

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NUMBER: 26150/2020

DATE OF HEARING: 19 August 2022

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REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO

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In the matters between:

BLACK SPEAR HOLDINGS (PTY) LTD

Plaintiff

and

BRYTE INSURANCE COMPANY LIMITED

First Defendant

SASRIA SOC LIMITED

Second Defendant

This judgment has been delivered by being uploaded to the caselines profile on 22 August 2022 at 10h00 and communicated to the parties by email.

JUDGMENT

HEADNOTE:

Contract of insurance – interpretation of clause delineating the scope of compensation and mode of calculation

The claim was for the total loss of mining equipment lost by the flooding of the mine and the absence of any reasonable expectation that it could be recovered – the controversy was whether the notional cost of removal from the site underground was to be factored into the sum of compensation

Held: the clause as applied to the facts required the costs of a theoretical removal not to be included.

SUTHERLAND DJP:

[1] The issue for decision is the proper meaning to be attributed to a clause in a contract of insurance. A stated case has been presented.

[2] The relevant portion of the clause reads:

‘2. Total loss

In the event that the insured property is totally lost or destroyed the amount payable shall be the cost of removing the damaged property (limited to the removal costs of 15% of the claim) less the value of the remains plus

(a) ...cost of replacing or reinstating on the same site property of equal performance capacity and age but not superior to or more extensive than the insured item insofar as is practicable...

- [3] The policy is in respect of mining equipment located underground. In the trial which preceded this application, it was established that the mine was flooded and the workings, by reason thereof, are inaccessible.
- [4] In the stated case the common cause relevant facts are:
- (a) The plaintiff has suffered a total loss
 - (b) It is uneconomical to recover the insured property from the underground mine
 - (c) The plaintiff will not be indemnified for the cost of removing the insured equipment from where they are in situ in the underground mine and
 - (d) The insured equipment has no residual value.
- [5] The purpose of a contract of insurance is to recognise the predicament of the insured party and provide compensation commensurate with the loss. In every case the terms of the policy must be applied to the relevant facts. More especially, a contract of insurance concluded to provide cover for equipment situated underground must be taken to have contemplated the circumstances of such goods.¹ Moreover, in the event that a band of plausible interpretations might exist the option most favourable to the insured person or entity must prevail.²

¹ In *Centriq Insurance Company Ltd v Oosthuizen and Another 2019 (3) SA 387 (SCA)* at [17] it was held: ‘..... It is therefore necessary to revisit the approach to interpreting insurance contracts. As the learned judge observed, insurance contracts are contracts like any other and must be construed by having regard to their language, context and purpose in what is a unitary exercise. A commercially sensible meaning is to be adopted instead of one that is insensible or at odds with the purpose of the contract. The analysis is objective and is aimed at establishing what the parties must be taken to have intended, having regard to the words they used in the light of the document as a whole and of the factual matrix within which they concluded the contract.’

² *Guardrisk Insurance Co Ltd v Café Chameleon CC 2021 (2) SA 323 (SCA)* at para [13] ‘In this analysis it must be borne in mind that insurance contracts are ‘contracts of indemnity’. They should therefore be interpreted ‘reasonably and fairly to this end’. In this regard it is instructive to recall Schreiner JA’s adoption of the following statement from the English authorities on insurance law:

[6] The controversy between the parties relates to single point of difference about the modality of the valuation: must the sum of compensation take account of the costs of removing the equipment from the underground site or not.

[7] An examination of the text of the clause reveals the following:

(1) The conception of a total 'loss' or total 'destruction' relates to the *utility* of the insured goods and does not necessarily mean that the goods have literally 'disappeared'. This construction accommodates the notion of residual value in the scrap.

(2) In instances where scrap is accessible and might have another use of however modest a nature, it self-evidently has a residual value which can be set off against the utility value of the goods. However, where the scrap is inaccessible this factor can have no practical application.

(3) The valuer must conceptualise what would be needed to replace the goods at the place where they were located. This encompasses the notional assumption that the goods would typically be acquired at some other place and moved onto site at a cost to be taken into account. Were such a typical source for the acquisition of the relevant

'No rule, in the interpretation of a policy, is more firmly established, or more imperative and controlling, than that, in all cases, it must be liberally construed in favour of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain the claim and cover the loss, must in preference be adopted.'

goods be overseas or next door, that dimension would be factored into the calculation at the differential cost. But self-evidently where no contemplation of actually, as distinct from notionally, replacing the insured goods, the aspect of a removal can play no role in the valuer's calculations and the clause cannot be read to imply that such a factor must, in every case, be catered for. The striving for business sense must prevail.

[8] In such circumstances as the stated case has set out, the reasonable valuer would put a value on the goods without regard to the factor of removal costs and that outcome would be consistent with the proper interpretation of the clause.

[9] The appropriate order is therefore set out in paragraph 10 of the stated case.

The order

- (1) The second defendant must make payment to the plaintiff of the amount of R6491750, inclusive of VAT.
- (2) Interest thereon at the rate of 13.5% per annum from 27 March 2017 until date of payment.
- (3) Costs of this part of the action including the costs of the plaintiff expert witness Hans Kamp.

Sutherland DJP

Heard: 2022 08 19

Judgment: 2022 08 22

For the Plaintiff

Adv R Shepstone,

Instructed by Fairbridges Wertheim Becker

For the Second Defendant

Adv P Coetsee,

Instructed by Stegmanns