this Policy shall be payable :-

(i) unless the terms of this condition have been complied with:

(ii) for any loss or damage after the expiry of 12 months from the happening of such loss or damage unless the claim is the subject of pending legal action."

The /

The respondents promptly reported to the appellant that there had been a fire with resultant damage and loss and they lodged claims on 26 October, 1978.

(Nothing turns on the circumstance that the claims were lodged a few days late.) For a considerable period after the occurrence which caused the destruction and damage the parties, through their respective representatives and advisers, from time to time held discussions, carried on negotiations and corresponded with one another relative to the claims. On 5 December 1979, the appellant's attorneys sent a letter to the respondents' attorneys in these terms:-

"We /

"We have been instructed by our clients to communicate to yourselves the following facts :

1. In terms of the provisions of Clause 2(b)(ii), the fire claim is no longer enforceable in that no action has been instituted within the requisite period of 12 months and the claim is accordingly not 'the subject of pending legal action', and
2. There is accordingly no liability in terms of the loss of profits policy by virtue of the provisions of the preamble thereto which link the loss of profit policy to the fire policy.

Consideration is being given by our client to reclaiming the without prejudice interim payment ^(R10 000) forwarded to Standard Bank Insurance Brokers by way of letter dated 27th September 1978."

On 8 September 1980, very nearly two years after the fire and some nine months after appellant's rejection of their claims, the respondents issued summons against

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the appellant in the Durban and Coast Local Division of the Supreme Court, in which they claimed (a) an order declaring that the appellant was obliged to indemnify the respondents in terms of the policy of insurance, and (b) payment of specified amounts to each of the respondents, together with ancillary relief. The pleadings filed cover about forty pages of the record; fortunately it is not necessary to reproduce them either fully or in summarized form because before the commencement of the trial the parties agreed upon a "Statement of Issues" in terms of rule 33 (4) of the Uniform Rules of Court and also defined, by agreement, what relief should follow upon the Court's findings in regard to the stated issues. The range of the conflict was further reduced when concessions

were /

were made on behalf of the respondents which had the practical effect of removing from the scene some of the stated issues. Eventually only three issues remained: the first (which was issue No 3 at the trial) related to the question whether a term should be implied in clause (2)(b)(ii) of the policy, reproduced above; the second, (issue no 4 at the trial) whether or not the appellant was estopped from raising a defence founded upon the failure to issue summons within 12 months of the fire and the third, (issue no 5 at the trial), whether the R10 000 referred to in the concluding paragraph of the letter of 5 December, 1979, (reproduced above) would be repayable to the appellant in the event of a finding that the appellant was not obliged to compensate

respondents /

respondents in terms of the policy. The Court a quo (BROOME, J) found in favour of the respondents on the first of the issues; that is, it found that clause (2)(b)(ii) was to be read subject to an implied term such as was contended for by the respondents. This finding rendered it unnecessary for the Court a quo to make a finding on the estoppel issue, which was really an alternative to the contention that a term was to be implied, but the learned Judge considered the estoppel issue and concluded that if he were in error in regard to the implied term, the respondents would be entitled to succeed on the estoppel issue. In the light of those findings it was unnecessary for the Court a quo to consider the third issue relating to repayment of the R10 000.

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The appeal is against the whole of the judgment and orders. (The judgment is reported but not in full at 1983(3) SA 246.)

It is necessary to reproduce in full the stated issue relating to the implication of a term in clause (2)(b)(ii) of the policy. It reads as follows:

"(a). Was the contract of insurance subject to an implied term that the provisions of Condition 2(b)(ii) thereof would not come into operation if:

- (i) the (First) Defendant had required the Plaintiffs, before the expiration of the period of 12 months, to give the (First) Defendant proofs, information or sworn declarations;
- (ii) by the time the said period had expired a reasonable time for the furnishing of such proofs, information or sworn declarations had not yet elapsed?

(b) If so, /

(b) If so, had a reasonable time for the furnishing of the audited financial statements, required by the First Defendant, elapsed by the time the period of 12 months had expired?"

Paragraph (b) of this issue poses a purely factual question. If the answer to it should be "yes", the question of the implied term mentioned in (a) of the stated issue would fall away. The Court a quo held that the answer to paragraph (b) was "no".

For purposes of this judgment I shall assume, but without so deciding or expressing any opinion thereon, that the trial Court's answer to that question was correct.

When considering whether clause (2) warrants and requires the implication of a term such as is mentioned in the statement of issues, it is important to

understand /

understand precisely what the effects are of the

clause as it stands.

Clause (2)(b)(ii)

is a condition distinct from and independent of the

condition described in 2(a), read with (2)(b)(i).

Failure by the insured to comply with any of the require=

ments enumerated in (2)(a)(i), (ii) and (iii) entitles

the insurer in terms of (2)(b)(i) to refuse to make pay=

ment of any claim under the policy. This is an indepen=

dent defence - it is available to the insurer if the

insured fails to do what clause (2)(a) requires him to do.

Clause (2)(b)(ii) constitutes another independent defence

to a claim under the policy. All that is necessary to make such

defence available to the insurer is the failure of the insured to insti=

stute /

tute action within 12 months of the "happening".

If the insurer, by reason of the lateness of his request for information such as he is entitled to in terms of clause (2)(a), leaves the insured wholly insufficient time within which to comply with the requirements of the clause before the institution of action, it stands to reason that he, the insurer, would not be entitled to raise as a defence to a claim the insured's non-compliance with clause (2)(a). His own tardiness which frustrated the insured in regard to compliance, would serve to frustrate any attempt the insurer might make to invoke non-compliance with (2)(a) as a defence. Mr Shaw, for the appellant, conceded that in such circumstances a term to that effect might be implied in

regard /

regard to clause (2)(a). But such implication would not touch or affect clause (2)(b)(ii); the defence provided by the latter clause would still be available to the insurer if the insured failed to institute action within twelve months, unless the policy otherwise provided, which it certainly does not expressly do.

The respondents' case is that it does so by implication.

The implied term contended for by the respondents is not of the kind "implied by law" but of the kind v Transvaal Provincial Administration described in A McAlpine & Son (Pty) Ltd 1974(3) SA 506 (AD) at p 532 as a "tacit term" which is founded upon "the actual or imputed intention of the parties". In regard to such a term (I shall continue to refer to it as an "implied term", for it has been so called throughout

this /

this litigation) certain principles guide the Court when it is asked to conclude that although the parties omitted to give direct expression to a particular term, it was their intention that such term should be part of the agreement. Such principles have frequently been stated; I shall briefly mention those that are fundamental. The Court will not lightly "imply a term in a contract which is not to be found there". It will therefore not be sufficient to say that it would be reasonable to make the implication; the implication must be a necessary one - that is, "necessary in the business sense to give efficacy to the contract".

(Mullin (Pty) Ltd v Benade Ltd 1952(1) SA 211 (AD) at pp 214-5; McAlpine's case, supra, at p 532 H - p 533 B).

Further /

Further, since the implication of a term finds its justification in the inferred or imputed intention of the parties, it follows that the term which it is said should be implied must be capable of clear and precise formulation. (Rapp and Maister v Aronovsky 1943 WLD 68 at p 75; Desai and Others v Greyridge Investments (Pty) Ltd 1974(1) SA 509 (AD) at pp 522 - 3.) If the answer to the casual bystander's question (see Mullin's case, supra, at 215 A) were to be vague, or ambiguous, there would be no room for an implied term for it would not be possible, with the requisite degree of confidence, to infer or to impute to the parties any clear intention.

On the face of it, clause (2)(b)(ii) has no need of a special interpretative approach or an implied

term /

term to give it meaning or efficacy. It is clear and unambiguous; it entitles the insurer to refuse to pay any claim after expiration of the 12-month period if no action is then pending. If, as the end of the 12-month period approaches, the insured finds it impossible within such period to furnish all the required information in terms of clause (2)(a), due to the insurer's own untoward delay in requesting such information, there would to my mind be nothing to bar the insured from issuing summons within the 12-month period. The Court a quo found itself unable to accept that the parties could have intended that in such a case the insured, in order to preserve his claim, would be obliged to issue summons before the information required by the insurer had been furnished.

The /

The reasoning of the Court a quo appears to have been, in effect, that the purpose of clause (2)(a) being to enable the insurer to have all necessary information before it for the purpose of "assessing the claim", it "offended" one's sense of fairness to hold that the intention of the parties was that the insured could be required to institute action before the required information was made available to the insurer. This consideration is, I think, deprived of whatever moral force it might otherwise have had when the unavailability of the required information is of the insurer's own making; when he has so long delayed that the insured could not furnish the information within the 12-month period. And it must be remembered that the implied term contended

for /

for by the respondents predicates precisely that -
namely, that the insurer allowed insufficient time
for the furnishing of the required information.

It appears to me to be not only not certain, but very
unlikely, that if the parties had been asked at the
time what was to happen if a situation such as I have
described should arise, they would have answered with
one voice that in such event "the provisions of condition
(2)(b)(ii) would not come into operation". If they
had thought of such a solution it is, I think, inevitable
that they would have discussed the implications of a term
to the effect that clause (2)(b)(ii) "would not come
into operation". They would no doubt have considered
whether the 12-month term should be entirely eliminated,

thus /

thus allowing the insured to take action at any time before the claim became prescribed in terms of the Prescription Act, or whether the 12-month period should merely be extended. And from those considerations, others would no doubt arise - for example, for what period of time should it be extended? It is not possible to infer from the policy of insurance, considered with other factors proper to be taken into account, what precisely the parties intended in the event of there arising a situation such as we are now concerned with, nor is it possible to impute to them, with the requisite degree of conviction, any clear intention.

Mr Gordon, for the respondents, suggested both in the Court a quo and in this Court an implied term

different /

different in certain respects from that defined in the stated issue. He contended that it would be proper to infer that the parties intended that the provisions of clause (2)(b)(ii) would be suspended during the period that the insured was engaged in obtaining and furnishing the insurer with the required information. But apart from other difficulties in the way of drawing such an inference, this contention also leaves in the air problems which necessarily arise from the notion of a temporary suspension, of a duration which is not only not precisely defined but is within the capacity of one of the parties to determine unilaterally.

I come /

I come to the conclusion, therefore, that the Court a quo erred in upholding the contention that clause (2)(b)(ii) was subject to an implied term which precluded the appellant from invoking its provisions.

The issue relating to estoppel may be briefly disposed of. The respondent's case in that regard rests upon what is alleged to have been done and said by the appellant's representatives during the period between the occurrence of the fire and the rejection of the respondents' claims after the expiry of the 12-month period. It is alleged, in effect, that by express representations, by certain acts and omissions and by its conduct in general and in specific respects, the appellant represented that it intended to indemnify the respondents

in /

in terms of the policy and that it did not intend to avail itself of the provisions of clause (2)(b)(ii) of the policy. It was pleaded that respondents relied on such representations to their prejudice since on the strength of them, they refrained from instituting legal action within the 12-month period. The respondents found themselves in some difficulty in regard to this issue when it appeared at the trial that neither the respondents nor their representatives were at any relevant time aware of the provisions of clause (2)(b)(ii) of the policy. The learned Judge a quo made the observation in his judgment that

"..... incredible as it may sound, none of the plaintiff's representatives who were involved in the matter in 1979 was consciously aware of the provisions of condition (2)(b)(ii)",

and he /

and he recognized that this was an "obvious difficulty" in the respondents' case on this issue. But the Court found, in effect, that if the conduct and utterances of the appellant's representatives had not, as it were, "lulled the (plaintiffs) into a false sense of security" it was probable that the respondents would have commenced action within the 12-month period and that the appellant was therefore estopped from relying on clause (2)(b)(ii).

Quite apart from the question whether it was established that the appellant's representatives held out or represented that the appellant accepted liability under the policy and intended to pay the respondents out when the value of the claims had been agreed, (which was strongly disputed on behalf of the appellant whose counsel pointed out that the evidence showed that some doubts were entertained by the appellant concerning not only the quantum but also the validity of the respondents' claims), I cannot in the circumstances of this case accept /

accept as correct the approach of the Court a quo to the issue of estoppel. As Mr Shaw correctly contended, the respondents' lack of knowledge of the existence of clause (2)(b)(ii) excludes a finding that they were led to believe that the appellant would not rely upon that clause. There is nothing to show or even to suggest that the representatives of the appellant induced in the respondents a belief that the policy contained no condition relative to the time within which action had to be instituted. If that were established, different considerations would apply. The respondents' ignorance was self-induced; whether they were ignorant by reason of lack of interest or inquiry, or by reason of any other cause stemming from themselves, is of no consequence /

consequence in so far as the question of estoppel is concerned. Nor is there anything to show that the appellant or its representatives were aware that the respondents or their representatives were ignorant of important provisions in the policy, including clause (2)(b)(ii). An essential element of estoppel is that the conduct or representation must be "of such a nature that it could reasonably have been expected to mislead" or to induce in the representee a belief in the existence of a particular state of facts. (See Monzali v Smith 1929 AD 382 at p 386; Poort Sugar Planters (Pty) Ltd v Minister of Lands 1963(3) SA 352 (AD) at p 364 per OGILVIE THOMPSON, JA.) In this respect too, the respondents' case for an estoppel falls short. In my judgment, therefore /

therefore, the respondents fail both in regard to the issue relating to an implied term and the issue of estoppel.

What remains to be dealt with is the issue concerning the amount of R10 000 paid to the respondents.

This payment was made on 27 September 1978 by cheque.

The letter which accompanied the cheque is self-explanatory.

It reads as follows:

"As discussed this morning we enclose our cheque for R10 000 in favour of the insured being the agreed interim payment, without waiver of any rights we may wish to exercise in terms of the policy."

The stance of the appellant was, initially, that if the respondents were not entitled to recover on the policy

by reason of their failure to institute action within the

stipulated /

stipulated period, the R10'000 would be repayable to the appellant. In the course of argument on appeal, however, Mr Shaw correctly, I think, and very fairly, conceded that because clause (2)(b)(ii) relieved the appellant from the obligation of making payment of claims after expiration of the 12-month period and if no action was pending, and did not provide for the repayment of money already paid in respect of a claim, the respondents were entitled to retain the amount paid. The appellant will be liable for the costs occasioned in regard to that issue.

The appeal is allowed and the following order is made:-

(1) The order /

- (1) The order of the Court a quo is set aside and there is substituted therefor an order dismissing the plaintiffs' claims.
- (2) The plaintiffs are declared to be entitled to retain the amount of R10 000 paid to them.
- (3) The costs in the Court a quo are to be paid by the plaintiffs, save only such costs as were incurred in respect of the defendant's claim for payment of R10 000, which costs will be paid by the defendant.
- (4) The costs of appeal are to be paid by the respondents, save only such costs as are attributable to the claim of R10 000, which costs will be paid by the appellant.
- (5) The above orders relating to costs in favour of the appellant (defendant in the Court below) shall include costs in respect of two counsel.

S MILLER
JUDGE OF APPEAL

CILLIÉ, JA)
 VILJOEN, JA)
 BOTHA, JA)
 VIVIER, AJA)

CONCUR