

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 049359/2022

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES /NO
..... SIGNATURE	 DATE

In the matter between:

AZRAPART (PTY) LTD

First Plaintiff

ACCELERATE PROPERTY FUND LIMITED

Second Plaintiff

and

AIG SOUTH AFRICA LIMITED

First Defendant

OLD MUTUAL INSURE LIMITED

Second Defendant

BRYTE INSURANCE COMPANY LIMITED

Third Defendant

GUARDRISK INSURANCE COMPANY LIMITED

Fourth Defendant

**INSURANCE UNDERWRITING MANAGERS
(PTY) LTD**

Fifth Defendant

JUDGMENT ON LEAVE TO APPEAL - SEPARATED ISSUES

MANOIM J:

- [1] This is an application for leave to appeal brought by five defendants in this matter. All are insurance companies who are being sued by the two plaintiffs in this matter, owners of a shopping mall for a claim for business interruption insurance. The claim against the defendants is large – approximately one billion rand. The claim for business interruption insurance arises from the Covid epidemic in the 2020 financial year.
- [2] The plaintiffs allege that due to the pandemic they lost this amount in rental income from the tenants, or at least some of them, in the Fourways Mall, a large commercial shopping centre. There is no dispute that the five defendants had indemnified the plaintiffs in respect of business interruption insurance during the period in question. What is in dispute is whether the plaintiffs were covered for infectious and contagious diseases or ICD cover.
- [3] From the pleadings the dispute concerned whether the proper contract was one concluded in November 2019 (what the defendants term the antecedent contract) or the policy signed the following year in March 2020.¹ What turned on this was that in the antecedent contract, ICD cover was not included, but in a subsequent contract, the placement contract, and then the policy, it was. The plaintiffs contend based on the parol evidence rule that the policy constituted

¹ I will use the term antecedent contract from now on, but I accept that the plaintiffs do not accept this terminology

the final memorial of the agreement between the parties and thus was the proper contract. The first to fourth defendants contended that it was the antecedent contract because it was accepted by the plaintiffs' broker and brought into operation on 1 December 2024.

- [4] The presence or absent of ICD cover is not the only dispute between the parties in this litigation. But given the centrality of this dispute at the behest of the four defendant and the plaintiffs, I separated the issues into three questions. The fifth respondent opposed the separation issue although when the separation was ordered it participated in the proceedings.
- [5] The first separated question was to identify which was the correct contract. The second was that assuming the correct contract issue was decided against the first to fourth defendants whether they were entitled to rectification. The third issue related to the payment of the premium. The second separated issue involved the fifth defendant. I found against the defendants including the fifth defendant, on all three issues.
- [6] The first to fourth defendants now seek leave to appeal on the first and second separated issue but not the third which dealt with the premium. The fifth defendant seeks leave to appeal on the basis that it had been wrongly excluded from consideration on the first issue and hence its case on the second issue – rectification – could not properly be considered because it was not clear what contract it was seeking to have rectified.
- [7] The first to fourth defendants have raised seven grounds of appeal. The first and second ground of appeal are made on behalf of all four defendants and address the finding on the proper contract and rectification issues, respectively.

The third to sixth grounds deal with the specific cases of the second to fourth defendants, respectively. Essentially the argument made here is that the latter defendants had made out in addition to the defences raised by the first defendant – the lead insurer- distinctive defences pertinent to them.

- [8] The final or seventh ground is again made in respect of all four defendants. Here the argument is that the issues to be decided in this case in relation to what is termed the POLDRA policies, are issues being raised in other pending matters and hence are issues of public interest to insurers and insured. This ground is based on a section 17(1)(a) (ii) of the Superior Courts Act which provides as an alternate ground “a compelling reason” for the appeal to be heard. In terms of the *Caratco* decision a compelling reason:

“...includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive. Caratco must satisfy this court that it has met this threshold.”²

- [9] As the first to fourth defendants put it:

“The issues raised in this matter in relation to POLDRA policies have arisen in a number of pending matters in this court which are still to be heard, and are issues of public importance to insurers and insureds.”

² *Caratco (Pty) Ltd v independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) (25 March 2020).

[10] But even if this may be the position, I have no information before me that these cases raise the same issues of fact and law that the present one does. I was also told that similar issues have arisen in recently decided arbitrations. But again, I have insufficient information that this is the case. I therefore cannot grant leave to appeal based on this ground without more pertinent information concerning the issue.

[11] I am however persuaded that the first ground of appeal, on what the proper contract is, does constitute a ground of appeal with a reasonable prospect of success in terms of section 17(1)(a) (i). The second ground of appeal related to rectification is joined at the hip to this ground as I go on to explain and so it too would qualify as having reasonable prospects of success.

[12] Here, succinctly expressed, the issue is what the relationship of an antecedent contract and the final contract are where they differ on a crucial term. On the unusual facts of this case the antecedent contract was signed off by all the defendants and for a time period regarded by the plaintiffs as being in force. On this antecedent contract ICD was not included.

[13] This antecedent contract constituted a quote emanating from all the defendants. The plaintiffs through their agent accepted these quotes so the argument goes when he emailed all of them to say we are going live from 1 December. The conundrum was that all the defendants later signed the next document in the process the – placing slip which did include ICD cover. Then came the final document the policy. The policy included ICD although it was only signed by the first defendant the lead insurer. But the facts are even more

complicated because preceding the antecedent contract was a series of email exchanges enclosing drafts where the ICD cover was variously in or out.

[14] In this jumble of confusion, I relied on the parol evidence rule to find in favour of the plaintiffs. This was because I found that the policy was the final version and so the integration rule applied. I also found against the defendants on rectification. Essentially because they never led any witnesses on the subject of an ongoing common intention unlike the plaintiffs. The defendants stridently maintain that they did not need to do so. They rely on this passage in *Meyer v Merchants Trust* that “*proof of an antecedent agreement may be the best proof of the common intention*”.³

[15] Thus, the first to fourth defendants rely on the antecedent agreement as the basis for both proof of the contract and rectification. I accept that in cases where the parol evidence rule is relied on “*...it occurs in the same context as the parol evidence rule*”⁴.

[16] For this reason, I do not have to decide whether the prospects for appeal have their merits in either the first ground or the second ground. To the extent that there is this interface between the two premised on the existence of an antecedent contract they cover the same ground.

[17] I am satisfied that this point has reasonable prospects on appeal and justifies because of its unusual features engaging the appellate jurisdiction of the SCA.⁵

³ 1942 AD 244 at 253

⁴ Van Huyssteen et al *Contract General Principles*, Sixth edition page 194.

⁵ See *MEC for Health, Eastern Cape v Mkhitha and Another* JDR 2214 SCA, where the court held that: “An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or

[18] I do not need then need to consider the merits of the other grounds of appeal raised by the second to fourth defendants.

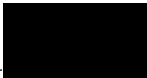
[19] The fifth defendant's grounds of appeal remain obtuse for me because as I noted in my judgment at paragraph 43 that the manner in which they pleaded the contract in this case was unclear. Nevertheless, they signed the same document which the first to fourth defendants contend is the antecedent contract. On this basis the fifth defendant is also covered by this ground of appeal. Accordingly, I grant the fifth defendant leave to appeal as well.

[20] Costs for the appeal are as is normally the case are costs in the appeal.

ORDER:-

[21] In the result the following order is made:

1. Leave to appeal to the Supreme Court of Appeal is granted for the first to fifth defendants.
2. Costs to be costs in the appeal.



N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

Date of hearing: 18 July 2024

Date of Judgment: 23 July 2024

Appearances:

Counsel for the Plaintiff:

MC Maritz SC

G Elliott SC

Instructed by.

Thomson Wilks Inc

Counsel for the First to Fourth Defendants:

IP Green SC

R Ismail

Instructed by:

Webber Wentzel

Counsel for the Fifth Defendant:

EJ Ferreira SC

Instructed by:

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