IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT

Case No: EL933/2022

MBUYISELI NGQELENI Plaintiff

and

OUTSURANCE INSURANCE COMPANY LIMITED Defendant

(**Reg No: 1994/010719/06)**

JUDGMENT

B B Brody

[1] On the 15th of August 2024 the parties agreed to a stated case in terms of rule 33.

[2] One of the facts agreed upon was that there was an insurance agreement between the parties in terms of which the plaintiff's property was covered against certain loss or damage, as per an insurance policy attached to the stated case as annexure "A". I will deal more fully with the relevant paragraphs in the insurance policy below.

[3] A further fact was that a wall above the ceiling of the insured property collapsed, and fell through the ceiling, causing damage to the plaintiff.

[4] The parties agreed that the aforesaid incident occurred due to defective and/or poor workmanship during alterations done before the plaintiff had even bought the property, and which he was not aware of, in accordance with an expert opinion attached as annexures "C1" and "C2" of the stated case.

[5] The plaintiff contended that the aforesaid incident constituted an insured event and that the defendant was liable for the plaintiff's damages. The defendant, on the other hand, contended that the incident, and damages, were not an insured peril, or event. It alleged that the defendant was not liable for the plaintiff's damages in that the plaintiff could and should have foreseen the poor workmanship, and in any event, this issue was not relevant to the terms of the contract of insurance.

[6] The issue for determination by this court was the following:

> "3.1 Whether the incident was an insured peril or event in terms of the policy resulting in the liability of the defendant.
>
> 3.2 Plaintiff submits that a further issue for determination is whether plaintiff could have foreseen that there was poor workmanship and failed to disclose it to the defendant."

[7] The policy (annexure "A" to the stated case) indicated that the policy was effective from the 5th of August 2021 and the relevant clause of the policy, to the stated case, was the following:

> "**WHAT IS NOT COVERED under Comprehensive Buildings cover. ..**
>
> **…**<u>Where any of the following cause or contribute to damage</u> …

- defects in the design or construction of the building, or where the structure would not have been approved by the relevant local authority at the time of construction

- construction, alteration or repairs, defective workmanship or materials…"

[8] In the defendant's repudiation letter dated the 15th of November 2021 (annexure "B") the defendant indicated that it was repudiating as defective workmanship allegedly contributed to the damage and that this was not covered by the insurance policy. The letter emphasised the following wording in the policy:

> "Where any of the following either cause or contribute to damage:
>
> - construction, alteration or repairs, defective workmanship or materials"

[9] In the expert opinion summary Mr Peter John Maker, an architect of forty two years of experience stated *inter alia* the following:

> "(iii) It would have been impossible for the plaintiff to have been aware that a wall had been removed which made the firewall brickwork unstable. …
>
> …(ix) He is in agreement with the defendant's assessor as to the cause of the failure however the plaintiff would have had no knowledge of the impending collapse."

[10] Prior to the matter being called, and when it was apparent that there were no heads of argument on behalf of the defendant, various enquiries were made with the legal practitioners acting on behalf of the plaintiff and the

defendant, and no explanation was given why the defendant had not filed heads of argument.

[11] When the matter was called, there was no appearance on behalf of the defendant. Sometime later, and on the 25th of October 2024, a letter was received from the defendant's attorneys of record which indicated *inter alia* that "Due to an oversight, the defendant's counsel did not appear at the hearing." The defendant's legal representative also then requested that this court have regard to the defendant's heads of argument "to avoid the potential for further litigation." Whatever that means, I will not have regard to the defendant's heads of argument as they were not served and filed timeously and, despite enquiries made, the heads were not made available on request, or in terms of the rules of court.

[12] The plaintiff's heads of argument were filed timeously and Mr Maswazi appeared on behalf of the plaintiff, and argued the matter fully.

[13] I do not intend repeating Mr Maswazi's argument, however, I am in agreement with him that it is now trite law that in considering the interpretation of a contract, consideration must be given to the language used in the light of the ordinary grammar and syntax.[1] It is further trite law that the process of interpreting contracts is objective, not subjective and a sensible or businesslike result is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the contract.[2]

[14] This court is bound by the four corners of the stated case, as read with the annexures thereto.

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[1] Natal Joint Pension Funds vs Endumeni Local Municipality 2012(4) SCA 593, paragraph 18 and Jaga vs Donges 1950(4) AD 653 at 662

[2] Natal Joint Pension Funds *supra*

[15] There can be no doubt that the defendant's contention is primarily that the plaintiff could, and should, have foreseen the poor workmanship and that for this reason the claim was not relevant in terms of the contract.

[16] The expert report by the architect makes it abundantly clear, as set out above, that the plaintiff would not have been aware of the poor workmanship, and in fact, it was "impossible for the plaintiff to have been aware that a wall had been removed, which made the firewall brick unstable." This is emphasised twice by the expert when he stated *inter alia* that "the plaintiff would have had no knowledge of the impending collapse." As part of the stated case, this was apparently the defendant's assessor's view as well.

[17] The exclusion referred to in the policy that "defects in the design or construction of the building, or where the structure would not have been approved by the relevant local authority at the time of construction", and "construction, alteration repairs, defective workmanship or materials" cannot be considered in isolation. This exclusion must be read in the context of the stated case, which raises pertinently the prior knowledge, or foreseeability, of the poor workmanship by the plaintiff.

[18] I am therefore in agreement with Mr Maswazi that the exclusions are only applicable to defective workmanship where the plaintiff was "aware" prior to entering into the contract. This is what is raised in the stated case, together with its annexures, and there was no other facts, or annexures, which disputed the issue of a lack of knowledge.

[19] Accordingly, the issues for determination, and as determined by this court are that:

[19.1] The incident, in the context of the stated case, was an insured peril, or event, in terms of the policy, resulting in the liability of the defendant;

[19.2] The plaintiff, in the context of the stated case, and its annexures thereto, could not have foreseen that there was poor workmanship, which he failed to disclose to the defendant.

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

[20.1] Both issues for determination are answered in favour of the plaintiff.

[20.2] The defendant is ordered to pay the plaintiff's costs on scale C as contemplated by rule 69(7).

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B B BRODY

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

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Matter heard on : 24 October 2024
Judgment delivered on : 14 November 2024