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LEHMBECKER'S EARTHMOVING AND EXCAVATORS (PTY) LIMITED

and

INCORPORATED GENERAL INSURANCES LIMITED

379/82

N.v.H.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :-

LEHMBECKER'S EARTHMOVING AND
EXCAVATORS (PTY) LIMITED Appellant

and

INCORPORATED GENERAL
INSURANCES LIMITED Respondent

CORAM: RABIE, CJ, KOTZé, MILLER, JJA,
et HOWARD, GROSSKOPF, AJJA.

HEARD: 22 MARCH 1984

DELIVERED: 10 MAY 1984

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J U D G M E N T

MILLER, JA :-

The respondent issued a policy of insurance to the appellant in terms of which the goods described / .....

described in the schedule thereto were insured against all risks of physical loss or damage while being conveyed within stated geographical limits, which included the Republic of South Africa. The policy was described as "Transit Policy Goods". It was to endure for a year, commencing on 1 August 1979 and terminating on 31 July 1980. During October 1981 the appellant instituted proceedings against the respondent in the Transvaal Provincial Division for payment of an amount representing the loss it suffered when goods covered by the policy were accidentally damaged on 21 October 1979 while in transit in the Republic of South Africa. The claim was opposed by the respondent.

After / .....

After a plea had been filed, the parties agreed to submit the dispute to the Court in the form of a stated case, for which purpose an agreed "Statement of Facts" (the statement) was prepared. Included in the statement was a brief description of the issue between the parties. After hearing argument the Court decided the issue in favour of the respondent and accordingly dismissed the appellant's claim with costs. The appeal is against the whole of that order.

Paragraphs 1 and 2 of the statement describe the policy and its duration. The rest of the statement reads as follows :

"3. On / .....

"3.

On the 21st of October, 1979 a mechanical horse having registration No BWL 125T, towing a semi trailer having registration No TSN35805 and a four wheel trailer having registration TSN35789, was involved in a collision at De Wet, district of Worcester, Cape Province.

4.

The Plaintiff was at all material times the owner of the said vehicles.

5.

At the time of the collision the vehicles were being used by the Plaintiff for the conveyance of certain goods for and on behalf of Defy Industries (Pty) Limited for reward and incidental to the Plaintiff's business.

6.

The goods so conveyed were damaged and/or destroyed in the collision in consequence whereof the Plaintiff became liable to Defy Industries (Pty) Limited in an amount of R24 224,86 or such amount as is actually paid to Defy whichever is the lower.

7. On / .....

7.

On the 1st of November 1979 the Plaintiff represented by P C Pretorius, he being duly authorised thereto, duly submitted a written claim to the Defendant in terms of the conditions of the said policy. A copy of the claim is hereto annexed marked 'B'.

8.

On the 23rd of November, 1979 the Plaintiff, again represented by Pretorius, he being duly authorised thereto, submitted a further claim for an indemnity under the said policy of insurance arising out of damage to a certain machine owned by Messrs Helios (Pty) Limited, to the Defendant. A copy of the claim is hereto attached marked 'C'.

9.

The claim submitted by the Plaintiff in terms of annexure 'C' hereto was made fraudulently, more particularly in that:

(a) The date and place of the happening giving rise to the said claim was alleged to have taken place on the 5th of November, 1979 at 10 a.m. at 2 Main Road, Malborough, Sandton,

whereas / .....

whereas in truth and in fact the said machine was damaged prior to the 26th of January, 1979.

(b) The damage to the said machine was occasioned prior to the date upon which the said policy of insurance annexure 'A' hereto, commenced and the Plaintiff was accordingly not entitled to indemnity under the said policy of insurance although Plaintiff was before the 1st of August 1979 in fact insured with the Defendant in terms of a previous policy but did not claim thereunder.

(c) In submitting the claim reflected in annexure 'C' the Plaintiff sought to achieve an advantage which to its knowledge it was not entitled to.

10.

After investigating the Plaintiff's claim in terms of annexure 'C' and ascertaining the true position the Defendant repudiated the said claim on the ground that same had been submitted fraudulently, which repudiation was accepted by the Plaintiff.

In or / .....

In or about April 1980 the Defendant repudiated liability in respect of the Plaintiff's claim in terms of annexure 'B' hereto relying on Clause 3 of the conditions of the policy of insurance, annexure 'A' hereto.

11.

The Plaintiff contends that although the Defendant is not obliged to indemnify it in respect of the claim made under annexure 'C' hereto, the Defendant is obliged to indemnify the Plaintiff in respect of the claim made under annexure 'B' hereto."

It is not necessary to reproduce claims "B" and "C" referred to in paras 7 and 8, respectively, of the statement. Nor is it necessary to reproduce the policy. The relevant part of clause 3 of the conditions of the policy of insurance, referred to in para 10 of the statement, reads thus :-

"If the / .....

> "If the Insured in the aforementioned proposal or in any statement for the continuance of this Insurance shall make any misstatement or if any Claim be in any respect fraudulent or intentionally exaggerated or if any fraudulent means or devices be used by the Insured or anyone acting on his behalf to obtain any benefit under this Policy or if any loss or damage be occasioned by or through the wilful act or with the connivance of the Insured all benefit under this Policy shall be forfeited."

I should add that respondent also relied in its Heads of Argument on Condition 10 of the policy, which it was said, supported its argument on the effect of condition 3. The point was not persisted in, however, and since condition 10, in my view, has no bearing on the issue before us I shall not again refer to it.

It is / .....

It is common cause that the claim referred to in paragraph 7 of the statement (which I shall call claim "B") was in all respects a valid claim, in no way tainted with dishonesty; a claim which would have been paid out by respondent but for the later submission of the claim referred to in paragraphs 8 and 9 of the statement, which I shall call claim "C". It is also common cause that claim "C" neither forms any part of nor is in any way related to claim "B", save only in the sense that both claims were submitted, at different times, under the same policy. The respondent's case is that notwithstanding the validity of claim "B" and its independence of claim "C", the fraudulent character of the later claim relieves the respondent of its obligation to make payment in terms of the earlier and valid claim "B", by virtue of the provision in condition 3 of the policy that if any claim be in any respect fraudulent, "all benefit under

this Policy shall be forfeited" by the insured.

Similarly, but not necessarily identically, worded conditions of forfeiture in respect of fraudulent claims have for very many years been a feature of certain kinds of insurance policies. MacGillivray and Parkington, in their Insurance Law (7th Ed., para. 1925 at p. 804) give a brief, historical sketch of the development of the introduction into policies of such conditions. In many instances the price of making a fraudulent claim was said in the "false claim clause" to be that the claimant thereby "forfeited all claim (or benefit) under the policy." (E.g. Lek v Mathews (1927) 29 Ll.L.R. 141, H.L., and cf. Central Bank of India, Ltd. v Guardian Assurance Co. and Rustomji (1936) 54 Ll.L.R. 247, P.C. in which the condition in the policy approximates very closely to condition 3 in this case). In other policies (e.g. Lloyd's) the clause provided that if a false claim were made "this Policy shall become void and all claim hereunder shall be forfeited."

(See / .....

(See e.g. Dome Mining Corporation Ltd. v Drysdale (1931) 41 Ll.L.R. 109 at p. 121; Ivamy, General Principles of Insurance Law, 4th Ed., p. 434). It appears to me that the insertion of express words to the effect that the result of a fraudulent claim would be avoidance of the policy, adds nothing of substance to a clause which already provides for forfeiture of all benefit under the policy. The latter provision of itself connotes avoidance or termination of the policy and has, in general, been so understood. (See, in addition to the learned authors referred to above, 44 Am. Jur. 2d, para. 1501 at p. 369).

I accept, therefore, (and there was no argument to the contrary before us) that condition 3 provides for avoidance or termination of the policy; or to put it more accurately, that in the event of a fraudulent claim being made, condition 3 renders the policy voidable at the option of the insurer. (See Ivamy, supra, p. 437; Colinvaux, The Law of Insurance, 4th Ed., 9 - 32 at p.162). There is no doubt about the respondent's election to terminate

the policy. The cardinal question is whether such termination had the effect of rendering unenforceable a valid and as yet unpaid claim under the policy, submitted by the appellant to the respondent prior to the making of the fraudulent claim and prior to termination of the policy.

There can, I think, be no doubt that claim "B" accrued to the appellant prior to the submission of claim "C" to the respondent. In Daff v Midland Colliery Owners Mutual Indemnity Co., (1913) 82 L.J.K.B. (H.L.) 1340 at p. 1352, and with reference to an indemnity given by the company to its members against all claims arising out of an accident, LORD MOULTON said that

> "if the accident occurs within the protected period such an indemnity at once vests in the member."

In the same case, LORD SHAW (at p. 1345) affirmed that it was "too late in the day to question the doctrine that on the occurrence of an accident, a right in the nature of a

vested right to compensation is conferred upon the injured workman", and held further that the Indemnity Company, which was held to be an insurer in respect of loss accidentally suffered by a workman, incurred liability as insurer upon occurrence of the accident. In Walker's Fruit Farms Ltd. v Sumner, 1930 T.P.D. 394 at p. 401, GREENBERG, J., held that where a party repudiates a contract and the other party elects to accept such repudiation so that the contract then comes to an end, the latter party is not precluded by reason of termination of the contract, from suing for money which had already accrued in terms of the contract prior to its termination. (See also Crest Enterprises (Pty) Ltd. v Rycklof Beleggings (Edms) Bpk, 1972 (2) S.A. 863 (A.D.) at p. 870, where it was pointed out that when GREENBERG, J. used the word "accrued" in the context of the principle enunciated by him, he meant "accrued, due and enforceable"; see also B.K. Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk, 1979 (1) S.A. 391 A.D. at p. 424). Upon application of the

principle / .....

principle that termination of the contract in such a case applies only "to the executory portion thereof" and has no effect upon accrued rights under the contract, the respondent would not be entitled to repudiate claim "B". The respondent's answer thereto is that because the aim was to combat fraud, very wide terms were used in condition 3 of the policy, and that if proper effect were given to such wide terms, the termination of the policy on the ground of the making of a fraudulent claim would affect any and all claims even if they had accrued to the appel= lant in terms of the policy, prior to its termination.

I have given to this argument careful and anxious consideration. I accept that the language of condition 3 is very wide and that the circumstance that the condition is aimed only at fraudulent conduct is a factor to be kept in the foreground of the mind when considering the meaning and effect of the condition. Indeed, I shall for purposes of this judgment assume in favour of the

respondent that because the main objects of condition 3 are to lend protection to the insurer against fraudulent claims and to discourage attempts to gain undue advantage by lodging falsely inflated claims, there is a less strong need for the Court to "lean towards upholding the policy and against producing a forfeiture." (The words quoted are taken from the judgment of SCHREINER, J.A., in Kliptown Clothing Industries (Pty.) Ltd. v Marine and Trade Insurance Company of S.A. Ltd., 1961 (1) S.A. 103 at p. 106 H). But in the final result I am not persuaded that the answer to the problem is to be found simply in the wide literal meaning of the words used in condition 3. In Russell N.O. and Loveday N.O. v Collins Submarine Pipelines Africa (Pty.) Ltd. 1975 (1) S.A. 110 at p. 129, this Court accepted that ultimately the problem of interpretation of an insurance policy was

> "one of arriving at the intention of the parties from the terms of the contract

considered / .....

considered as a whole",

and that the intention

> "was to be looked for on the face of the policy ..... in the words which the parties themselves have chosen to express their meaning."

But it not infrequently happens that the parties use simple words, in themselves unambiguous, but which cannot readily or reasonably be applied in their literal sense to all the situations to which their agreement was directed. In such cases an element of ambiguity arises from the fact that "an absolutely literal inter= pretation" may be wholly or substantially impracticable, or productive of startling results which could hardly have been intended. (See MacGillivray and Parkington, ibid,

para / .....

para 1040 at pp 437 - 8). "Therefore", say the learned authors,

> "some gloss on the words becomes essential and their surface plainness is seen to be illusory."

Examples readily come to mind of acceptance by the Courts of the need sometimes restrictively to construe words or phrases which in their literal sense bear a wide, all-embracing meaning. In R v Hugo, 1926 A D 268 at p 271, INNES, CJ, recognized that the word "any", although a word of "wide and unqualified generality", might needs be "restricted by the subject matter or the context" of the legislation. In Rabinowitz and Another v De Beer's Consolidated Mines Ltd and Another 1958 (3) SA 619 (A) at p 631, SCHREINER, JA, recognized that phrases or

expressions such as "in connection with" or "in respect of", wide as their scope and range of association might be, needed in certain cases to be read as having a more limited connotation. (See also Lipschitz N.O. v U D C Bank Ltd 1979(1) SA 789 (AD) at p 804.)

One of the difficulties regarding the inter= pretation of condition 3 is that it deals at the same

level / .....

level with two contingencies which do not belong on the same level;. that is, (i) the contingency of a fraudulent misrepresentation in the proposal which induces the agreement of insurance, and (ii) the contingency of a fraudulent claim made under an existing policy. Condition 3 provides generally that "all benefit under this Policy shall be forfeited" but without expressly, or by clear implication, recognizing that the two contingencies give rise to essentially different situations; in the instance of fraud inducing the contract, the policy may be treated by the insurers as void ab initio; the same does not apply when a fraudulent claim under an existing policy is made. It is noteworthy and of considerable significance that when dealing with "false claim clauses" substantially similar to condition 3, the Courts and writers on the subject of insurance pointedly bring out the differences between the two sets of circumstances and allow for such differences when applying the clause. Thus, in Vol. 25, para. 425 of Halsbury's Laws of England (4th Ed.) we find these

passages / .....

passages :-

> "A condition subsequent affecting the policy is a condition relative in its essence to duties after the inception of the policy which by necessary intendment or express agreement affects the continued existence of the policy in the sense that if there is a breach, the other party may treat the policy as at an end .....
> The avoidance of such a policy can only date from the breach; up to that date the policy is fully effective so as to entitle the assured to recover in respect of any loss which occurred before the breach." (My underlining.)

Ivamy, at p. 292, is to similar effect; conditions which relate to matters arising after conclusion of the contract, do not, he says, render the policy void ab initio, but the policy may be avoided by the insurer "as from the date of the breach"; and at p. 309 the learned author says that if the insured's loss takes place before the breach, "he is not precluded from recovering in respect of it, since the policy, at the time of loss, was still operative." (See also the cases referred to in note 17

on p. 309)/.....

on p 309.)

The significance of these and other similar comments is that they are made in respect of clauses similar to condition 3 and certainly in respect of clauses which provide that "all benefit" or "all claim" shall be forfeited. What emerges from all this is that the words "all benefit" or "all claim" have obviously been given, by the Courts and by the learned authors mentioned above, the sort of "gloss" to which MacGillivray and Parkington refer, in the sense that despite the comprehensiveness of the word "all" in its literal connotation, valid claims previously made by and accrued to the insured in terms of the policy, have been

taken to be unaffected by the forfeiture provision; and, in my view, rightly so. Indeed, the words "all benefit under this policy shall be forfeited" upon the making of a fraudulent claim, are at least clearly capable of bearing the meaning that as from the time that the fraudulent claim is made, the insured shall have no further benefit or claim under the policy; and, therefore, that valid claims already accrued (and, a fortiori, valid claims already paid out to the insured) remain inviolate and untouched by the subsequent, unrelated fraudulent claim. It therefore cannot be said that condition 3 unambiguously provides for forfeiture of valid claims which had accrued prior to the fraudulent claim.

The reasons why a Court would not, in the absence of clear and entirely unambiguous provision therefor in the contract, give effect to the interpretation contended / .....

contended for by the respondent, are not hard to find. A provision requiring forfeiture of honest claims made under and in terms of a valid policy of insurance and which had accrued and become due and payable prior to the subsequent breach causing the premature termination of the policy, would surely be nothing less than a penalty. And it could be a penalty grossly and intolerably disproportionate to the breach, which would be the case if the accrued, valid claims ran into hundreds of thousands of rands and the subsequent fraudulent claim was of relatively insignificant value. This point was strongly made by LORD MOULTON in Daff's case, supra, (1913) 82 L.J.K.B. (H.L.) at p. 1353 :-

> "The whole of the argument on behalf of the respondents so far as it merited serious consideration rested on the words 'shall not be entitled to any indemnity in respect of any accident.' They would have us read these words as meaning that they shall 'forfeit every indemnity which they have acquired in times past.' But

a Court /.....

> a Court will not give to a clause
> a meaning which makes it a forfeiture
> clause of a highly penal type unless
> the words clearly require that meaning."

And later in the judgment :

> "Counsel for the respondents felt
> the difficulty of interpreting the
> above-mentioned words of this article
> as divesting the members of rights
> already vested and even disclaimed
> the intention of giving it such a
> meaning."

Daff's case was not, it is true, a case in which the claimants were said to have forfeited rights because of fraudulent conduct; a less serious breach was alleged against them. But as I have earlier pointed out, the Indemnity Company in that case was held to stand in the position of an insurer towards its members. In the extract from the judgment which I have just quoted, therefore, LORD MOULTON was concerned with a problem of the

very same kind as that now before us, namely, whether a clause which provided that a member would in the event of the specified breach "not be entitled to any indemnity in respect of any accident", was sufficient to justify a finding that previously vested rights in terms of the article were forfeited and unenforceable because of a subsequent, unrelated breach.

In my judgment condition 3 does not achieve subversion of the principle enunciated in the Walker's Fruit Farms case referred to earlier herein. We were not referred to any decision holding that that has been the effect of such a clause or of any clause substantially similar to it, at any time thoughout the very many years (more than a century) that such clauses have appeared in insurance policies. Nor am I aware of any such decision. But, as I have indicated, there is a considerable body of authority supporting the continued enforceability of a valid claim made by and accrued to an insured prior to

the termination / ....

the termination of the policy.

I have not overlooked the argument on behalf of respondent that if condition 3 does not provide for forfeiture of previously accrued claims, it adds little to the insurer's common law rights. This appears to be recognized by Colinvaux, supra, in para. 9 -32, where the learned author says of conditions of this kind that they are "declaratory of the legal position without them." This observation, however, is hardly of assistance to the respondent for it serves to emphasize that in the view of the author such conditions, going no further than the common law, do not render previously accrued claims unenforceable. It is not necessary to decide whether the rights given to the insurer in terms of condition 3 are precisely co-extensive with rights which the insurers could have exercised under the common law. Certainly, it is of advantage to an insurer to have written expression of his rights; the condition has been relied on in many instances to support the right to repudiate the whole

of a claim which is false only in one relatively minor respect. But in any event, I do not think that the argument that little additional advantage would result to insurers from a condition of the nature of condition 3 unless it means what respondent says it means, takes the matter any further. Such a consideration cannot serve to transform the condition into one which clearly provides that the insurer may divest the insured of rights which had properly become vested in him at a time when the policy was in operation.

In the result:-

(1) The appeal is allowed with costs.

(2) The order made by the Court a quo is set aside

and /.....

and there is substituted therefor an order in these terms:-

Judgment for the plaintiff in the amount claimed, together with interest thereon at the rate of 11% per annum as from 8 January 1980, with costs.

S. MILLER
JUDGE OF APPEAL

RABIE, CJ )
KOTZé, JA ) CONCUR
HOWARD, AJA )
GROSSKOPF, AJA )