REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 068873/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

6 March 2026
DATE

[redacted]
SIGNATURE

In the matter between:

**NURSCON FLEXIBLES (PTY) LTD** Plaintiff

and

**SANTAM LTD** First Defendant

**VAN FLYMEN & ASSOCIATES (PTY) LTD** Second Defendant

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**JUDGMENT**

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**CRUTCHFIELD J**

[1] The first defendant, Santam Limited ("Santam"), excepts to the plaintiff's main claim, claim A, brought by the plaintiff against the first defendant ("the main claim").

[2] The plaintiff, Nurscon Flexibles (Pty) Ltd, opposes the exception, seeking an order that the exception be dismissed with costs.

[3] The second defendant, Van Flymen & Associates (Pty) Ltd, does not participate in the exception proceedings.

[4] Santam's exception is premised on the main claim allegedly lacking averments necessary to sustain it. Santam contends that on a reasonable reading of the written contract of insurance ("the policy"), underpinning the main claim, the policy cannot bear the meaning that the plaintiff ascribes to it.

[5] Santam must "show that the (plaintiff's) claim is (not may be) bad in law".[1] Santam must persuade this court that the main claim is not capable of supporting the relief sought on the strength thereof, "upon every interpretation which the particulars of claim can reasonable bear".[2]

[6] The plaintiff contends that the exception ignores the context in which the relevant provisions of the policy stand to be construed and that the evidence to be advanced at the trial regarding the surrounding circumstances at the time that the policy was amended in 2021, may impact the proper interpretation of the policy. Furthermore, that the exception calls for an interpretation of the policy, a process that generally is not appropriate at the exception stage of proceedings.[3]

[7] The plaintiff contends that the interpretation advanced by it is one that the policy may reasonably bear and that it is not appropriate to uphold the exception on the basis of Santam's interpretation of the policy.

[8] The purpose of the exception procedure is *inter alia* to "avoid the leading of unnecessary evidence"[4] at the trial.

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[1] *Belet Industries CC t/a Belet Cellular v MTN Service Provider (Pty)* **Ltd** (936/2013) [2014] ZASCA 181 (24 November 2014) quoting *Trustees, Bus Industry Restructuring Fund v Breakthrough Investment CC & Others* 2008 (1) SA 67 (SCA) para [11].
[2] *Lewis v Oneanate (Pty) Ltd & Another* 1992 (4) SA 811 (A) at 817F-G.
[3] *Metanza Metallurgical Laborities (Pty) Ltd v Rados International Services SA (Pty)* **Ltd** 2022 JDR 2009 (JG) ("*Metanza*") at para [25] – [30].
[4] *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706D-E.

[9] Furthermore, an exception that a pleading lacks averments necessary to sustain a defence (or action) "is intended to obtain a decision on a point of law that will dispose of the case in whole or in part. If it is not to have that effect, the exception should not be entertained."[5]

[10] Santam argues that if it is correct that the policy does not sustain an interpretation that construes the sum insured as R350 million, as opposed to R175 million, then the exception is good, the main claim cannot be sustained and upholding the exception will serve to curtail considerably the evidence to be led at the trial. This because the plaintiff will have to lead evidence based on one, as opposed to two, possible sums insured.

[11] For the purposes of the exception, I accept the pleadings as being factually correct.

[12] The plaintiff's claim arises from the policy, which includes cover for business interruption ("BI").

[13] The policy comprises the policy wording annexed as "POC1" and the schedule as "POC2", to the amended particulars of claim.

[14] The interpretation of a written contract requires the application of the triad of text, purpose and context.[6] The starting point is the text and the syntax of the relevant provisions of the contract.

[15] The parol evidence rule applies and thus in the absence of a claim for rectification of the policy by the plaintiff, the exception turns solely on the policy.

[16] The plaintiff's claim for payment arises under the BI section of the policy pursuant to an insured event. In terms thereof, the first defendant insured the plaintiff for the loss of gross profit in the sum of R175 million. The policy obliged the plaintiff to pay a monthly premium of R40 104.01 in respect of the sum insured and recorded the indemnity period as 24 months.

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[5] *Miller & Others v Bellville Municipality* 1971 (4) SA 544 (C).
[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ("*Endumeni*").

[17] The loss calculation clause is "item 1 Gross Profit (Difference Basis)" of the policy. It provides for the manner in which the amount payable for the business interruption is to be calculated.

[18] The loss calculation clause defines underinsurance as "less any sum saved during the indemnity period, in respect of such of the charges and expenses of the business payable out of gross profit ...", subject to the proviso that "the amount payable shall be proportionately reduced if the sum insured in respect of gross profit is less than the sum produced by applying the rate of gross profit to the annual turnover, where the maximum indemnity period is 12 months or less, or the appropriate multiple of the annual turnover where the maximum indemnity period exceeds 12 months".

[19] The exception turns on the proper interpretation and application of the proviso, particularly of the words "sum insured" therein, in the context of the policy.

[20] In order to apply the proviso, the plaintiff pleads that the sum insured in respect of gross profit is R175 million, and that the sum insured is insured on an annual basis. Accordingly, the plaintiff pleads that the total sum insured over the indemnity period of 24 months is double the gross profit of R175 million, being R350 million.

[21] The first defendant's exception is that the policy does not sustain an interpretation whereby the sum insured, for the purposes of applying the proviso, can be construed as being insured annually, amounting to R350 million.

[22] The policy incepted during October 2020. In terms thereof, the sum insured under the BI section was R142 million at a monthly premium of R44 834.82. The gross profit insured was R140 million at a premium of R32 083.21. The indemnity period was 12 months.

[23] The parties amended the policy during November 2021. In terms thereof, the sum insured under the BI section increased from R142 million to R177 million, at a monthly premium of R58 855.62. The gross profit insured increased from

R140 million to R175 million at a premium of R40 104.01, whilst the indemnity period increased from 12 to 24 months.

[24] The increases in the sum insured and the monthly premium equate to increases of 25% respectively, whilst the indemnity period doubled from 12 to 24 months.

[25] The essence of the plaintiff's case for purposes of the exception is that because Santam doubled the indemnity period from 12 to 24 months, the sum insured must be construed as having been doubled correspondingly, from R175 million to R350 million over the two year period, notwithstanding that the policy does not make any such provision.

[26] Accordingly, the plaintiff contends that the policy reasonably sustains an interpretation whereby the sum insured under the BI section of the policy stands to be construed as R350 million as opposed to the amount stated in the policy, being R175 million.

[27] Santam denies that the policy can reasonably sustain such an interpretation and argues that the plaintiff confuses the indemnity period with the period of insurance.

[28] It is against this background that I consider the exception.

[29] The exception interprets the policy against the background of established principles of insurance law. These principles provide context to the interpretative process of the policy.

[30] The policy does not define the term "sum insured". The latter is, however, a firmly established concept in insurance, being the maximum monetary limit of the insurer's liability to the insured under the policy. The insurer is not obliged to pay any more than the amount of the sum insured.

[31] If the sum insured is less than what was at risk, then the insurer pays *pro rata* because the insured was underinsured and the insured becomes "self-insured" for the balance.

[32] The period of indemnity is the length of the period for which the insurer must indemnify the insured for the implications on the business of the insured event. The policy defines the indemnity period in such terms. The indemnity period is recorded as 24 months. Thus, the maximum indemnity period exceeds 12 months.

[33] The period of insurance is the period for which the policy endures and during which the insured event must occur. The loss that gives rise to the indemnity period must occur during the period of the insurance. The policy period herein is one year.

[34] The plaintiff relies on the amendments to the policy aforementioned in respect of the indemnity period, the sum insured and the monthly premium of 25% each in respect of the sum insured and the premium, allegedly in order to ensure that the plaintiff would be covered for R175 million per annum over 24 months.

[35] It is useful to remember that whilst the indemnity period increased from 12 to 24 months, the period of insurance remained one year.

[36] The plaintiff pleads in paragraph 36.2 of the particulars of claim and in its heads of argument that the sum insured is insured on an annual basis. In paragraph 24 of the heads of argument, the plaintiff sets out in tabular form, the increase in the sum insured in the original policy and after the amendment, being an increase of 25% in the sum insured and an increase of 25% in the premium from the original policy to the amended policy whilst the indemnity period in the original policy was 12 months and in the amended policy a period of 24 months. The sum insured in respect of gross profits is stipulated in the policy as R175 million.

[37] The plaintiff advances an interpretation of the proviso in terms of which the sum insured in respect of gross profit is R175 million and that sum is insured on an annual basis, resulting in a total sum over 24 months of R350 million.

[38] However, the policy wording makes provision for multiplication of the turnover only, where the indemnity period is more than 12 months. It is logical that if the

parties increase the indemnity period from 12 months to 24 months, then they multiply the relevant turnover by two because it is not 12 months turnover but 24 months.

[39] The policy wording does not, however, provide for multiplication of the sum insured. Nor does the policy stipulate that the sum insured is insured on an annual basis and, the policy does not stipulate that the sum insured is R350 million as the plaintiff would contend.

[40] The policy provides that the sum insured, the maximum liability of the insurer to the insured under the policy, as R175 million. The policy does not state that the sum insured is insured on an annual basis.

[41] Nor is there any claim for rectification of the policy be the plaintiff.

[42] The policy does not provide for a sum insured on an annual basis but only for a sum insured in respect of material damage sustained during the period of insurance.

[43] The amount of the sum insured can only be increased during the policy period by agreement between the parties. There is no such agreement to increase the amount of the sum insured and the plaintiff does not rely on any such agreement.

[44] There is no concept of a sum insured on an annual basis in established insurance law. The sum insured is the upper limit of the insurer's liability under the policy. There is no provision in the policy for the doubling of the sum insured. The policy provides for the sum insured under BI cover as R175 million and not R350 million.

[45] The plaintiff contends that if the first defendant is correct and the insured sum of R175 million is not an annual figure, that means that the plaintiff is insured for a loss of gross profit in the amount R87.5 million annually. The plaintiff contends that this is commercially nonsensical because the amount of R87.5 million is 37.5% less than the original amount of R140 million for which the plaintiff was initially insured on an annual basis. Subsequent to the amendments to the policy, the plaintiff is paying a premium that is 25% higher

for significantly less cover. That according to the plaintiff, defeats the purpose of the amendment, which was to increase the plaintiff's cover.

[46] Insofar as the plaintiff alleges that Santam's construction is commercially insensible, I disagree. To the contrary, the plaintiff's version that the sum insured is insured annually such that the increase is 150% from R175 000.00 to R350 000.00 whilst the premium increases by 25%, that is commercially insensible and makes no logical commercial sense.

[47] The proper construction of the material damage proviso is that the plaintiff was insured for one year and as long as material damage occurred during that year, the first defendant would cover the plaintiff under the BI section of the policy if the plaintiff took out BI cover, which it did. Once the damage occurred during the one year period of the insurance policy, which it did, then the maximum period of indemnity for the BI cover is 24 months but the sum insured in respect of that 24 month period remains R175 million.

[48] The plaintiff's difficulty is that its claim arises from the policy, a written contract, and there is no claim for rectification. Whilst the plaintiff doubled its maximum indemnity period from 12 to 24 months, it failed to double the sum insured. There is nothing in the policy that provides that the sum insured will double automatically if the maximum period of indemnity doubles from 12 to 24 months.

[49] The policy is to be construed against the background of the surrounding circumstances, including the established principles of insurance law. Those principles tell us that the sum insured is a fixed sum and that it is the maximum amount of the insurer's liability. The policy in this matter does not provide for a multiplication or increase of the sum insured. The policy provides for multiplication of the previous year's turnover but not of the sum insured.

[50] The policy does not sustain the construction advanced by the plaintiff that the sum insured was insured annually over 24 months.

[51] If regard is had to the written policy, it does not state and nor does it imply what the plaintiff would have it state or imply. Viewed in its context and against

the principles of insurance law and the factual background of the increase in the premium by a mere 25%, the plaintiff's main claim stands contrary to the policy, which provides that the sum insured is R175 million and not R350 million.

[52] In the circumstances, the policy does not support the relief sought by the plaintiff on the strength of that policy.

[53] Accordingly, Santam's exception is good and serves to dispose of the main claim.[7] Upholding the exception will serve to avoid the leading of unnecessary evidence[8] and prevent the parties from preparing for trial in respect of the main claim.

[54] Whilst I intend to uphold the exception, the plaintiff is entitled to an opportunity to amend its amended particulars of claim.

[55] In respect of the costs of the exception, there is no reason why the costs should not follow the order on the merits. Accordingly, the plaintiff is liable for the costs of the exception.

[56] The matter is reasonably complex and both parties utilised senior counsel. In the circumstances, the costs of senior counsel will be payable on scale C.

[57] By virtue of the aforementioned, I grant the following order:

1. The first defendant's exception is upheld with costs including the costs of senior counsel on scale C.

2. The plaintiff's main claim against the first defendant, claim A, is struck out.

3. The plaintiff is granted leave to amend its amended particulars of claim within one (1) month of the delivery of this judgment.

[redacted]

[7] *Miller & Others v Bellville Municipality* 1971 (4) SA 544 (C).
[8] *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A).

**CRUTCHFIELD J**

**JUDGE OF THE HIGH COURT**
**JOHANNESBURG**

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| For the Plaintiff: | Adv J Babamia SC assisted by Adv Cloete instructed by Shaheed Dollie Inc. |
| For the First Defendant: | Adv J F Mullins SC instructed by Savage, Jooste and Adams Inc. |
| For the Second Defendant: | Adv I Green SC instructed by Webber Wentzel. |
| Date of the hearing: | 21 July 2025. |
| Date of the judgment: | 6 March 2026. |