REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT
DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO.17408/09
3984/10

In the matter between

BARRY THOMPSON Plaintiff

and

FEDERATED TIMBERS 1st Defendant

DURBAN PROPERTY CLEANING SERVICES CC 2nd Defendant

ZURICH INSURANCE COMPANY (SOUTH AFRICA) LIMITED Third Party

REASONS FOR JUDGMENT

Del. 8 December 2010

WALLIS J.

[1] Mr Thompson says that whilst he was shopping in Federated Timbers' Home Improvement Centre in Hillcrest on 29 June 2007 he tripped over an electric cord lying across the floor of one of the aisles in the shop and injured himself. On 18 March 2008 he commenced an action against Federated Timbers to recover the damages suffered by him in consequence of his injuries. In its plea Federated Timbers says that it employed Durban Property Cleaning Services ("DPCS") as a professional contractor to attend to the cleaning of its premises. It alleged that the employees of DPCS were under the latter's control and were independent contractors.

[2] In February 2009, some six months after this plea was delivered, Mr Thompson's attorneys addressed certain enquiries to DPCS. In the letter they said that they might be obliged to join DPCS as a second defendant in the action. Mr Judkins, the managing member of DPCS, replied to that enquiry on 2 March 2009 essentially disavowing any knowledge of the incident beyond a report made to him by the manager of the Federated Timbers store. This prompted some surprise from Mr Thompson's attorneys who indicated that they saw no alternative but to join DPCS as a second defendant. They said that they would waste no further time in doing so. However, nothing more happened until December 2009 when they issued a separate summons against DPCS. When that was served in January 2010 DPCS immediately caused the summons to be sent to its insurers, Zurich Insurance Company (South Africa) Limited.

[3] After some initial hesitation Zurich indicated that it would not accept liability for this claim. As a result DPCS joined them as a third party to Mr Thompson's action against them, claiming an indemnity under the insurance policy in the event of DPCS being held liable to compensate Mr Thompson. Zurich resists that claim for an indemnity. Mr Thompson's two actions were then consolidated.

[4] At the commencement of the trial I made an order in terms of Rule 33(4) separating for determination the issues raised by the third party notice served by DPCS on Zurich. DPCS then led the evidence of Mrs Olive Simpson, Mrs Catherine Kapp and Mr Paul Judkins and the matter was then argued. In view of the urgent need to proceed with Mr Thompson's action, I made an order on Friday 3 December 2010 dismissing the second defendant's claim against the third party with

costs. This judgment embodies the reasons for making that order.

[5] There is no dispute that DPCS was insured by Zurich and that one of the heads of cover was public liability, on a claims made basis. In terms of that section of the policy the defined events against which DPCS obtained insurance cover were

'Damages which the insured shall become legally liable to pay consequent upon accidental death of or bodily injury to …any person…and which results in a claim or claims first being made against the insured in writing during the period of insurance.'

It is accepted that the claim by Mr Thompson falls within that definition.

[6] Zurich contends that it is not liable to indemnify DPCS against this claim by virtue of the latter's alleged non-compliance with the provisions of the policy that require notice to be given to Zurich of events that may give rise to a claim. The relevant provision is clause 6 in the general exceptions, conditions and provisions of the policy, which reads as follows:

'6. **Claims**

(a) On the happening of any event which may result in a claim under this policy the insured shall, at their own expense

(i) give notice thereof to the company as soon as reasonably possible and provide particulars of any other insurance covering such events as are hereby insured.

(ii) …

(iii) as soon as practicable after the event submit to the company full details in writing of any claim.

(iv) give the company such proof, information and sworn declarations as the company may require and forward to the company immediately any notice of claim or any communication, writ, summons or other legal process issued or commenced against the insured in connection with the event giving rise to the claim.'

Zurich contends that there was non-compliance with all three of these provisions but it is only necessary, for my purposes, to refer to the first one.

[7] Both parties accept that the onus rests upon Zurich to establish its entitlement to rely upon this clause.[1] They also accept that the event that DPCS was obliged to notify to Zurich was Mr Thompson's accident as that is the defined event that may result in a claim by DPCS under the policy. This follows from the reference to 'defined events' in the insuring clause at the commencement of the general conditions section of the policy, when read with the 'defined events' set out at the commencement of each section of the policy embodying the separate heads of cover. The approach the parties adopt, correctly so, is that the word 'event' should bear a consistent meaning throughout the policy. Lastly, whilst the words 'on the happening of any event' might suggest that the obligation to notify Zurich is one that arises immediately upon the event occurring and irrespective of whether DPCS knew of it[2] this emphatic wording is qualified by the fact that the obligation is only to give notice 'as soon as reasonably possible'. Accordingly the words 'on the happening of any event' fall to be construed as if they read 'after the occurrence of any event'.

[8] Mr Thompson's fall is said to have occurred on 29 June 2007. Accordingly the event of which DPCS was obliged to give notice to Zurich occurred on 29 June 2007. DPCS quite rightly points out that it was not reasonably possible for it to give notice on that date as it was unaware of the event having occurred. That brings into focus the question

1 *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co.* Ltd 1963 (1) SA 632 (A) at 644 D-H.
2 C/f the obligation in terms of the policy considered in *Sleighthome Farms (Pvt) Ltd v National Farmers Union Mutual Insurance Society Ltd* 1967 (1) SA 13 (R) at 16 D-H.

of when it became reasonably possible for DPCS to notify Zurich of the accident involving Mr Thompson. The requirement that the notification be made so soon as reasonably possible must mean so soon as is reasonably practicable in all the circumstances.[3] The enquiry is a factual one. And the answer will depend upon the circumstances of each particular case.[4]

[9] Whilst the test of what is reasonable in all the circumstances is objective it is necessary to take into account certain subjective matters such as the state of mind of the representatives of DPCS. This follows from the requirement that the events that must be notified to the insurer are events that may result in a claim under this policy. It is perfectly conceivable that an insured person may know that an event has occurred but have no knowledge of the potential for a claim to arise in consequence of that event. Thus in *Sleighthome Farms*[5] the insured was aware that the building in which it stored its tobacco had been damaged in a storm. The storm and the damage it caused constituted the event that gave rise to the claim. However, the insured was utterly unaware that in consequence of the ingress of water into the building a quantity of the tobacco leaf stored in the building was damaged by 'burning'. This damage was only discovered some months after the storm had occurred. In those circumstances the court held that there was no breach of the obligation to give notice 'as soon as is reasonably possible in the circumstances'.[6]

[10] Even if the insured is aware that a particular event has occurred and

3 *Naciker and Others v Godfrey and Others* 1945 NPD 458 at 460; *Collen v AA Mutual Insurance Association Ltd* 1954 (3) SA 625 (E) at 629 H-630 A.
4 LAWSA (First re-issue) Vol 12 para 317 p 246.
5 Footnote 2, *supra*.
6 The claim failed for other reasons.

that damage has resulted the circumstances may be such that there is no appreciation of the potential for a claim. That is particularly so when dealing with the type of cover under consideration in this case, which is public liability (claims made) cover. The fact that the insured is aware that an event has occurred, such as Mr Thompson's fall, and that damage has been suffered, as in the case of damage flowing from Mr Thompson's injuries, does not mean that there will be an appreciation that a claim may be made against the insured, resulting in its turn in a claim under the policy. Some confusion may be occasioned by the reference in the preamble to clause 6(a) to an 'event giving rise to a claim'. When one is dealing with public liability cover there are two different claims. The first is the claim by the injured party against the insured (DPCS) and the second is the claim by the insured against the insurer (Zurich) under the policy. The reference under clause 6(a) is to the latter, not the former, claim. There are two reasons why this is so.

[11] The first reason is that Zurich is not concerned with claims made against its insured unless the insured in turn makes a claim against Zurich. There may be many reasons, of which the triviality of a claim or a desire not to lose a no-claim bonus are obvious examples, why an insured may choose to deal with a claim itself without referring the matter to its insurer. The insurer has no wish to be apprised of the events giving rise to such claims, as they do not attract liability under the policy. Accordingly the obligation to notify the insurer of an event is an obligation in relation to an event that may result in DPCS seeking an indemnity under the insurance policy.

[12] The second reason is apparent from considering the other risks covered under this policy. It is a Multi Mark III policy, which in standard

terms is able to provide cover under virtually any head of potential loss in twenty separate sections of the policy. When concluding the contract of insurance the insured selects the cover that it requires, with the result that certain sections of the policy are operative and others not. DPCS selected cover under the fire, electronic equipment, office contents, money, public liability, employer's liability and the motor section. Clause 6 is part of the general conditions of the policy and must accordingly be applicable not only to a claim under the public liability section but also to claims under these other sections and indeed the sections under which cover was not required. It is legitimate therefore in construing clause 6 to have regard to the manner in which it would operate in relation to one of these other sections.[7] Looking at the preamble to clause 6(a) in the context of, for example, a fire at the insured's premises, it is plain that the event must be the fire and the claim must be the claim by the insured against the insurer for an indemnity in respect of the damage suffered in the fire. That makes it apparent that the reference to a claim in the preamble is to the claim by the insured against the insurer, not, in the context of a public liability claim, the claim by a third party against DPCS.

[13] I have set this out in some detail because it is apparent from the correspondence and what occurred that Mr Judkins' approach was that until a claim was received from Mr Thompson there was nothing to report to Zurich. In his evidence he confirmed, in response to questions from the Bench, that he understood that until someone said that DPCS was liable and must pay there was no claim and that he acted on that belief. He also placed some store on a statement by the manager of the store that DPCS were not involved in the matter as the summons had been addressed to Federated Timbers alone. In a letter to his brokers dated 13 January 2010

7 *Commercial Union Insurance Co of SA Ltd v KwaZulu Finance & Investment Corporation and another* 1995 (3) SA 751 (A) at 758F-759H.

he explains that he did not submit a claim in March 2009 when he received the correspondence from Mr Thompson's attorney because there was no proof that any incident had taken place and 'I was only aware of some form of pending claim against Federated Timbers'. This stance involves a misapprehension of the obligation imposed under clause 6(a)(i), of which he was in any event unaware. That obligation is to notify the insurer of the happening of any event, such as Mr Thompson's fall, which could lead DPCS to make a claim against Zurich under the insurance policy. It is not an obligation to notify of the event only if or once a claim has been made. That is clear from clause 6(a)(iii) which provides that the insured must 'as soon as practicable after the event submit to the company full details in writing of any claim'. Clearly this is a reference to a claim against the insured arising out of the incident. The fact that the obligation to notify the company of a claim against the insured is dealt with separately in sub-clause (iii) from the obligation to notify the company of an event in sub-clause (i) makes it clear that the obligation to notify the insurer under the first clause is not dependent upon a claim having been made against the insured. The obligation to notify the insurer of a claim arises separately under clauses 6(a)(iii) and (iv).

[14] Reverting to when it was reasonably possible for DPCS to notify Zurich of Mr Thompson's fall it was not reasonably possible for it to do so until it was aware of his claim that he had tripped and fallen in the Federated Timbers shop. According to Mr Judkins the first he knew of that allegation was in the first half of 2008. He recorded his state of knowledge in a letter addressed to Mr Thompson's attorney on 2 March 2009 where he said:

'Over a year ago the manager of the Hillcrest branch had briefly discussed an incident that had allegedly occurred at their premises many months prior. I offered any

assistance as this was the first time I was being made aware of anything that may have involved one of our staff members. It was agreed that should Federated Timbers require our insurers' details then they would contact us. Your letter is the first we have received requesting any information from us.
You claim that someone suffered injuries after tripping over an electrical cord which was possibly attached to one of our cleaning machines. I can not confirm or deny that our cleaning equipment was in use at the claim time of the alleged incident as I was not contacted or notified of anything occurring on the day in question (29 June 2007). We have been contracted to provide a general cleaning service at the site for many years and this service does include floor maintenance.'

[15] In evidence Mr Judkins said that the source of his information was a conversation with Mrs Enstrom, the manager of the Federated Timbers branch in Hillcrest. This occurred in 2008, when she told him that Federated Timbers had been sued by Mr Thompson arising out of his having fallen in their store on 29 June 2007. As the summons against Federated Timbers was issued at the end of March 2008 and served early in April 2008, it seems probable that this conversation took place some time between April and June 2008. As a result Mr Judkins acquired knowledge of the alleged event that might (and indeed does in these proceedings) give rise to a claim by DPCS against Zurich for an indemnity under the insurance policy.

[16] The basis upon which DPCS says that it was not obliged to notify Zurich of this incident in 2008 is that Mr Judkins says that he had no appreciation at the time, and could not have had any appreciation at that time, of the possibility that the incident might lead to a claim under the policy. The question is whether this stance is justified.

[17] Two issues potentially arise from this. The first is whether in fact

there was no appreciation of the possibility of a claim being made under the insurance policy. If there was such an appreciation then that is an end to the matter. The obligation to notify the insurer of the relevant event is then clear. If, however, the court is not satisfied that there was such an appreciation that does not resolve the issue the other way. If the failure to appreciate the possibility of a claim is unreasonable, in the sense that a reasonable insured in the same position would appreciate the possibility of a claim, the fact that this particular insured did not cannot, I think, relieve it of the consequences of its failure to notify the insurer of the event. That would put a premium on ignorance and, as one is dealing with the state of mind of the insured, provide an incentive to dishonesty. That does not strike me as a reasonable and business-like construction of the policy.

[18] *Resisto Dairy* provides an example of the court concluding that the insured must have appreciated the possibility of a claim being made under an insurance policy. In that case the fuel tank of a truck broke loose and was dragged along a public road with the result that oil leaked on to the road. This oil caused a motor car to skid on the road and collide with another vehicle. The owner of that vehicle claimed compensation from Resisto Dairy and it in turn sought an indemnity from its insurer. Liability was repudiated under a clause similar, although by no means identical, to the one under consideration in the present case. The question was whether the insured was under an obligation to report the accident involving the collision with the claimant's vehicle. It was held that it was. The day after the collision the managing director of Resisto Dairy had telephoned the police and been informed that its truck was not involved in the collision. He however knew that the cause of the accident was the oil leaking from the fallen fuel tank. In those circumstances the court held that he must

have recognised the possibility that the owner of the claimant's vehicle would hold Resisto Dairy liable for his damage. It was therefore its obligation to notify its insurer of the occurrence as soon as possible. As it had not done so it was in breach of this provision of the policy.

[19] That decision lends support to my view that under clause 6(a)(i) if the insured ought reasonably to have appreciated the possibility of a claim arising from a particular event that is sufficient to trigger the notification obligation. However, it is I think clear from Mr Judkins' letter that when he learnt of this incident he was aware of the possibility that it might give rise to a claim under DPCS' public liability insurance policy. Why else would he have agreed with Mrs Enstrom to provide Federated Timbers with details of DPCS' insurer? That can only have arisen in two circumstances. The first would be if Mrs Enstrom asked for it and the second would be if Mr Judkins himself volunteered to make the information available if required. According to his evidence it was the former. He said that Mrs Enstrom asked him if he would let her have the details of DPCS' insurer and his response was 'Sure. Anything you want.'

[20] It is difficult to accept that when this question was asked and answered in this way Mr Judkins did not appreciate that there was a possibility, however faint, that some claim might be forthcoming against DPCS arising from this incident. The only conceivable reason for Mrs Enstrom making the request was a possible need for Federated Timbers to look to DPCS and hence its insurers in respect of Mr Thompson's claim. No other reason was suggested by or to Mr Judkins and none was advanced in argument. I accordingly find that when Mr Judkins was told about this incident he appreciated that there was some small risk that it

might result in a claim against DPCS that it would in turn refer to its insurer for an indemnity. I accept that Mr Judkins did not at the time appreciate the significance of this because he was unaware of clause 6(a)(i) and as time passed he probably discounted the risk even more but that is of no assistance. Once he appreciated that there was inherent in the situation a possibility that a claim might be made by DPCS against Zurich there was an obligation to notify Zurich of the event that might give rise to such claim.

[21] Even if I am wrong in that factual finding I find that a reasonable insured, when told of an incident possibly involving one of its employees that resulted in a person being injured and commencing action to recover damages, would when asked if it would provide details of its insurer have appreciated that there was a possibility that an attempt would be made to hold it liable in whole or in part for the claim and that this would result in a claim against its insurer. On my construction of clause 6(a)(i) the obligation to notify Zurich would then have been triggered and DPCS did not do so.

[22] Even if one accepts that the only possible claim contemplated at the time was a claim by Federated Timbers – presumably for a complete indemnity for or contribution towards any damages it might be ordered to pay Mr Thompson – that is not relevant. It can make no difference that the claim that has in fact been made is a claim for indemnification by Zurich in respect of Mr Thompson's direct claim against DPCS. I accept that Mr Judkins did not contemplate that possibility until he was told at the end of February 2009 and again in March 2009 that DPCS would be joined as a defendant in the action against Federated Timbers. However, the fact that he did not contemplate that possibility does not I think help.

The reason is that what had to be reported was the event that might give rise to the claim against Zurich and that event was Mr Thompson's alleged fall. This approach is consistent with that adopted in the case relied on by DPCS, namely *Snodgrass v Hart (Santam Limited Third Party)*.[8] I agree with the approach that Jones J took in that case to the interpretation of the word 'event' (at 859 -860) and would only add to his reasoning that in this policy the word 'event' is used in the context of an event causing loss that is covered by the policy. That is clear from the portions of the policy referred to in paragraph [6] of this judgment. It is a basic principle of interpretation that where the same language is used in different portions of the contract it should be given a consistent meaning throughout.

[23] The consequence of that approach to the meaning of the word 'event' is that provided the insurer is notified of the event it is no part of the insured's obligation to identify the claim or claims that may arise from that event and be made against the insured. Thus in *Snodgrass* the claim in respect of which an indemnification was sought was a claim under the motor section of the policy dealing with balance of third party liability. The insured had been driving a motor vehicle when it was involved in an accident in which his passenger was seriously injured. The passenger sued the insured for that portion of his damages exceeding the statutory compensation limit of R25 000. In turn the insured driver sought an indemnity from his insurance company. It repudiated liability on the grounds that it had not been notified as soon as reasonably possible of the event giving rise to the claim. The policy was, like the present one, a Multi Mark III policy[9] and the very clause I am confronted with was

8 2002 (1) SA 851 (SE).
9 It was explained by the broker's claims manager, Mrs Simpson, that these are standard terms used with minor variations by all short-term insurers.

considered in that case. The evidence showed that the insurer had only been notified of the passenger's injuries after the passenger had commenced his action against the insured driver, but the court held that this did not suffice to discharge the burden of proof of non-compliance with clause 6(a)(i) that rested on the insurer. It held that because the insured driver had contacted the insurer a few days after the accident to cancel the policy of insurance, because he no longer had need of it, the probability was that he would have informed the insurer of the date of the accident and the fact that the vehicle had been written off in the collision. As the accident was the event giving rise to the claim Jones J held that this would suffice to discharge the insured's obligation to notify the insurer of the event or at least, in the face of this likelihood, the insurer had not discharged the onus of showing a breach of clause 6(a)(i). Once the insurer knew of the accident, whatever the circumstances in which it was informed of it, it could, if it chose to do so, investigate the event and consider any possible claims that might arise therefrom.

[24] That approach is in my view correct. The purpose of a clause such as this is to enable the insurer to investigate the event under the most favourable circumstances and to take immediate steps to mitigate the loss. It can interview witnesses, inspect the scene of the accident, assess the cause of the accident and determine whether or not any liability is likely to attach in consequence of the incident. That in turn may enable it to resolve the claim quickly and at minimal cost. Delay may be seriously prejudicial.[10] In particular, the insurer, with its broader experience, may have a better understanding of what type of claim may arise from a particular accident. Thus in the present case where Mr Judkins contemplated the possibility of a claim by Federated Timbers the insurer

10 LAWSA, *supra,* para 317.

would no doubt have contemplated the possibility of a direct claim by Mr Thompson. That could have led them to contact Mr Thompson's attorneys at an early stage and compromise the claim. It is clear that the failure to notify Zurich in 2008 of Mr Thompson's alleged accident had within it the seeds of prejudice to Zurich's interests.

[25] In the result I hold on the basis of Mr Judkins' own statements that he was aware of the alleged accident involving Mr Thompson by the middle of 2008 and, because he and Mrs Enstrom recognised the possibility that this might involve Zurich, as DPCS' insurer, he could reasonably have notified Zurich of the event at that time. His failure to do so entitles Zurich to avoid liability under the policy as it has done. For those reason I made an order dismissing the claim for an indemnity by Durban Property Cleaning Services CC against Zurich Insurance Company (South Africa) Limited. The dismissal of the third party claim carried with it an order that DPCS pay Zurich's costs in this action.

DATE OF HEARING:	2 DECEMBER 2010
DATE OF JUDGMENT:	8 DECEMBER 2010
SECOND DEFENDANT'S COUNSEL:	MR S K DAYAL
SECOND DEFENDANT'S ATTORNEYS:	JAYSHREE MOODLEY & ASSOC.
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